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

HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	
v.	§	**Case No. 3:21-cv-00881**
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et. al.,	§	
Defendants.	§	

APPENDIX IN SUPPORT OF MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DEEM VARIOUS PARTIES VEXATIOUS LITIGANTS AND FOR RELATED RELIEF

Defendants file this Appendix in Support of their *Memorandum of Law in Opposition to Motion to Deem Various Parties Vexatious Litigants and for Related Relief* and request this Court take judicial notice of the documents contained herein.

Exhibit No.	Date	Case	Docket	Description	Appendix Page(s)
1			N/A	Flow Chart	1-2
2	12/5/2014	14-00408	4	Defendants Linda S. Restrepo and Carlos E. Restrepo Notice of Removal and Memorandum in Support of Notice	3-93
3	9/4/2015	13-07858	N/A	Final Judgment	94-96
4	10/16/2019	19-34054	3	Voluntary Petition for Non-Individuals Filing for Bankruptcy (Excerpt)	97-113
5	10/29/2019	19-34054	64	Notice of Appointment of Committee of Unsecured Creditors	114-115
6	11/1/2019	19-34054	85	Motion of the Official Committee of Unsecured Creditors for an Order Transferring Venue of this Case to the United States Bankruptcy Court for the Northern District of Texas (Excerpt)	116-132
7	11/12/2019	19-34054	120	Limited Objection to the Debtor's: (I) Application for an Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel, NUNC PRO TUNC to the Petition Date; and (II) Application for an Order Authorizing the Retention and Employment of Lynn Pinker Cox & Hurst LLP as Special Texas Litigation Counsel, NUNC PRO TUNC to the Petition Date (Excerpt)	133-142
8	11/12/2019	19-34054	122	Objection of the Debtor to the Motion of Official Committee of Unsecured Creditors to Transfer Venue of this Case to the United States Bankruptcy Court for the Northern District of Texas	143-170

9	11/12/2019	19-34054	123	Limited Objection of the Official Committee of Unsecured Creditors to the motion of the Debtor for an Order Authorizing the Debtor to Retain, Employee, and Compensate Certain Professionals Utilized by the Debtors in the Ordinary Course of Business	171-176
10	11/12/2019	19-34054	124	Limited Objection of the Official Committee of Unsecured Creditors to the Debtor's Application for an Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP and Lynn Pinker Cox & Hurst as Special Texas Counsel and Special Texas Litigation Counsel, NUNC PRO TUNC to the Petition Date	177-183
11	12/2/2019	19-12239	181	Hearing Transcript (Excerpt)	184-193
12	12/4/2019	19-34054	1	Order Transferring Venue of this Case to the United States Bankruptcy Court for the Northern District of Texas	194-196
13	12/4/2019	19-34054	186	Order Transferring Venue of this Case to the United States Bankruptcy Court for the Northern District of Texas	197-199
14	12/13/2019	19-34054	248	Settlement of Financial Affairs for Non-Individuals Filing for Bankruptcy	200-214
15	12/23/2019	19-34054	271	Notice of Hearing for January 21, 2020	215-228
16	12/27/2019	19-34054	281	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	229-329
17	1/9/2020	19-34054	339	Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course	330-335

18	1/13/2020	19-34054	353	Acis Capital Management, L.P. and ACIS Capital Management GP, LLC's Objection to the First Monthly Application for Compensation and Reimbursement of Expenses of Foley Gardere, Foley and Lardner LLP as Special Texas Counsel for the Period from October 16, 2019 through November 30, 2019	336-343
19	2/5/2020	19-34054	428	Order Denying United States Trustee's Motion for an Order Directing the Appointment of a Chapter 11 Trustee	344-346
20	2/14/2020	19-34054	451	Motion for Relief from the Automatic Stay to Allow Pursuit of State Court Action Against Non-Debtors	347-352
21	2/14/2020	19-34054	453	ACIS Capital Management, L.P. and ACIS Capital Management GP, LLC's Objection to the Second Monthly Application for Compensation and Reimbursement of Expenses of Foley Gardere, Foley and Lardner LLP as Special Texas Counsel for the Period from December 1, 2019 through December 31, 2019	353-361
22	3/2/2020	19-34054	487	Objection of the Official Committee of Unsecured Creditors to the Motion of the Debtor for Entry of an Order Authorizing, but not Directing, the Debtor to Cause Distributions to Certain "Related Entities"	362-376
23	3/6/2020	19-34054	505	Notice of Appearance and Request for Service	377-380
24	4/10/2020	19-34054	580	ACIS Capital Management, L.P. and ACIS Capital Management GP, LLC's Omnibus Limited Objection to Applications for Compensation and Reimbursement of Expense of Foley Gardere, Foley & Lardner LLP and Special Texas Counsel	381-393

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25	4/17/2020	19-34054	593	Motion for Relief from the Automatic Stay to Allow Pursuit of Motion for Order to Show Cause for Violations of the ACIS Plan Injunction	394-404
26	5/1/2020	19-34054	617	James Dondero's Limited Response to ACIS Capital Management, L.P. and ACIS Capital Management GP, LLC's Motion for Relief from the Automatic Stay to Allow Pursuit of Motion for Order to Show Cause for Violations of the ACIS Plan Injunction	405-408
27	5/19/2020	19-34054	641	ACIS Capital Management, L.P. and ACIS Capital Management GP, LLC's Omnibus Limited Objection to Applications for Compensation and Reimbursement of Expense of Foley Gardere, Foley & Lardner LLP and Special Texas Counsel for the Period from October 16, 2019 through March 31, 2020	409-428
28	5/20/2020	19-34054	644	UBS's Motion for Relief from the Automatic Stay to Proceed with State Court Action	429-457
29	5/26/2020	18-02360	66	Order (Granting Motion to Dismiss)	458-490
30	6/3/2020	19-34054	687	Debtor's Objection to UBS's Motion for Relief from the Automatic Stay to Proceed with State Court Action	491-520
31	6/3/2020	19-34054	690	Objection of the Official Committee of Unsecured Creditors to UBS's Motion for Relief from the Automatic Stay to Proceed with State Court Action	521-528
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33	6/3/2020	19-34054	694	ACIS Capital Management, L.P. and ACIS Capital Management GP, LLC's Joinder to the Redeemer Committee's Objection to UBS's Motion for Relief from the Automatic Stay to Proceed with State Court Action	552-556
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37	7/13/2020	19-34054	827	James Dondero's (I) Objection to Proof of Claim of ACIS Capital Management, L.P. and ACIS Capital Management GP, LLC; and (II) Joinder in Support of Highland Capital Management, L.P.'s Objection to Proof of Claim of ACIS Capital Management L.P. and ACIS Capital Management GP, LLC	675-683
38	7/14/2020	19-34054	832	Response of James Dondero to the Official Committee of Unsecured Creditors' Emergency Motion to Compel Production by the Debtor	684-693

39	7/15/2020	19-34054	841	Limited Objection to (A) Official Committee of Unsecured Creditors' Emergency Motion to Compel Production by the Debtor and (B) Debtor's Motion for Entry of (I) a Protective Order, or, in the Alternative, (II) an Order Directing the Debtor to Comply with Certain Discovery Demands Tendered by the Official Committee of Unsecured Creditors, Pursuant to Federal Rule of Bankruptcy Procedure 7026 and 7034	694-702
40	7/15/2020	19-34054	845	Debtor's Objection to Official Committee of Unsecured Creditors' Emergency Motion to Compel Production by the Debtor	703-720
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43	7/16/2020	19-34054	854	Order Approving 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	754-766
44	7/30/2020	19-34054	906	Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; © Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims	767-790

45	8/7/2020	19-34054	928	Debtor's Objection to Proofs of Claim 190 and 191 of UBS Securities LLC and UBS AG, London Branch (Excerpt)	791-828
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47	8/8/2020	21-03020	182	Hearing Held	857-858
48	8/12/2020	19-34054	944	Plan of Reorganization of Highland Capital Management, L.P.	859-918
49	8/26/2020	19-34054	995	Debtor's (I) Objection to Claim No. 152 of Hunter Mountain Investment Trust and (II) Complaint to Subordinate Claim of Hunter Mountain Investment Trust and for Declaratory Relief	919-938
50	8/26/2020	19-34054	996	Objection to the Proof of Claim Filed by Redeemer Committee of the Highland Crusader Fund (Excerpt)	939-960
51	8/31/2020	19-34054	1008	Debtor's (I) Objection to Claim No. 77 of Patrick Hagaman Daugherty and (II) Complaint to Subordinate Claim of Patrick Hagaman Daugherty	961-986
52	9/24/2020	19-34054	1099	Patrick Daugherty's Motion to Confirm Status of Automatic Stay, or Alternatively to Modify Automatic Stay (Excerpt)	987-995
53	10/5/2020	19-34054	1121	James Dondero's Response to Debtor's Motion for Entry of an Order Approving Settlement with (A) ACIS Capital Management, L.P. and ACIS Capital Management GP LLC (Claim No. 23), (B) Joshua N. Terry and Jennifer G. Terry (Claim No. 156), and (C) ACIS Capital Management, L.P. (Claim No. 159), and Authorizing Actions Consistent Therewith	996-1006

54	10/8/2020	19-34054	1148	Debtor's (I) Objection to Patrick Daugherty's Motion to Confirm Status of Automatic Stay, or Alternatively to Modify Automatic Stay and (II) Cross-Motion to Extend the Automatic Stay to, or Otherwise Enjoin, the Delaware Cases	1007-1023
55	10/8/2020	19-34054	1150	Complaint to Extend the Automatic Stay or, In the Alternative, for Preliminary Injunctive Relief	1024-1040
56	10/8/2020	19-34054	1153	Response of the Dugaboy Investment Trust to the Debtor's First Omnibus Objection to Certain Proofs of Claim	1041-1081
57	10/16/2020	19-34054	1177	CLO HOLDCO, LTD.'s Reservation of Rights and Response to Debtor's Motion for Entry of Order Approving Settlement with (A) ACIS Capital Management, L.P. and ACIS Capital Management GP LLC; (B) Joshua N. Terry and Jennifer G. Terry; and (C) ACIS Capital Management, LP	1082-1086
58	10/16/2020	19-34054	1183	Redeemer Committee of the Highland Crusader Funds and the Crusader Funds' Motion for Partial Summary Judgement on Proof of Claim Nos. 190 and 191 of UBS AG, London Branch and UBS Securities LLC	1087-1095
59	10/16/2020	19-34054	1190	Objection to the Debtor's Motion for Entry of an Order Approving Settlements with (A) The Redeemer Committee of the Highland Crusader Fund (Claim No. 72), and (B) the Highland Crusader Funds (Claim No. 81)	1096-1138
60	10/16/2020	19-34054	1195	Harbourbest Limited Objection and Reservation of Rights to Debtor's Motion for Entry of an Order Approving Settlement with (A) ACIS Capital Management, L.P. and ACIS Capital Management GP LLC (Claim No. 23), (B) Joshua N.	1139-1145

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61	10/16/2020	19-34054	1197	Nexpoint Real Estate Partners LLC's Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims	1146-1156
62	11/9/2020	19-34054	1349	Debtor's Objection to Patrick Hagaman Daugherty's Motion for Temporary Allowance of Claim for Voting Purposes Pursuant to Bankruptcy Rule 3018	1157-1180
63	11/16/2020	19-34054	1402	Debtor's Reply in Support of Motion for Partial Summary Judgment on Proof of Claim Nos. 190 and 191 of UBS Securities LLC and UBS AG, London Branch	1181-1207
64	11/19/2020	19-34054	1439	James Dondero's Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside the Ordinary Course of Business	1208-1223
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67	12/7/2020	19-34054	1514	Plaintiff Highland Capital Management, L.P.'s Verified Original Complaint for Damages and for Declaratory and Injunctive Relief	1416-1431

68	12/8/2020	19-34054	1522	Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles	1432-1458
69	12/11/2020	19-34054	1546	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	1459-1470
70	12/23/2020	19-34054	1622	Notice of Withdrawal	1471-1473
71	1/5/2021	19-34054	1662	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.	1474-1481
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74	1/5/2021	19-34054	1669	Senior Employees' Limited Objection to Debtor's Fifth Amended Plan of Reorganization	1524-1550
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76	1/5/2021	19-34054	1671	United States Trustee's Limited Objection to Confirmation of Debtors' Fifth Amended Plan of Reorganization (Docket Entry No. 1472)	1602-1608
77	1/5/2021	19-34054	1673	Nexpoint Real Estate Partners LLC's Objection to Debtor's Fifth Amended Plan of Reorganization	1609-1616
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79	1/6/2021	19-34054	1692	Plaintiff Highland Capital Management, L.P.'s Verified Original Complaint for Damages and for Declaratory and Injunctive Relief	1630-1651
80	1/6/2021	19-34054	1697	James Dondero's Objection to Debtor's Motion for Entry of an Order Approving Settlement with Harbourvest	1652-1667
81	1/8/2021	19-34054	1706	Objection to Debtor's Motion for Entry of an Order Approving Settlement with Harbourvest (Claim Nos. 143, 147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith	1668-1678
82	1/8/2021	19-34054	1707	CLO HOLDCO, LTD's Objection to Harbourvest Settlement	1679-1689
83	1/13/2021	19-34054	1731	Debtor's Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with Harbourvest (Claim Nos. 143, 147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith	1690-1712
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87	1/22/2021	19-34054	1802	Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate	1757-1777
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89	1/22/2021	19-34054	1804	Complaint for (I) Breach of Contract and (II) Turnover of Property of the Debtor's Estate	1806-1843

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97	2/17/2021	21-03010	2	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	1999-2008
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99	2/22/2021	21-03010	20	Objection to Mandatory Injunction and Brief in Support Thereof	2027-2054
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103	3/18/2021	19-34054	2061	James Dondero, Highland Capital Management Fund Advisors, L.P., Nexpoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and Nexpoint Real Estate Partners, LLC, F/K/A HCRE Partners, LLC, a Delaware Limited Liability Company's Brief in Support of their Motion to Recuse Pursuant to 28 U.S.C.455	2236-2273
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108	4/29/2021	19-34054	2256	Motion to Compel Compliance with Bankruptcy Rule 2015.3	2375-2384
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110	5/21/2021	19-34054	2341	Debtor's Opposition to Motion to Compel Compliance with Bankruptcy Rule 2015.3 Filed by Dugaboy Investment Trust and Get Good Trust	2395-2405
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124	9/2/2022	21-10449	N/A	Petition of Appellants Highland Income Fund; Nexpoint Strategic Opportunities Fund; Highland Global Allocation Fund; and Nexpoint Capital, Inc. for Limited Panel Rehearing	2526-2566
125	9/12/2022	19-34054	3519	Hearing Transcript (Excerpt)	2567-2628
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129	1/5/2023	22-631	N/A	Petition for a Writ of Certiorari	2662-2693
130	1/27/2023	2019-0956-MTZ	N/A	Letter to Counsel re: Patrick Daugherty v. James Dondero, et al.	2694-2714
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134	4/27/2023	23-90013	2	Petition for Permission to Appeal	2966-2986
135	5/25/2023	23-31039	1	Voluntary Petition for Non-Individuals Filing for Bankruptcy	2987-2997
136	5/25/2023	23-31037	1	Voluntary Petition for Non-Individuals Filing for Bankruptcy	2998-3007
137	5/31/2023	19-34054	3802	The Dugaboy Investment Trust's Motion to Preserve Evidence	3008-3028

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138	5/31/2023	19-34054	3803	Declaration of Michelle Hartmann	3029-3059
139	6/5/2023	19-34054	3816	Hunter Mountain Investment Trust's Emergency Motion for Leave to File Verified Adversary Proceeding	3060-3125
140	6/16/2023	19-34054	3851	Highland Capital Management, L.P.'s Motion for (A) Bad Faith Finding and (B) Attorneys' Fees Against Nexpoint Real Estate partners LLC (F/K/A HCRE Partners, LLC) in Connection with Proof of Claim 146	3126-3140
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142	7/14/2023	23-31037	26	Highland Capital Management, L.P.'s Response and Joinder to Motion to Transfer/Reassign Case	3148-3163
143	7/14/2023	23-31039	27	Highland Capital Management, L.P.'s Response and Joinder to Motion to Transfer/Reassign Case	3164-3179
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Dated: December 15, 2023

Respectfully submitted,

STINSON LLP

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CERTIFICATE OF SERVICE

I certify that on December 15, 2023, 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/ Deborah Deitsch-Perez
Deborah Deitsch-Perez

Appendix Exhibit 1

Movant's Requested Relief Would Create An Unworkable Mechanism With Potentially Inconsistent Results

What must the Dondero Entities do in order to file a lawsuit if the Movant's request is granted?

- Obtain permission from Judge Jernigan in Bankruptcy Court to satisfy the Gatekeeper Motion and determine whether there is a colorable claim.
- Judge Jernigan's decision will be appealed by either side to the District Court, where it could be heard by any District Court Judge.
- Obtain permission from Judge Starr in District Court to satisfy a potential vexatious litigant order and determine whether the claim has merit.
- Judge Starr's decision will be appealed by either side to the Fifth Circuit.

Appendix Exhibit 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ALLIANCE RIGGERS & CONSTRUCTORS, LTD. Plaintiff, v. LINDA S. RESTREPO, CARLOS E. RESTREPO D/B/A COLLECTIVELY RDI GLOBAL SERVICES and R&D INTERNATIONAL Defendants.	§	CASE NO. _____ (Formerly TC No. 2012-DCV-04523 County Court at Law No. 5 El Paso County, Texas)

DEFENDANTS LINDA S. RESTREPO AND CARLOS E. RESTREPO NOTICE OF REMOVAL AND MEMORANDUM IN SUPPORT OF NOTICE

JUDGE DAVID CHAPERRAMA

EP14CV0408

IN THE COUNTY COURT AT LAW NUMBER 5
EL PASO COUNTY TEXAS

ALLIANCE RIGGERS & CONSTRUCTORS, LTD.	§	
Plaintiff,	§	
v.	§	2012-DCV-04523
LINDA S. RESTREPO and CARLOS E. RESTREPO D/B/A/ Collectively RDI GLOBAL SERVICE and R&D INTERNATIONAL,	§	JUDGE DAVID GUADERRAMA
Defendants	§	EP14CV0408

NOTICE OF REMOVAL TO THE UNITED STATES DISTRICT COURT

COMES NOW the Defendants, Linda S. Restrepo and Carlos E. Restrepo, and in direct support of their Notice to this Court and all parties, hereby alleges, states, and provides the following:

Notice of Removal to the United States District Court

1. By the filing of this Notice with the Clerk of this state Court, together with the attached and corresponding petition for removal that was filed in the United States District Court prior, these state proceedings are now REMOVED, by automatic operation of federal law, and these Defendants now formally notify the Court and all parties of that same fact.

2. Pursuant to the express and specific language of 28 U.S.C. 1441, et seq., immediately upon the filing of this Notice, with the Clerk of this Court, this case has been already removed. The removal of jurisdiction from this Court is automatic by operation of federal law, and does not require any additional written order from the District Judge to cause this removal to become "effective" – the removal is an automatic judicial event, and immediate by operation of law.

3. Put another way, the United States Supreme Court clarified and established, clear back in 1966: "The petition is now filed in the first instance in the federal court. After notice is given to all adverse parties and a copy of the petition is filed with the state court, removal is effected and state court proceedings cease unless the case is remanded. 28 U. S. C. § 1446 (1964 ed.). See generally, American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Tentative Draft No. 4, p. 153 et seq. (April 25, 1966)." Georgia v. Rachel, 384 U.S. 780, 809 n27, 86 S. Ct. 1783, 16 L. Ed. 2d 925 (1966). (emphasis added).

4. Because this cause is now removed, the instant Court is without jurisdiction to effect any judgment in these proceedings (28 U.S.C. § 1446(c)(3)).

5. The Petition for Removal to the United States District Court is attached hereto as required by the express language of federal law, as Exhibit # 1.

WHEREFORE, the undersigned Defendants, Linda S. Restrepo and Carlos E. Restrepo, notify the Court and all other parties that this cause is now removed, that this court now has absolutely no jurisdiction for any judgment in this cause, bar none, unless and until the United States District Court may or may not remand, and further moves for all other relief that is just and proper in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, certify that a copy of this Notice of Removal were served upon the following this 31st day of October 2014: to Wayne Pritchard, P.C., Attorney of Record, 300 East Main, Suite 1240, El Paso,Texas 79901, (915)533-0080 and the Honorable Judge Carlos Villa, County Court at Law Number Five, 500 East San Antonio St. 8th Floor, Room 806, El Paso, Texas 79901.

Carlos E. Restrepo, Pro Se

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STATEMENT AS TO IDENTITY OF THE PARTIES

For clarity of Interpretation, Linda S. Restrepo and Carlos E. Restrepo wrongly brought into the frivolous case as Defendants in the County Court at Law Number Five Cause No. 2012-DCV-04523 will be referred to as "Restrepo's". Plaintiff Alliance Riggers & Constructors, Ltd. will be referred to as "Alliance". Third Party Defendant GoDaddy Arizona corporation intentionally left out of the Plaintiff Alliance original and first amended petitions will be referred to as: "GoDaddy".

NOTICE OF APPEAL

The Restrepo's object to any expedited summarily remand of this case back to County Court at Law Number Five and give Notice of Appeal to any expedited remand. Restrepo's invoke their right to appeal any expedited remand, to the opportunity accorded by federal law to contest any expedited remand of this case, and to a Stay of any expedited remand in order to file a proper appeal in accordance with Federal Appellate Procedures to the Fifth Circuit Court of Appeals before this case is remanded.

This Notice of Removal and Memorandum in Support is filed in accordance with the instructions of the United States District Court for the Western District of Texas El Paso Division, the Honorable Judge Kathleen Cardone Order dated October 29, 2014 which states in relevant part that: "..If Plaintiffs wish to remove a state court proceeding, they must file a Notice of Removal....".

PREAMBLE
RESTREPOS CLAIM
FOURTEENTH AMENDMENT PROTECTIONS

Restrepos plead protection under the U.S. Constitution Fourteenth Amendment, which requires in relevant part that a state is forbidden to enter judgment attempting to bind person over whom it has no jurisdiction, and it has even less right to enter judgment purporting to extinguish interest of such person in property over which court has no jurisdiction; and any state court judgment purporting to bind person "or Defendant" over whom court has not acquired 'in personam' jurisdiction or purporting to exercise jurisdiction over property outside state is void both within and without state. U.S.C.A.Const. Amend. 14.

Restrepos bring a claim against Judge Carlos Villa, presiding Judge of County Court at Law Number Five, El Paso County, Texas in his individual capacity, pursuant to 42 U.S.C. § 1983 alleging that Judge Villa failure to abide by Federal Copyright Act of 1976 28 U.S.C., deprived Restrepos of their Rights To Due Process under the Fourteenth Amendment to the U.S. Constitution.

A constitutional court cannot acquire jurisdiction by agreement or stipulation. Either it has or has no jurisdiction. If it does not have

jurisdiction, any judgment entered is void ab initio and has no legal effect. Jurisdiction should not be sustained upon the doctrine of estoppel, especially where personal liberties are involved. *In Re Wesley v. Schneckloth,* 346 P. 2d 658 - Wash: Supreme Court 1959. Thus, because the Honorable Judge Carlos Villa lacks jurisdiction to hear a cause, "any judgment entered is void ab initio and is, in legal effect, no judgment at all." Id. It. The exercise of such abuse of power by Judge Carlos Villa has resulted in injury to the Restrepos for which there is no adequate remedy.

Alliance threw the Court a "red herring" frivolously and fraudulently[1] claiming that:

> "Defendants have, without permission or authority from Plaintiff, registered the domain name "www.allianceregersandconstructors.com", and in fact, launched a web page at such address in which they make multiple use of Plaintiff's trademark".

The fact is and the Restrepos ask this Court to take Judicial Notice of Appx. Exh. 5, which documents that the domain name "www.allianceregersandconstructors.com subject of Alliance Petition

[1] The Plaintiff's allegation represents a false and perjured statement knowingly, wantonly made to the Court with malice. Defendants NEVER registered the cited purported domain name, Defendants have NEVER purchased the cited purported domain name, Defendants have NEVER used the cited purported domain name. The Petition is premised on a blatant lie and a malicious, groundless, bad faith and harassment lawsuit by the Plaintiffs and their attorney of record Wayne R. Pritchard.

is for sale and was never purchased, was never utilized or was never claimed by the Restrepos. The owner of the domain name GoDaddy, a foreign Arizona corporation was purposely not brought into the suit by Alliance to avoid federal jurisdiction. The Restrepos are the wrong Defendants in this case because they have never had or claimed ownership of the domain name "alliancereggersandconstructors.com". Without GoDaddy the true owners of the domain name Judge Villa has never obtained subject matter jurisdiction.

As a matter of law deprivation of a Federal Right is a violation of a Constitutional Right which arise under the Laws of the United States. Article III, Section 2, of the Constitution extends the judicial power of the federal government to all cases "arising under ... the Laws of the United States." Such cases are commonly referred to as "federal question" cases. In the instant case deprivation of the Restrepos Federal Copyrights by the state County Court is a violation of their Constitutional Rights.

County Court at Law Number Five never had jurisdiction over alliancereggersandconstructors.com. There is complete diversity in that alliancereggersandconstructors.com is owned by an Arizona corporation that is not a party to this litigation. The County Court has

no authority or rule on any issue concerning the domain name

allliancereggersandconstructors.com

Federal courts' actual subject-matter jurisdiction derives from Congressional enabling statutes, such as 28 U.S.C. §§ 1330–1369 and 28 U.S.C. §§ 1441–1452. The United States Congress has not extended federal courts' subject-matter jurisdiction to its constitutional limits. The enabling statute for federal question jurisdiction, 28 U.S.C. § 1331, provides that the district courts have original jurisdiction in *all civil actions arising under the Constitution, laws, or treaties of the United States*.

FEDERAL COURT REMOVAL JURISDICTION

In the United States, removal jurisdiction refers to the right of a defendant to move a lawsuit filed in state court to the federal district court for the federal judicial district in which the state court sits. This is a general exception to the usual American rule giving the plaintiff the right to make the decision on the proper forum. Restrepos file a "notice of removal" in the state court where the lawsuit is presently filed to the Western District of Texas El Paso Division federal court.

Restrepo's removal is governed by statute, 28 U.S.C. § 1441 et seq. At the time of the initial filing, this case should have been filed in federal court. The removal of this case is based on an independent ground for subject-matter jurisdiction and federal question jurisdiction. A case must be removed to the federal district court that encompasses the state court where the action was initiated. Once removed, the case can be transferred to, or consolidated in, another federal court, despite the plaintiff's original intended venue. Alliance original complaint was

an attempt in bad faith to evade federal jurisdiction by knowingly, wantonly and with m,alice deleting GoDady an Arizona corporation as a defendant by which Go Daddy is the only owner of the domain name "allianceregersandconstructors" stated in the original complaint.

Restrepos invoke removal of the state law claim base on complete federal jurisdiction and supplemental jurisdiction in that they share a common nucleus of operative fact with claims based on federal Copyright Law.

Supplemental jurisdiction is the authority of United States federal courts to hear additional claims substantially related to the original claim even though the court would lack the subject-matter jurisdiction to hear the additional claims independently. 28 U.S.C. § 1367 is a codification of the Supreme Court's rulings on ancillary jurisdiction (*Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978)) and pendent jurisdiction (*United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966)) and a superseding of the Court's treatment of pendent party jurisdiction (*Finley v. United States*, 490 U.S. 545 (1989)).

The Western District of Texas, El Paso Division federal court has supplemental jurisdiction over "all other claims that are so related . . . that they form part of the same case or controversy" (§ 1367(a)). The true test being that the new claim "arises from the same set of operative facts." This means a federal court hearing a federal claim can also hear substantially related state law claims, thereby encouraging efficiency by only having one trial at the federal level rather than one trial in federal court and another in state court.

Restrepos claim Pendent jurisdiction which is the authority of a United States federal court to hear a closely related state law claim against Alliance already facing a federal claim for violation of Restrepo copyright, described by the Supreme Court as "jurisdiction over nonfederal claims between parties litigating other matters properly before the court." Restrepos plead federal jurisdiction to encourage both "economy in litigation", and fairness by eliminating the need for a separate federal and state trial hearing essentially the same facts yet potentially reaching opposite conclusions.

Pendent jurisdiction refers to the court's authority to adjudicate claims it could not otherwise hear. The related concept of pendent party jurisdiction by contrast is the court's authority to adjudicate claims against a party not otherwise under the court's jurisdiction because the claim arises from the same nucleus of facts as Restrepos federal copyright claim properly before the federal court.

The leading case on pendent jurisdiction is *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). *Gibbs* has been read to require that (1) there must be a federal claim (whether from the Constitution, federal statute, or treaty) and (2) the non-federal claim arises "from a common nucleus of operative fact" such that a plaintiff "would ordinarily be expected to try them in one judicial proceeding."

Restrepo's claim Ancillary jurisdiction which allows this Federal Court to hear non-federal claims sufficiently logically dependent on Restrepo's federal copyright "anchor claim" (i.e., a federal claim serving as the basis for supplemental jurisdiction), despite that such courts would otherwise lack jurisdiction over such claims. Like pendent

jurisdiction, a federal court can exercise ancillary jurisdiction if the anchor claim has original federal jurisdiction either through federal-question jurisdiction or diversity jurisdiction.

Areas where ancillary jurisdiction can be asserted include counterclaims (Fed. R. Civ. P. 13), cross-claims (Fed. R. Civ. P. 13), impleader (Fed. R. Civ. P. 14), interpleader (Fed. R. Civ. P. 22) and interventions (Fed. R. Civ. P. 24). *Moore v. New York Cotton Exchange* and *Owen Equipment & Erection Co. v. Kroger* are seminal cases relating to ancillary jurisdiction.

Ancillary jurisdiction has been replaced entirely by supplemental jurisdiction, per 28 U.S.C. § 1367(b), part of the U.S. supplemental jurisdiction statute:

28 U.S. Code § 1367 - Supplemental jurisdiction
(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

Without removal of this case to federal court the federal courts will be jurisdictionally stripped of their complete federal right to exercise jurisdiction over federal copyright cases such as the instant case.

The federal court for the Western District of Texas, El Paso Division has complete jurisdiction over the instant copyright law case both jurisdiction over the parties or things (personal jurisdiction) and

jurisdiction over the subject matter. This rule applies to every cause of action and every party in a case.

The County Court at Law Number Five lack of subject matter jurisdiction was never waivable; the county court never had it, and cannot assert it. Furthermore, Restrepo's can raise lack of subject matter jurisdiction at any time; there are no time restraints on when such an objection can be raised thus removal of this case to federal court is proper and timely. FRCP 12(h)(3).

Federal district courts have jurisdiction over this case where a federal question has been raised. 28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Jurisdiction under § 1331 is sometimes referred to as "federal question jurisdiction."

Congress has extended the federal trial courts' jurisdiction to other matters, including cases involving: federal patents, copyrights and trademarks, 28 U.S.C. § 1338.

Alliance claimed Federal Jurisdiction by making a claim for a domain name which is a Federal Question based on Restrepo's Copyrights to the domain name subject of the litigation.

It is important to note that federal subject matter jurisdiction was achieved based on the allegations contained Alliance complaint.

It is also important to note that even if Alliance attempts to avoid federal jurisdiction by failing to allege a question of federal law in the complaint and only pleading state law in a claim filed in state court,

where the claim under state law is completely trumped by federal law, the federal courts will retain subject matter jurisdiction over the case. See *Avco Corp. v. Aero Lodge* No. 735, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968). In such a situation, the case can be removed to federal court by the Restrepos.

Unlike diversity of citizenship jurisdiction, for federal question jurisdiction, there is no minimum for the amount in controversy, nor must the parties be citizens of different states.

The Federal court for the Western District of Texas El Paso Division has exclusive jurisdiction over the Copyright law case of the Restrepos surreptitiously filed by Alliance in the County Court at Law Number Five to avoid federal jurisdiction.

PROSE DEFENDANTS INVOKE THEIR FIRST AMENDMENT RIGHTS IN FILING THIS NOTICE OF REMOVAL

ProSe Defendants invoke the First Amendment Right to the United States Constitution which affords access to the courts, including the right to petition the government for redress of grievances. App. C, U.S. Const. Amend I; see also Texas Const., Art. 1 § 27. The right to petition the government is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America,* Dist. 12 v. *Illinois State Bar Ass'n,* 389 U.S. 217, 222 (1967). Tex. Const. art. I, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law")

PROSE DEFENDANTS INVOKE THE FEDERAL COURT'S PROTECTION

Defendants, Linda S. Restrepo and Carlos E. Restrepo, Pro Se, bring this action on the behalf of themselves. They respectfully come before this Honorable Court in the instant cause as Pro Se litigants. Defendants relied on *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991), where the Court stated that; "A Pro Se litigant's pleading are to be construed liberally and to a less stringent standard than formal pleadings drafted by lawyers...If a Court can reasonably read the pleadings to state a valid claim on which Plaintiff could prevail, it should do so despite the Plaintiff's failure to site proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction or his unfamiliarity with pleading requirements" (Citation Omitted)." See also *Riley v. Greene*, 149 F. Supp. 2d 1256 (D. Colo. 2001).

NOTICE OF REMOVAL AND MOTION TO TRANSFER VENUE

Pursuant to the removal statutes 28 U.S.C. §§ 1331, 1332, 1338, 1404(a), 1441(a), 1441(b) and 1446(b) and under the provisions of the Copyright Act of 1976 and other applicable federal law, ProSe Defendants Linda S. Restrepo and Carlos E. Restrepo D/B/A/ Collectively as RDI GLOBAL SERVICES and R&D INTERNATIONAL, hereby file their Motion to Remove this case Number 2012-DCV-04523 based solely on Alliance June 20, 2012 original petition and Alliance first amended petition filed June 20, 2014, from the County Court at Law Number Five, El Paso County, Texas, the Honorable Carlos Villa presiding, to the United States District Court, Western District of Texas, El Paso Division for acquired exclusive federal copyright jurisdiction, subject matter jurisdiction, amount in controversy and serves the interest of justice.

Because Restrepo's case involves important Federal legal issues of substantial public importance to safeguard the integrity of Copyright laws, the authority of Federal Agencies and Acts of Congress, presenting issues of first impression pertaining to interpretation of Federal Copyright laws, Federal Preemption, Exclusive Jurisdiction of Federal Courts, Authority of Federal Agencies, and mandates of the U.S. Congress, this matter should be removed to Federal Court.

No actions or pleadings by Restrepo's constitute an acquiescence or waiver of procedural or other defects in the Notice of Removal. This Motion is supported by the Memorandum of Points and Authorities below.

MEMORANDUM OF POINTS AND AUTHORITIES.

I. FACTUAL BACKGROUND. (SEE INFOGRAPHIC I)

1. This case arises out of a domain name dispute between the Restrepo's and Alliance where the Restrepo's authorized by Alliance designed an original artistic webpage which Restrepo's Copyrighted, and upload it to the Internet utilizing GoDaddy and Arizona corporation domain names and hosting services. There were other Defendants Copyrighted artistic compositions, corporate videos, articles and ancillary services produced as original works by the Restrepo's under the contract that Alliance received and has benefited from but has refused to pay the Restrepo's for.

2. Defendants acquired Copyright under the provisions of the Federal Copyright Act of 1976 and claim removal jurisdiction based on Federal question jurisdiction due to the fact that copyright claims are being brought under the Federal Copyright statute for all their original artistic and technical productions i.e., original photographs, original video footage, original narrative compilations, original graphic designs, music composition in the videos, original voice narrations, creation of the html computer code utilized to upload the webpage to the Internet, the web page and its contents, the corporate videos and their content, and to the domain name "alliancериggersdandconstructors.com" by Restrepo's purchase of the domain from GoDaddy an Arizona corporation as sole and only principal property owners and forever grandfather owners of such domain name.

3. Restrepo's claimed, asserted, utilized, made visible and known to all their Copyright ownership by labeling and dating all the pages in the webpage with the "Copyright" symbol which Alliance acquiesced and approved by signing their initials in the webpage (**Exhibit 1**). Restrepo's also inserted a comprehensive Notice of Copyright at the end of all videos produced, the article written by Restrepo's and published in the SEAA Connector Magazine 2012 Edition. Alliance never made any claims to the contrary and surrendered by operation of law any claims it might have had to the domain name "allianceriggersandconstructors.com", the words thereof, the webpage and its artistic compositions, the videos, articles, photographs et al produced as original artistic work product by the Restrepo's.

4. This case involves an exclusive federal question of Restrepo's Copyright ownership to the entire original webpage, html codes, video productions, names, the copyrighted Internet domain name "allianceriggersandconstructors.com" pursuant to 28 U.S.C. § 1338(a).

5. Alliance non-suited their original petition on June 20, 2014 and thus their amended petition filed on the same date is barred by res judicata. Alliance a vexatious litigant and serial filer of Breach of Contract lawsuits in El Paso, Texas courts, filed a First Amended Petition (**Exhibit 2**) in Texas state County Court at Law Number 5 against Restrepo's alleging trademark infringement by the utilization by Restrepos of a domain name "allianceriggersandconstructors.com",

breach of contract among other ancillary superficial and substantively lacking pleadings.

6. Alliance concurred with the Restrepo's copyrighted original creative work product as attested by the Judicial Admissions (**Exhibit 3**) filed by Alliance General Manager Phillip H. Cordova and Operations Manager Terry Stevens.

7. On June 20, 2012 Alliance filed a vexatious frivolous original Petition (**Exhibit 4**) predicated on fraud against Restrepo's alleging trademark infringement by the utilization by Restrepo's of a domain name "allianceregersandconsdtructors.com", breach of contract among other ancillary superficial and substantively lacking pleadings. Alliance fraudulently, knowingly, maliciously and wantonly filed false and perjured statements to the court knowing that Restrepo's were never Defendants in this cause.

8. Restrepo's never purchased, utilized, owned, or uploaded a webpage to the Internet utilizing the alleged name "allianceregers&constructors.com" as fraudulently alleged by Alliance in the original petition and maintained by Alliance for 27 months of litigation. Factually the domain name "allianceregers&constructors.com" is and has been available for purchase from GoDaddy for $12.99 and a Google search of the Internet disclosed that there is no webpage uploaded to the Internet via GoDaddy hosting services by the Restrepo's.

9. On April,18, 2014, Alliance invoked for the second time the exclusive jurisdiction of a Federal agency by filing a second application for trademark to the name "alliance riggers & constructors" before the United States Patent and Trademark Office (USPTO) (**Exhibit 5**).

10. Previously on May 22, 2012 Alliance invoked Federal Jurisdiction by filing a first application for a trademark to the name "alliance riggers & constructors" to the USPTO.

11. On September 14, 2012 the USPTO: (1) denied Alliance's Trademark application, (2) informed Alliance and attorney Pritchard that the name Alliance was the sole legal trademark previously owned by Alliance Steel, Inc. an Oklahoma corporation domiciled at 3333 South Council Road, Oklahoma City, Oklahoma under Trademark registration No. 3604909, (3) ordered Alliance to disclaim the use of the words "riggers & constructors", (4) ordered Alliance to make an "Entity Clarification" in that Alliance "has not indicated the names and citizenship of the partners", (5) informed Alliance that the words "riggers & constructors" were common English language words not subject to trademark registration which Alliance failed to comply with. (**Exhibit 6**).

12. Alliance never appealed the negative ruling of the USPTO and the Federal Agency ruled on April 15, 2013 that Alliance trademark application had been abandoned. (**Exhibit 7**).

On April 21, 2014, Alliance for the second time in sworn federal documents under penalty of perjury officially disclaimed any rights to

the common English words "riggers and constructors" as documented by the official USPTO document attached herein as **Exhibit 9** and incorporated herein by reference as if set forth in its entirety.

Alliance cannot claim any trademark rights to the name "Alliance" because it is the legally owned trademark of Alliance Steel corporation domiciled at 3333 South Council Road, Oklahoma City, Oklahoma, 73179 under trademark registration number 3604909 showing in **Exhibit 6** incorporated herein by reference as if set forth in its entirety.

Alliance disclaimer to the words "riggers and constructors" and their inability to claim any trademark rights to the word "Alliance" completely and entirely voids the lawsuit filed against Restrepo's for lack of standing on the part of Alliance.

Therefore, as a matter of law County Court at Law Number Five never acquired jurisdiction and has no subject matter jurisdiction because Alliance has no standing before the court, or any rights to the name "Alliance" or the word "riggers and constructors". *No cause of actions, no lawsuit, no standing, no basis in fact or in law exists for Alliance vexatious frivolous lawsuit to proceed in the courts.*

Alliance consented by signing a written contract to: (1) a venue and forum selection in federal district court, (2) To GoDaddy Universal Terms of Service requiring venue in Arizona federal district court and (3) To the Department of Commerce ICANN (Internet Corporation of Assigned Names and Numbers) headquartered in California to resolve any tort claims and/or domain names disputes.

Alliance non-suit and amended petition were fraudulent lawsuits in which the Texas County Court at Law Number 5 lacked and never

acquired personal jurisdiction due to improper service of Linda S. Restrepo and neither subject matter jurisdiction. By non-suit of the original petition and refilling with the state County Court substantiates Restrepo's position that the prior petition, that was filed, was fraudulent, as supported by the modified petition which removed the language in the original pleadings.

14. Alliance aided by attorney R. Wayne Pritchard and aided and abetted by others known and unknown to the Restrepo's, and aiding and abetting others known and unknown to the Restrepo's, devised and intended to devise a scheme and artifice predicated on the conscious doing of wrong for dishonesty and malicious purposes to defraud the Restrepo's and five other national and international corporations through extortion, bribery and the concealment of material information.

15. Pritchard and Alliance with the intent to defraud, devised a scheme and artifice to defraud and obtain money and personal property by materially false and fraudulent pretenses, representations, that is they conspired among themselves and devised a scheme to defraud Restrepo's and five other National and International corporations of their computer html codes, personal property, intellectual property, trade secrets, copyrighted and trademark property and payment due Restrepo's by filing a frivolous lawsuit in County Court at Law Number 5, El Paso County, Texas.

16. The unlawful intent of Attorney Pritchard and Alliance in filing the suit against Restrepo's was to disguise a Federal Copyright question under a frivolous bogus "breach of contract" claim to cajole a Texas County Court at Law judge to grant Alliance rights to a federal

trademark name legally owned by Alliance Steel an Oklahoma corporation (See **Exhibit 6** USPTO Determination). Through this unlawful scheme attorney Pritchard and Alliance sought to abrogate established federal laws and dilute the congressionally mandated authority of federal agencies to wit: the USPTO, and the Internet Corporation for Assigned Names and Numbers ICANN a federal agency which has the exclusive jurisdiction over domain name disputes. (**Exhibit 8** Go Daddy Legal Agreement Section 23 Governing Law).

II. THE REMOVAL IS TIMELY

This Notice of Removal is a timely filed Constitutional claim within the time frame of the federal court acceptance of Restrepo's federal copyright lawsuit filed on October 16, 2014 and within one year of Alliance June 20, 2014 amended petition.

III. LEGAL STANDARD

A. 28 U.S.C. § 1331. FEDERAL QUESTION:

Section 1331 establishes that district courts shall have original jurisdiction when Motions to Transfer venue under 28 USC §1441(a) and 28 USC § 1331 require that: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Federal question jurisdiction exists when a claim arises pursuant to federal law.

Further, 28 U.S.C. §1446 allows transfer of this cause for original Federal Court jurisdiction. See e.g. *Hayes v. Livermore,* 279 F2d 818 (D.C. Cir. 1960; *Amerio Contact Plate Freezers, Inc. v. Knowles,* 274 F2d 755 (D.C. Cir. 1960)

Alliance sought and is currently under the exclusive jurisdiction of a federal agency the USPTO when they applied for a trademark for the second time on April 18, 2014 thus invoking the exclusive application of federal law involving a federal question. Given this fact along with the Restrepo's Copyright and the fact that the Restrepo's have a current and pending appeal of Alliance trademark application Number 76/716209, the removal of this case to the Federal District Court for the Western District of Texas, El Paso Division is warranted. The facts in this case easily satisfy the criteria of exclusive federal law, federal jurisdiction, and venue are proper and the case should be transferred to the Western District of Texas, El Paso Division.

IV. ARGUMENT

A. This Matter Should Be Removed to the United States District Court, Western District of Texas, El Paso Division for the Complaint Alleges Claims Which Create Complete Federal Question Jurisdiction.

"Chasing the Rabbit Down the Hole"

Alliance non-suited and first Amended Petition artfully and maliciously attempts to disguise a federal Copyright matter by claiming trademark infringement by Restrepo's for allegedly using the common English words "alliance riggers and constructors".

Alliance by their own statements under oath to the County Court at Law Number Five have documented that this is a federal case involving federal questions of a domain name ownership of Restrepo's Copyrighted "allianceriggersandconstructors.com" domain name as attested by the court transcript excerpt presented below, **Exhibit 10**. Court Transcript Reporter's Record May 3, 2013.

"**MR. PRITCHARD:** yeah, your Honor, this is a real simple case. i mean, and not to belabor any of the legal issues we've already talked about,, but the simplicity of the case is this: is that they have a domain name that is—-
MR. PRITCHARD: —- is similar to our trademark. All we want them to do is transfer the domain name to us. That's what we want. We don't want them having another —- and the law is that you can't have domain name that is confusingly similar to a trademark. That's what this case is about."

However, we must look deeper into the real motivation of Alliance which is to deceitfully gain all the original Copyrighted domain name and product originally created by Defendants contained in the webpage, the html code, the videos, the published articles, the music score, the MP3's (original narrations), slide shows, original footage movies, et. al which are and have been used as Copyrighted original creative work product by Restrepo's thus covered by and subject to determination by Federal District Court under 28 U.S.C. § 1338.

We must also look into the factual dishonest intent of Alliance meritless allegations that his "alliance riggers & constructors" words domain name belongs exclusively to Alliance in light of the fact that there are currently FOUR GoDaddy available for purchase domain names all containing the words "alliance riggers and constructors" to wit: (1) allianceriggersandconstructors.org sells for $12.99; (2) allianceriggersandconstructors.co sells for $6.99; (3) allianceriggersandconstructors.info sells for $2.99; and (4) allianceriggersandconstructors.us sells for $4.99.

The question is then: (1) Why Alliance has not sued GoDaddy the legal owner of the aforementioned domain names all containing the allegedly trademark name "alliance riggers & constructors"? (2) Why

Alliance does not purchase anyone of the four domain names, or better yet, all four of the domain names containing the words "alliance riggers and constructors" which can either or all be used as equal identifiers of the webpage?.

Alliance's disclaimer to the words "riggers and constructors" and their inability to claim any trademark rights to the word "Alliance" completely and entirely voids the lawsuit filed against Restrepo's for lack of standing on the part of Alliance.

Therefore, as a matter of law County Court at Law Number Five never acquired jurisdiction and has no subject matter jurisdiction because Alliance has no standing before the court, or any rights to the name "Alliance" or the generic words "riggers and constructors".

Further, by Alliance's own court recorded admissions this is a federal question domain name ownership copyright case that belongs in the Western District of Texas El Paso Division federal court.

Factually the Federal USPTO has already ruled that Alliance cannot claim title to the word "Alliance" because it is a legal registered trademark of Alliance Steel an Oklahoma corporation. Further, the Federal USPTO has also informed Plaintiff that it cannot register and claim title to the words "riggers" and "constructors" which have been determined to be common usage words contained in the English Dictionary and thus NOT subject to trademark registration.

To the extent that Alliance claims alleged rights to the federal copyrighted domain name "alliance riggers & constructors" those rights are weak, narrow, and exist in a crowded field of merely competing descriptive names, uses and ordinary plain English words as evidenced

by the Federal USPTO ruling against Plaintiffs application dated September 14, 2012.

Alliance contractually agreed and consented to jurisdiction and forum selection in Federal district court for resolution of any domain names disputes by signing the contract and accepting GoDaddy's Universal Terms of Service for GoDaddy software and services as follows: "*For the adjudication of disputes concerning the use of any domain name registered with GoDaddy, You agree to submit to jurisdiction and venue in the U.S. District Court for the district of Arizona located in Phoenix, Arizona.*"

It is then obvious to the casual observer as well as to the Federal Court that Alliance, with no investigation, or exercise of prudent due diligence, and in contradiction to his sworn testimony and judicial admissions asserts a variety of scurrilous, sensational and unfounded accusations against the Restrepo's. Alliance original and non-suited Petition and subsequent Amended Petition have no standing, no basis in fact or in law, defies common sense, and therefore County Court at Law Number Five never obtained, and cannot exercise any jurisdiction over a federal Copyrighted domain name.

Alliance filed his first Amended Petition without any substantive change from his first Petition and with the knowledge that it was and would be groundless. Thus, his pleading has been, by definition, made in bad faith and for the purpose of harassment. Therefore, Alliance is subject to sanctions. See *Tanner*, 856 S.W.2d at 730.

Alliance Amended Petition fails to comply with new Supreme Court rules by refusing to classify the damages sought into categories but instead proceed to make his own nebulous category. Plaintiff has

made a claim for damages which are within and in excess of the minimum jurisdictional limits of the Court at the same time.

Restrepo's request that the Alliance Amended Petition be stricken because it is substantially insufficient in law and in fact, or that the action should be dismissed with prejudice.

B. This Matter Should Be Removed To The United States District Court, Western District Of Texas, El Paso Division

Transfer to Federal District Court is mandatory because a Federal Question Jurisdiction exists by virtue of the Copyright Act of 1976 and 28 U.S.C § 1338. Federal question jurisdiction exists where the complaint "establishes either that [1] federal law creates the cause of action or [2] that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law, in that 'federal law is a necessary element of one of the well-pleaded ... claims'." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808-09 (1988) (quoting *Franchise Tax Bd.*, 463 U.S. at 27-28); 28 U.S.C. § 1331. "[I]n order for a complaint to state a claim 'arising under' federal law, it must be clear from the face of the plaintiff's well-pleaded complaint that there is a federal question." *Duncan v. Stuetzle,* 76 F.3d 1480, 1485 (9th Cir. 1996). Restrepo's have copyrighted the domain name "allianceriggersandconstructors.com" and all original work relating to their original creative video and Internet web page product.

A claim to determine copyright ownership is a federal court claim when interpretation of a copyright statute controls as in this case.

Suits whose purpose is to decide these federal copyright matters are exclusive federal court suits.

Restrepos contend that Alliance other claims of breach of contract, declaratory judgment and violation of the Texas Deceptive Trade Practices Act invoke federal question jurisdiction because all claims are based on and are covered under the umbrella of the protections afforded by the Federal Copyright Act and 28 U.S.C. § 1338.

The U.S. District Court, Western District of Texas, El Paso Division has exclusive subject matter jurisdiction over this case under 28 U.S.C. §§ 2201 and 2202, 28 U.S.C. §§ 1331 and 1338, and 15 U.S.C. § 1121. The federal district court shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright protection afforded by the Copyright Act of 1976 and 28 U.S.C. §1338 as in this case.

Alliance filing in state County Court however ambiguous and purposely concealed by the ancillary claims of Unfair Competition and Texas Deceptive Trade Practices Act is an attempt to evade the operation of mandatory provisions of Federal statutes and law.

There is not a scintilla of fact or evidence offered by Alliance that the Restrepo's line of business which consists of strategic marketing research and video productions, web page creations, and public relations services are in any way directly or indirectly, or that Restrepo's have the technical, equipment and financial capacity to engage in a competing offering of crane and rigging and steel erection services. Alliance claims otherwise are ludicrous and fail to meet the test of veracity and common sense.

Neither is any factual evidence offered by Plaintiff that Restrepos have engaged in Breach of Contract for all services rendered to Alliance by the Restrepo's were under a contract signed by Alliance for the intended purpose, approved verbally and in writing by Alliance. The Court record reflects that Alliance wrote complimentary E-mails to Defendants for their outstanding work. Further, Alliance has made filed judicial admissions through General Manager Phillip Cordova and Operations Manager Terry Stevens that that they gave permission to the Restrepos to utilize its alleged name in the web page, videos, and all other productions.

A judicial admission once made still is a judicial admission that completely obliterates Alliance claims of any "unauthorized use" of "alliance riggers & constructors" name. Alliance by their own judicial admissions in fact totally defeat any claims against Restrepo's and reflects Alliance lawsuit for what it really is: a vexatious frivolous lawsuit without any basis in fact or in law that defies all common sense and made only for the purpose of harassment of a disabled U.S. Army Veteran senior citizen and his wife.

Alliance claims under Common Law are unsubstantiated as well. Alliance is and has engaged in Interstate commerce outside of El Paso County, across interstate boundaries by having registered to offer its services in the State of New Mexico and other U.S. locations and operated across international borders in Mexico.

The copyrighted domain name "allianceriggersandconstructors.com" subject of Alliance's First Amended Petition is the Restrepo's legally owned and claimed

Copyright protected under Federal statutes. Every original creative work product, every document, contains the Restrepo's Copyright symbol and Notice of Copyright thus endowing the jurisdiction of and power of federal courts by statutes and Constitutional protection to adjudicate claims. See *Stockman v. Fed. Election Comm'n*, 138 F. 3rd 144, 151 (5th Cir. 1998) (citing *Veldhoen v. United States Coast Guard,* 35 F. 3d 222, 225 (5th Cir. 1994).

C. Lack of Subject Matter Jurisdiction of State County Court

The Restrepos rely on the following established case precedent: (1) "Once jurisdiction is challenged, the court cannot proceed when it clearly appears that the court lacks jurisdiction, the court has no authority to reach merits, but, rather, should dismiss the action." *Melo v. US*. 505 F2d 1026. (2) "The law provides that once State Jurisdiction has been challenged, it must be proven." *Main v; Thiboutot*. 100 S. Ct. 2502 (1980). (3) "Jurisdiction can be challenged at any time." and"Jurisdiction, once challenged, cannot be assumed and must be decided." *Basso v; Utah Power & Light Co*.. 495 F 2d 906, 910. (4) "Defense of lack of jurisdiction over the subject matter may be raised at any time, even on appeal." *HUI Top Developers v; Holiday Pines Service Corp*.. 478 So. 2d. 368 (Fla 2nd DCA 1985). (5) "Once challenged, jurisdiction cannot be assumed, it must be proved to exist." *Stuclc v. Metiical Examiners*. 94 Ca 2d 751. 211 P2d 389. (6) "There is no discretion to ignore that lack of jurisdiction." *Jovce v: US.* 474 F2d 215. (7) "The burden shifts to the court to prove jurisdiction." *Rosemond v: Lambert*. 469 F2d 416. (8) "A universal principle as old as the law is that a proceedings of a court without jurisdiction are a

nullity and its judgment therein without effect either on person or property." *Norwood v: Benfield*. 34 C 329; *Ex. parte Giambonini,* 49 P. 732. (9) "Jurisdiction is fundamental and a judgment rendered by a court that does not have jurisdiction to hear is void ab initio." In *Re AQ.Qlication of Wyatt*. 300 P. 132; *Re Qmd11*. 118 P2d 846. (10) "Thus, where a judicial tribunal has no jurisdiction of the subject matter on which it assumes to act, its proceedings are absolutely void in the fullest sense of the term." *DU/on v: DU/on*. 187 P 27. (11) "A court has no jurisdiction to determine its own jurisdiction, for a basic issue in any case before a tribunal is its power to act, and a court must have the authority to decide that question in the first instance." *Rescue Army v. Municipal Court of Los Angeles*. 171 P2d 8; 331 US 549, 91 L. ed. 1666, 67 S.Ct. 1409. (12) "A departure by a court from those recognized and established requirements of law, however close apparent adherence to mere form in method of procedure, which has the effect of depriving one of a constitutional right, is an excess of jurisdiction." *Wuest v: Wuest*. 127 P2d 934, 937. (13) "Where a court failed to observe safeguards, it amounts to denial of due process of law, court is deprived of juris." *Merritt v: Hunter. C.A. Kansas* 170 F2d 739.

D. Defective Service

The Record reflect that Restrepos have vigorously contested the lack of personal jurisdiction of County Court at Law Number Five because of insufficient process and insufficient service upon Linda S. Restrepo who never personally received and signed the citation of service. The Record before this Honorable Court document that Linda

S. Restrepo has made a standing and running objection to defective/ insufficient service and the fact that she has not been properly served.

The Court Record documents that service upon Linda Restrepo was defective in that the "certified mail", "restricted delivery" return receipt does not contain the addressee's signature (CR. Return Service). "A return of citation served by registered or certified mail must contain the return receipt, and the latter must contain the addressee's signature". Tex.R. Civ. P. 107; See *Keeton v. Carrasco*, 53 S.W.3d 13, 19 (Tex.App.-San Antonio 2001, pet. denied). If the return receipt is signed by someone else, then service of process is defective; See *All Comm. Floors, Inc. v. Barton & Rasor,* 97 S.W.3d 723, 726-27 (Tex. App.- Fort Worth 2003, no pet.) (holding that service was defective because the return receipt was signed by neither the addressee or registered agent for the entity). Because the service is defective, the attempted service is invalid and of no effect. *Wilson v. Dunn,* 800 S.W.2d 833, 836 (Tex.1990). The County Court has proceeded in this case without personal jurisdiction and contrary to Tex. R. Civl P. Rule 124, No Judgment Without Service.

Alliance alleged claims of ownership of a domain name, Breach of Contract, Unfair Competition, violations of the Texas Deceptive Trade Practices Act necessitate the resolution of a substantial question of federal law because all claims fall within the source of Restrepos copyrightable subject matter, are based on and hinge on the resolution of the disputed domain name Copyrights of Restrepos versus the alleged ownership rights claimed by Alliance.

This matter should be removed to the U.S. District Court, Western District of Texas, El Paso Division since there are complete and exclusive federal questions before the Court.

E. Transferring the Case to the Western District of Texas, El Paso Division Would Serve the Interests of Justice.

The traditional factor - the interest of justice - also supports a transfer to the Western District of Texas. Alliance would not be disadvantaged by a transfer of this case to the Western District of Texas. Because their fraudulent trademark claims and trademark infringement of the registered name "Alliance" and its disclaimer to the words "riggers and constructors" all raise issues of federal law, no one state district court is presumed to be any more or less familiar with the legal standards applicable to those claims. Moreover, the fraudulent Alliance breach of contract claims are based on a "surreptitious phantom trademark" claim that require that any domain name dispute arising under federal law shall be resolved in accordance with the federal jurisdiction of the federal District courts." The transferee District court, sitting in El Paso, Texas, may be presumed to have greater familiarity with the federal copyright, patent and trademark laws underlying these claims.55 I.£11JI *Vistaprint. Ltd.*, 628 F.3d 1342, 1346-47 & n.3 (Fed. Cir. 2010).

F. Defendants Request Equal Protection under the Law

Restrepo's request transfer to the U.S. District Court for the Western District of Texas, El Paso Division based on their claim to Equal Protection under the law. The County Court at Law Number 5

has treated Restrepo's as one class of people differently than another class of people. County Court at Law Number Five has singled out Restrepo's abuse of process and malicious persecution, differential treatment based on their claims of fraud against Alliance in the on-going El Paso County public corruption case. Restrepo's further state that they have been stripped in County Court at Law Number Five of their 1st Amendment Rights and their Rights to Due Process. The presiding Judge Carlos Villa is a state actor acting under the Color of Law under section 1983, who due to his bias against the Restrepo's for the fact that his nephew was part of the public corruption case which the Restrepo's have sought claims against Alliance, has decided to allow the Alliance to operate without complying with discovery, requests for production, disclosure, without stating a cause of action and without standing all in violation of the Restrepo's Constitutional and Due Process Rights which makes this a federal case.

V. CONCLUSION

This case is based on complete Federal Issues and complete Federal Copyright Law and does not belong in the County Court at Law Number Five of El Paso, Texas. It belongs in the Western District of Texas, El Paso Division - the exclusive Federal Forum originally acquired and required by the Federal Copyright Laws. Alliance alleged claims require an interpretation of federal copyright law in a federal court. A transfer to the Western District of Texas, El Paso Division would square with both common sense and fundamental fairness, particularly when the key witnesses in this case, and all of Alliance's owners, officers, currently employees identified to date that could

provide critical testimony work and reside in the Western District of Texas.

By this Notice of Removal and Motion to Transfer Venue, the Restrepo's do not waive any objections they may have as to appeal remand of the case to state court, service,, jurisdiction or venue, or any other defenses and objections it may have to any expedited rulings in this action. Restrepo's intend no admissions of fact, law, or liability by this Notice and Motion, and expressly reserve all appeals, defenses, motions and/or pleas. Restrepo's reserve the right to amend and/or supplement this Notice of Removal and Motion. This Notice of Removal is not brought for the purpose of delay but so that justice may be served.

Respectfully Submitted,

Dated this 31st Day of October.

Linda S. Restrepo- Pro Se
P.O. Box 12066
El Paso, Texas 79912
(915) 581-2732

Carlos E. Restrepo- Pro Se
P.O. Box 12066
El Paso, Texas 79912
(915) 581-273

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of October 2014 a copy of Defendants Motion to Transfer Venue Memorandum in Support, Declaration of Linda S. Restrepo and Declaration of Carlos E. Restrepo were served upon the following via E-mail to : wpritchard@pritchlaw.com, and the Honorable Judge Carlos Villa at: pbustmante@epcounty.com

Carlos E. Restrepo- Pro Se

Exhibits

Exhibit 1: Plaintiffs Initials on Webpage Acceptance
Exhibit 2: Plaintiffs First Amended Petition-non-suit of Original Petition
Exhibit 3: Plaintiffs Judicial Admissions
Exhibit 4: Plaintiffs Original Petition
Exhibit 5: Plaintiffs USPTO Application
Exhibit 6: USPTO Ruling
Exhibit 7: Abandonment of Trademark Ruling
Exhibit 8: Go Daddy Forum Selection Clause
Exhibit 9: Plaintiffs disclaim of the words riggers & constructors to the USPTO
Exhibit 10: Court Record

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Exhibit 1: Plaintiffs Initials on Webpage Acceptance

000027

click here

click here

click here

PROJECT SLIDESHOWS

WELCOME TO ALLIANCE RIGGERS & CONSTRUCTORS, LTD.

Alliance Riggers & Constructors is a Southwest Regional Services provider offering premier service throughout Texas and New Mexico. Our trained and professional employees offer an extensive menu of services and the expertise and equipment to assist YOU in Crane and Construction Partners in making YOUR Vision a reality ... safely, on time and within budget. Alliance Riggers & Constructors, Ltd. a limited partner, El Paso Crane & Rigging, Inc. and Crane Works is a family owned business doing business in El Paso Texas and the surrounding area for nearly 40 years.

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[redacted]

Exhibit 2: Plaintiffs First Amended Petition

IN THE COUNTY COURT AT LAW NUMBER 5
EL PASO COUNTY, TEXAS

ALLIANCE RIGGERS & CONSTRUCTORS, LTD., Plaintiff, v. LINDA S. RESTREPO and CARLOS E. RESTREPO D/b/a Collectively RDI Global Services and R&D International, Defendants.	§ § § § § § § § § § §	Cause No. 2012-DCV04523

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Now Comes, ALLIANCE RIGGERS & CONSTRUCTORS, LTD., by and through its attorney of record, R. Wayne Pritchard, P.E., of the law firm R. Wayne Pritchard, P.C., complaining of LINDA S. RESTREPO and CARLOS E. RESTREPO d/b/a Collectively RDI Global Services and R&D International, Defendants, and for cause of action would respectfully show the court as follows:

I.
DISCOVERY LEVEL

1. Discovery is to be conducted in accordance with Rule 190.3 of the Texas Rules of Civil Procedure, Level 2.

II.
PARTIES

2. Plaintiff is limited partnership having its principal place of business in El Paso, Texas.

3. CARLOS E. RESTREPO has appeared and answered herein.

4. LINDA S. RESTREPO has appeared and answered herein.

III.
TRADEMARK INFRINGEMENT/UNFAIR COMPETITION

5. By virtue of its long time use both here in El Paso County, Texas as well as elsewhere, Plaintiff is the owner of the well known common law trademark, ALLIANCE RIGGERS & CONSTRUCTORS.

6. As shown on the attached Exhibit "A", incorporated by reference for all purposes herein, on March 19, 2012, Defendants, without permission or authority from Plaintiff, registered the domain name "www.allianceriggersandconstructors.com", and have in fact, launched a web page at such address in which they make multiple use of Plaintiff's common law trademark. Despite this lawsuit, Defendants continue to maintain and assert ownership over the afore-referenced domain name.

7. The use by Defendants of Plaintiff's trademark without permission or authority constitutes trademark infringement and unfair competition under the laws of the State of Texas.

8. As a direct and proximate result of the actions complained of above, Plaintiff has suffered damages in excess of the minimum jurisdictional limits of this court, meaning, damages above the minimum jurisdictional limit. Put another way, Plaintiff is requesting damages within the jurisdictional limits of this Court.

IV.
BREACH OF CONTRACT

9. On or about March 2011, Plaintiff and Defendants entered into a contract ("Contract"), the primary purpose of which was to design for Plaintiff a web page. Defendants have breached the Contract by failing to design for Plaintiff the web page as

agreed. As a direct and proximate result of the conduct of Defendants described above, Plaintiff has suffered damages in excess of the minimum jurisdictional limits of this court, meaning, damages above the minimum jurisdictional limit. Put another way, Plaintiff is requesting damages within the jurisdictional limits of this Court.

V.
DECLARATORY JUDGMENT REQUEST

10. By letter dated June 12, 2012, Defendant alleged that Plaintiff had breached the Contract and made demand that Plaintiff pay Defendants $3,500.00.

11. As shown above, Plaintiff has not breached the Contract as alleged by Defendants and furthermore, does not owe Defendants any sum of money.

12. Plaintiff requests that pursuant to Section 37.001 et seq., of the Texas Civil Practice and Remedies Code, commonly referred to as the Texas Declaratory Judgment Act, this Court declare that Plaintiff is not in breach of the Contract and does not owe Defendants any amounts of money.

13. Plaintiff is entitled to recover from Defendants, jointly and severally, pursuant to Section 37.009 of the Texas Declaratory Judgment Act, its reasonable and necessary attorneys' fees incurred in this action.

VI.
VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT

14. In connection with the their agreement to design for Plaintiff a web page, Defendants:

A. Represented that services had characteristics, uses or benefits which they did not have in violation of Section 17.46(b)(5) of the Texas Deceptive Trade Practices Act ("TDPA");

B. Represented that services were of a particular standard, quality or grade when they were of another in violation of Section 17.46(b)(7) of the TDPA;

C. Represented that an agreement conferred or involved rights, remedies or obligations which it did not have or involve in violation of Section 17.46(b)(12) of the TDPA;

D. Failed to disclose information concerning services which was known at the time of the transaction, when such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed in violation of Section 17.46(b)(24) of the TDPA;

E. Engaged in unconscionable actions or course of actions in violation of Section 17.50(a)(3) of the TDPA;

15. The actions of Defendants complained of in paragraph 10, were a producing cause of damages to Plaintiff and are therefore actionable under Section 17.50(a)of the TDPA.

16. The conduct of Defendants as described above was committed knowingly entitling Plaintiff to recover three times its economic damages as provided in Section 17.50(b)(1) of the TDPA.

VII.
ATTORNEYS' FEES

17. Plaintiff is entitled to recover its reasonable attorneys' fees incurred in this action pursuant to Sections 37.009 and 38.001 et seq. of the Texas Civil Practice and Remedies Code as well as under the Texas Deceptive Trade Practices Act.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon final hearing in this matter, after proper notice to Defendants, that it recover from Defendants, jointly and severally, its actual damages, its economic damages, three times its economic damages, as well as court costs and reasonable attorneys' fees together with prejudgment and post-judgment interest as allowed by law, and such other and further relief to which it is entitled.

Respectfully submitted,

R. WAYNE PRITCHARD, P.C.
300 East Main, Suite 1240
El Paso, Texas 79901
Tel. (915) 533-0080
Fax (915) 533-0081

By: R. Wayne Pritchard
R. WAYNE PRITCHARD
State Bar No. 16340150

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I, R. WAYNE PRITCHARD, do hereby certify that on the 20th day of June 2014, a true and correct copy of the foregoing document was delivered as required by the Texas Rules of Civil Procedure to Defendants, LINDA S RESTREPO and CARLOS E. RESTREPO d/b/a RDI Global Services and R&D International, P.O. Box 12066, El Paso, Texas 79912

R. Wayne Pritchard

R. WAYNE PRITCHARD, P.E.

WHOIS search results for:
ALLIANCERIGGERSANDCONSTRUCTORS.CO...
(Registered)

Domain Name: ALLIANCERIGGERSANDCONSTRUCTORS.COM
Registry Domain ID: 1707909851_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Update Date: 2014-02-17 12:13:15
Creation Date: 2012-03-19 11:36:57
Registrar Registration Expiration Date: 2015-03-19 11:36:57
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.480-624-2505
Domain Status: clientTransferProhibited
Domain Status: clientUpdateProhibited
Domain Status: clientRenewProhibited
Domain Status: clientDeleteProhibited
Registry Registrant ID:
Registrant Name: Carlos Restrepo
Registrant Organization: R D International
Registrant Street: P.O. Box 12066
Registrant City: El Paso
Registrant State/Province: Texas
Registrant Postal Code: 79912
Registrant Country: United States
Registrant Phone: +1.9159999999
Registrant Phone Ext:
Registrant Fax:
Registrant Fax Ext:
Registrant Email: pdi-lat@zianet.com
Registry Admin ID:
Admin Name: Carlos Restrepo
Admin Organization: R D International
Admin Street: P.O. Box 12066
Admin City: El Paso
Admin State/Province: Texas
Admin Postal Code: 79912
Admin Country: United States
Admin Phone: +1.9159999999
Admin Phone Ext:
Admin Fax:
Admin Fax Ext:
Admin Email: pdi-lat@zianet.com
Registry Tech ID:
Tech Name: Carlos Restrepo
Tech Organization: R D International
Tech Street: P.O. Box 12066
Tech City: El Paso
Tech State/Province: Texas
Tech Postal Code: 79912
Tech Country: United States
Tech Phone: +1.9159999999
Tech Phone Ext:
Tech Fax:
Tech Fax Ext:
Tech Email: pdi-lat@zianet.com
Name Server: NS19.DOMAINCONTROL.COM
Name Server: NS20.DOMAINCONTROL.COM
DNSSEC: unsigned
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/
Last update of WHOIS database: 2014-6-19T16:00:00Z

See Underlying Registry Data

Domain already taken?

Enter Domain Name .com Search

NameMatch Recommendations

GoDaddy.com NameMatch has found similar domain names related to your search. Registering multiple domain names may help protect your online brand and enable you to capture more Web traffic, which you can then direct to your primary domain.

Domains available for new registration:

	Alternate TLDs		
☐	allianceriggersandconstruc....info	SAVE!	$2.99*/yr
☐	allianceriggersandconstruc....net	SAVE!	$9.99*/yr
☐	allianceriggersandconstruc....org	SAVE!	$12.99*/yr
☐	allianceriggersandconstruc....us	SAVE!	$3.99/yr
☐	allianceriggersandconstruc....biz	SAVE!	$7.99*/yr
☐	allianceriggersandconstruc....mobi	SAVE!	$9.99*/yr
☐	allianceriggersandconstruc....co		$12.99/yr
☐	allianceriggersandconstruc....me	SAVE!	$9.99/yr
	Similar Premium Domains ?		
☐	TireAndRims.com		$1,999.00*
☐	UsedTiresAndRims.com		$1,249.00*
☐	CheapRimsAndTires.com		$1,699.00*
☐	ActionAlliance.com		$3,488.00*
☐	AdvancedAlliance.com		$1,988.00*
☐	AllianceAcquisitions.com		$3,588.00*

ADD TO CART

Domains available at Go Daddy Auctions®:

☐	g-trigger.com Ends on: 9/18/2014 3:58:00 AM PDT	$2,400.00*
☐	fruitsandvegetables.net Ends on: 9/17/2014 8:35:00 PM PDT	$2,488.00*
☐	hispanicalliance.com Ends on: 9/17/2014 7:11:00 PM PDT	$1,100.00*
☐	nursingalliance.com Ends on: 9/17/2014 3:55:00 PM PDT	$4,488.00*
☐	newsandstuff.com Ends on: 9/17/2014 1:40:00 PM PDT	$688.00*
☐	needlesandpins.com Ends on: 9/17/2014 1:12:00 PM PDT	$4,088.00*

VIEW LISTING

Learn more about

Private Registration ? Deluxe Registration ?
Business Registration ? Protected Registration ?

EXHIBIT 'A' PENGAD 800-631-6989

000036

Exhibit 3: Plaintiffs Judicial Admissions

0000037

EXHIBIT G

IN THE COUNTY COURT AT LAW NUMBER 5
EL PASO COUNTY, TEXAS

ALLIANCE RIGGERS & CONSTRUCTORS, LTD.,	§	
Plaintiff,	§	
v.	§	Cause No. 2012-DCV04523
LINDA S. RESTREPO and CARLOS E. RESTREPO D/b/a Collectively RDI Global Services and R&D International,	§	
Defendants.	§	

PLAINTIFF'S RESPONSE TO REQUEST FOR ADMISSIONS OF CARLOS E. RESTREPO

TO: Defendants, LINDA S RESTREPO and CARLOS E. RESTREPO d/b/a RDI Global Services and R&D International, P.O. Box 12066, El Paso, Texas 79912

COMES NOW ALLIANCE RIGGERS & CONSTRUCTORS, LTD, and serves these their Objections and Answers to Defendant, CARLOS E. RESTREPO's Request for Admissions in accordance with the Texas Rules of Civil Procedure.

Respectfully submitted,

R. WAYNE PRITCHARD, P.C.
300 E. Main, Suite 1240
El Paso, Texas 79901
Tel. (915) 533-0080
Fax (915) 533-0081

By: R. Wayne Pritchard

R. WAYNE PRITCHARD
State Bar No. 16340150

ATTORNEYS FOR PLAINTIFF

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CERTIFICATE OF SERVICE

I, R. WAYNE PRITCHARD, do hereby certify that on the 20th day of December, 2012, a true and correct copy of the foregoing document was delivered as required by the Texas Rules of Civil Procedure to Defendants, LINDA S RESTREPO and CARLOS E. RESTREPO d/b/a RDI Global Services and R&D International, P.O. Box 12066, El Paso, Texas 79912

R. Wayne

R. WAYNE PRITCHARD, P.E.

00 275

REQUEST FOR ADMISSION NUMBER 10:

Admit that Plaintiff submitted a reversed typeset Alliance Logo to the Defendants to be utilized in the webpage.

RESPONSE:

Plaintiff admits that it permitted Defendants to use its trademark in connection with the design of its web page. Plaintiff denies the remaining portions of this request.

REQUEST FOR ADMISSION NUMBER 11:

Admit that Exhibit "A" is an accurate copy of the reversed typeset Alliance Logo Plaintiff submitted to the Defendants. A true and correct copy of the reversed typeset Alliance Logo submitted to Defendants by Plaintiff is attached hereto as Exhibit "A."

RESPONSE:

Plaintiff admits that Exhibit "A" contains a copy of its trademark and that it allowed Defendants to use such trademark in connection with the design of Plaintiff's web page. Plaintiff denies the remaining portions of this request.

REQUEST FOR ADMISSION NUMBER 12:

Admit that the Alliance Logo (Exhibit "A") was submitted by Plaintiff to Defendants with instructions to be utilized in the webpage.

RESPONSE:

Plaintiff admits that Exhibit "A" contains a copy of its trademark and that it allowed Defendants to use such trademark in connection with the design of Plaintiff's web page. Plaintiff denies the remaining portions of this request.

REQUEST FOR ADMISSION NUMBER 13:

Admit that Plaintiff edited and approved the webpage and submitted said edits to the Defendants.

RESPONSE:

Plaintiff admits that some but not all edits, changes and modifications to its web page were submitted to Plaintiff for approval. Plaintiff denies the remaining portions of this request.

REQUEST FOR ADMISSION NUMBER 14:

Admit that Exhibit "B" is an accurate copy of Alliance Riggers web edit submitted to the Defendants by Plaintiff. A true and correct copy of an email from Plaintiff with attached Alliance Riggers web edit.pdf is attached hereto as Exhibit "B."

Exhibit 4: Plaintiffs Original Petition

000041

IN THE COUNTY COURT AT LAW NUMBER
EL PASO COUNTY TEXAS

FILED
NORMA L. FAVELA
DISTRICT CLERK

2012 JUN 20 PM 1 49

EL PASO COUNTY, TEXAS
BY
DEPUTY

ALLIANCE RIGGERS & CONSTRUCTORS, LTD.,

Plaintiff,

v.

LINDA S. RESTREPO and CARLOS E. RESTREPO D/b/a Collectively RDI Global Services and R&D International,

Defendants.

Cause No. 2012-DCV 04523

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Now Comes, ALLIANCE RIGGERS & CONSTRUCTORS, LTD., by and through its attorney of record, R. Wayne Pritchard, P.E., of the law firm R. Wayne Pritchard, P.C., complaining of LINDA S. RESTREPO and CARLOS E. RESTREPO d/b/a Collectively RDI Global Services and R&D International, Defendants, and for cause of action would respectfully show the court as follows:

I.
DISCOVERY LEVEL

1. Discovery is to be conducted in accordance with Rule 190.3 of the Texas Rules of Civil Procedure, Level 2.

II.
PARTIES

2. Plaintiff is limited partnership having its principal place of business in El Paso, Texas.

3. CARLOS E. RESTREPO is an individual residing in El Paso County, Texas who may be served with process at his principal lace of residence located at 804 Pintada Place, El Paso, Texas 79912.

4. LINDA S. RESTREPO is an individual residing in El Paso County, Texas, who may be served with process at her principal place of residence located at 804 Pintada Place, El Paso, Texas 79912.

III.
TRADEMARK INFRINGEMENT/UNFAIR COMPETITION

5. Plaintiff is the owner of the well known common law trademark, ALLIANCE RIGGERS & CONSTRUCTORS.

6. Defendants have, without permission or authority from Plaintiff, registered the domain name "www.allianceriggersandcontructors.com", and have in fact, launched a web page at such address in which they make multiple use of Plaintiff's trademark.

7. The use by Defendants of Plaintiff's trademark without permission or authority constitutes trademark infringement and unfair competition under the laws of the State of Texas.

8. As a direct and proximate result of the actions complained of above, Plaintiff has suffered damages in excess of the minimum jurisdictional limits of this court.

IV.
BREACH OF CONTRACT

9. On or about March 2011, Plaintiff and Defendants entered into a contract ("Contract"), the primary purpose of which was to design for Plaintiff a web page. Defendants have breached the Contract by failing to design for Plaintiff the web page as

agreed. As a direct and proximate result of the conduct of Defendants described above, Plaintiff has suffered damages in excess of the minimum jurisdictional limits of this court.

V.
DECLARATORY JUDGMENT REQUEST

10. By letter dated June 12, 2012, a true and correct copy of which is attached hereto as Exhibit "A" and incorporated by reference for all purposes, Defendant alleged that Plaintiff had breached the Contract and made demand that Plaintiff pay Defendants $3,500.00.

11. As shown above, Plaintiff has not breached the Contract as alleged by Defendants and furthermore, does not owe Defendants any sum of money.

12. Plaintiff requests that pursuant to Section 37.001 et seq., of the Texas Civil Practice and Remedies Code, commonly referred to as the Texas Declaratory Judgment Act, this Court declare that Plaintiff is not in breach of the Contract and does not owe Defendants any amounts of money.

13. Plaintiff is entitled to recover from Defendants, jointly and severally, pursuant to Section 37.009 of the Texas Declaratory Judgment Act, its reasonable and necessary attorneys' fees incurred in this action.

VI.
VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT

14. In connection with the their agreement to design for Plaintiff a web page, Defendants:

A. Represented that services had characteristics, uses or benefits which they did not have in violation of Section 17.46(b)(5) of the Texas Deceptive Trade Practices Act ("TDPA");

B. Represented that services were of a particular standard, quality or grade when they were of another in violation of Section 17.46(b)(7) of the TDPA;

C. Represented that an agreement conferred or involved rights, remedies or obligations which it did not have or involve in violation of Section 17.46(b)(12) of the TDPA;

D. Failed to disclose information concerning services which was known at the time of the transaction, when such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed in violation of Section 17.46(b)(24) of the TDPA;

E. Engaged in unconscionable actions or course of actions in violation of Section 17.50(a)(3) of the TDPA;

15. The actions of Defendants complained of in paragraph 10, were a producing cause of damages to Plaintiff and are therefore actionable under Section 17.50(a)of the TDPA.

16. The conduct of Defendants as described above was committed knowingly entitling Plaintiff to recover three times its economic damages as provided in Section 17.50(b)(1) of the TDPA.

VII.
ATTORNEYS' FEES

17. Plaintiff is entitled to recover its reasonable attorneys' fees incurred in this action pursuant to Sections 37.009 and 38.001 et seq. of the Texas Civil Practice and Remedies Code as well as under the Texas Deceptive Trade Practices Act.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon final hearing in this matter, after proper notice to Defendants, that it recover from Defendants, jointly and severally, its actual damages, its economic damages, three times its economic damages, as well as court costs and reasonable attorneys' fees together with prejudgment and post-judgment interest as allowed by law, and such other and further relief to which it is entitled.

Respectfully submitted,

R. WAYNE PRITCHARD, P.C.
300 East Main, Suite 1240
El Paso, Texas 79901
Tel. (915) 533-0080
Fax (915) 533-0081

By: R. Wayne Pritchard
R. WAYNE PRITCHARD
State Bar No. 16340150

ATTORNEYS FOR PLAINTIFF

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June 12, 2012

Certified Mail Return Receipt Requested
7010 2780 0002 4346 6730
THIRD NOTICE REQUEST FOR OVERDUE PAYMENT

Subject: ALLIANCE CORPORATE VIDEO
Mr. Phil Cordova
CEO/General Manager
Alliance Riggers & Constructors
1200 Kastrin
El Paso, Texas 79907

Mr. Cordova:

We have not received a response from you regarding our continued requests for payment for past due invoices on your Corporate Video. We renew our request for immediate payment for outstanding invoices and amounts due on the Corporate Video. Alliance Riggers is unjustly enriching itself at our expense. Alliance Riggers is required to make restitution for benefits received, retained or appropriated. Please be advised that we consider you to be in breach of contract and your actions theft of services and will take every legal remedy available to us against all entities and parties involved.

Dr. Carlos E. Restrepo
(915) 581-2732

EXHIBIT
'A'

000047

Invoice

Attention:	Phillip H. Cordova	Project Title:	Alliance Corporate Video
Company Name:	Alliance Riggers & Constructors		
Address:	1200 Kastrin	Close Out Invoice	ALLI 4-24-12
City, State Zip Code:	El Paso, Texas 79907	Terms	Cash
Date:	4/24/12		

Description	Included in Basic Contract	Additional Work Requested/ Approved by Client	Paid	PAST DUE
Corporate Video - 5 minutes	X		$17,500	$1,000.00
Additional Corporate Video Minutes (4min. 32Sec)		X	$0.00	$2,500.00
		Total Amount Past Due		$3,500.00

Sincerely yours,

Dr. Carlos E. Restrepo
P.O. Box 12088
El Paso, Texas 79912

Exhibit 5: Plaintiffs USPTO Application

000049

04-21-2014

U.S. Patent & TMOfc/TM Mail Rcpt Dt. #22

Applicant: Alliance Riggers & Constructors, Ltd..
Applicant's Address: 1200 Kastrin Street
El Paso, Texas 79907

Goods recited in application: Crane and Erectors Services, namely: Structural Steel Erection, Tilt-up and Precast Erection, Crane and Rigging, Overhead Crane Systems, Machinery Moving, In-Plant Heavy Hauling, Welding Service, Crane Lift Drafting, Trans-Loading, and Pre-Engineered Metal Building Erection, din International Class 037

ALLIANCE
RIGGERS & CONSTRUCTORS

TRADEMARK
76716209

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TRADEMARK APPLICATION:

SERIAL NO. 76716209

U.S. DEPARTMENT OF COMMERCE

PATENT AND TRADEMARK OFFICE

FEE SHEET

04/21/2014 SWILSON1 00000009 76716209

01 FC:6001 375.00 OP

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R. WAYNE PRITCHARD, P.C.

Intellectual Property Law

R. Wayne Pritchard, P. E.
Admitted to Practice before the United States Patent & Trademark Office

300 East Main, Suite 1240
El Paso, Texas 79901
Telephone: (915) 533-0080
Facsimile: (915) 533-0081
wpritchard@pritchlaw.com

April 18, 2014

Via Express Mail

Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

I HEREBY CERTIFY THAT THIS CORRESPONDENCE IS BEING DEPOSITED WITH THE UNITED STATES POSTAL SERVICE AS EXPRESS MAIL NO. EI 498 588 363 US, IN AN ENVELOPE ADDRESSED TO: COMMISSIONER FOR TRADEMARKS, P.O. BOX 1451, ALEXANDRIA, VIRGINIA 22313-1451.

R. Wayne Pritchard

R. WAYNE PRITCHARD

04/18/2014

DATE

Re: Applicant: Alliance Riggers & Constructors, Ltd
Mark: ALLIANCE RIGGERS & CONSTRUCTORS (with design)

Dear Sirs:

In connection with the above referenced marks, please find enclosed the original actual use trademark application for the mark "Alliance Riggers & Constructors" (with design), one specimen; and a check made payable to the Commissioner for Trademarks in the amount of $375.00. Should you have any questions relating to the foregoing, please do not hesitate to contact me.

Respectfully,

R. Wayne Pritchard

R. Wayne Pritchard, P.E.
Registration Number 34,903

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK/SERVICE MARK APPLICATION

MARK: ALLIANCE RIGGERS & CONSTRUCTORS with Design

INT. CL. NO. : 037

INT. CL. TITLE: BUILDING CONSTRUCTION; REPAIR; INSTALLATIONS SERVICES

TO THE ASSISTANT SECRETARY AND
COMMISSIONER OF PATENTS AND TRADEMARKS:

APPLICANT: Alliance Riggers & Constructors, Ltd

APPLICANT IS: A Texas Limited Partnership

BUSINESS ADDRESS: 1200 Kastrin Street
El Paso, Texas 79907

GOODS OR SERVICES: Crane and Erectors Services, namely: Structural Steel Erection, Tilt-up and Precast Erection, Crane and Rigging, Overhead Crane Systems, Machinery Moving, In-Plant Heavy Hauling, Welding Service, Crane Lift Drafting, Trans-Loading, and Pre-Engineered Metal Building Erection, din International Class 037

Applicant requests registration of the above identified trademark/service mark shown on the accompanying drawing in the United States Patent and Trademark Office on the Principal Register established by the Act of July 25, 1946 (15 U.S.C. §1051, et seq.) as amended for the above identified goods/services.

The Applicant is using the mark in commerce or in connection with the above identified goods/services (15 U.S.C. §1051(a), as amended). Pursuant to Section 904.1 of the TMEP, Applicant submits one specimen showing the mark as used in commerce.

Date of first use of the mark anywhere: July 1, 1997

Date of first use of the mark in interstate commerce: July 1, 1997

POWER OF ATTORNEY

The Applicant hereby appoints R. Wayne Pritchard of the firm R. Wayne Pritchard, P.C., 300 East Main, Suite 1240, El Paso, Texas 79901, Telephone Number (915) 533-0080, Facsimile

Number (915) 533-0081, e-mail address wpritchard@pritchlaw.com, to prosecute and pursue this mark and this application to register, to transact all business with the Patent and Trademark Office in connection therewith, and to receive the Certificate of Registration. The USPTO is authorized to communicate with the applicant through its designated agent at the above stated e-mail address.

DECLARATION

The undersigned being hereby warned that willful, false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and that such willful, false statements may jeopardize the validity of the application or any resulting registration, declares that he/she believes the applicant to be the owner of the mark sought to be registered, or, if the application is being filed under 15 U.S.C. §1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use said mark in commerce either in identical form thereof or in such near resemblance thereto as to be likely , when applied to the goods of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true and that all statements made on information and belief are believed to be true.

Alliance Riggers & Constructors, Ltd.

By: Phillip H. Cordova
Name: Phillip H. Cordova
Its: General Manager
Date: April 17, 2014

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Exhibit 6: USPTO Ruling

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EXHIBIT B

UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION

APPLICATION SERIAL NO. 76711574

MARK: ALLIANCE RIGGERS & CONSTRUCTORS

76711574

CORRESPONDENT ADDRESS:
R. WAYNE PRITCHARD
Wayne Pritchard, P.C.
300 E MAIN DR STE 1240
EL PASO, TX 79901-1359

CLICK HERE TO RESPOND TO THIS LETTI
http://www.uspto.gov/trademarks/teas/response_forms.j

APPLICANT: Alliance Riggers & Constructors, Ltd

CORRESPONDENT'S REFERENCE/DOCKET NO :
N/A
CORRESPONDENT E-MAIL ADDRESS:

OFFICE ACTION

STRICT DEADLINE TO RESPOND TO THIS LETTER

TO AVOID ABANDONMENT OF APPLICANT'S TRADEMARK APPLICATION, THE USPTO MUST RECEIVE APPLICANT'S COMPLETE RESPONSE TO THIS LETTER WITHIN 6 MONTHS OF THE ISSUE/MAILING DATE BELOW.

ISSUE/MAILING DATE:

The referenced application has been reviewed by the assigned trademark examining attorney. Applicant must respond timely and completely to the issues below. 15 U.S.C. §1062(b); 37 C.F.R. §§2.62(a), 2.65(a); TMEP §§711, 718.03.

Summary of Issues

--Section 2(d) Refusal – Likelihood of Confusion
--Identification of Services
--Disclaimer Required
--Entity Clarification

SECTION 2(d) REFUSAL – LIKELIHOOD OF CONFUSION

Registration of the applied-for mark is refused because of a likelihood of confusion with the marks in U.S.

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[redacted]

Welding Service, Crane Lift Drafting, Trans- Loading, and Pre-Engineered Metal Building Erection, din" in the identification of services is indefinite and must be clarified because it is too broad and could include services in other international classes. *See* TMEP §§1402.01, 1402.03. Applicant must further specify the nature of the particular services and in some instances indicate the purpose of the services is for construction purposes.

Additionally, welding is a Class 40 service. Applicant must correctly classify the services or delete the services from the application.

Applicant may substitute the following wording, if accurate:

Class 037: Construction and pre-construction services, namely, providing crane and erectors services in the nature of structural steel erection, tilt-up and pre-cast concrete erection, and pre-engineered metal building erection; providing crane and rigging services for heavy lifting and hoisting, machinery moving, in-plant heavy hauling, and trans-loading for construction purposes; rental of overhead crane systems for construction purposes; Providing crane lift drafting, namely, ____ {specify with more particularity the nature of the services}

And/or

Class 039: Crane services for loading and unloading purposes; Transportation services, namely, transloading of building materials

And /or

Class 040: Welding services

Guidelines for Amending the Identification of Services

Identifications of services can be amended only to clarify or limit the services; adding to or broadening the scope of the services is not permitted. 37 C.F.R. §2.71(a); *see* TMEP §§1402.06 *et seq.*, 1402.07. Therefore, applicant may not amend the identification to include services that are not within the scope of the services set forth in the present identification.

For assistance with identifying and classifying goods and/or services in trademark applications, please see the online searchable *Manual of Acceptable Identifications of Goods and Services* at http://tess2.uspto.gov/netahtml/tidm.html. *See* TMEP §1402.04.

Disclaimer

Applicant must disclaim the descriptive wording "RIGGERS & CONSTRUCTORS" apart from the mark as shown because it merely describes a feature or purpose of applicant's services. *See* 15 U.S.C. §§1052(e)(1), 1056(a); *In re Steelbuilding.com*, 415 F.3d 1293, 1297, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005); *In re Gyulay*, 820 F.2d 1216, 1217-18, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987); TMEP §§1213, 1213.03(a).

Applicant seeks registration of the wording "ALLIANCE RIGGERS & CONSTRUCTORS" for "Crane

00 229

[redacted]

If applicant has questions about its application or needs assistance in responding to this Office action, please telephone the assigned trademark examining attorney.

/Kathleen Lorenzo/
Examining Attorney
Law Office 109
(571) 272-5883
kathleen.lorenzo@uspto.gov

TO RESPOND TO THIS LETTER: Go to http://www.uspto.gov/trademarks/teas/response_forms.jsp. Please wait 48-72 hours from the issue/mailing date before using TEAS, to allow for necessary system updates of the application. For *technical* assistance with online forms, e-mail TEAS@uspto.gov. For questions about the Office action itself, please contact the assigned trademark examining attorney. **E-mail communications will not be accepted as responses to Office actions; therefore, do not respond to this Office action by e-mail.**

All informal e-mail communications relevant to this application will be placed in the official application record.

WHO MUST SIGN THE RESPONSE: It must be personally signed by an individual applicant or someone with legal authority to bind an applicant (i.e., a corporate officer, a general partner, all joint applicants). If an applicant is represented by an attorney, the attorney must sign the response.

PERIODICALLY CHECK THE STATUS OF THE APPLICATION: To ensure that applicant does not miss crucial deadlines or official notices, check the status of the application every three to four months using Trademark Applications and Registrations Retrieval (TARR) at http://tarr.uspto.gov/. Please keep a copy of the complete TARR screen. If TARR shows no change for more than six months, call 1-800-786-9199. For more information on checking status, see http://www.uspto.gov/trademarks/process/status/.

TO UPDATE CORRESPONDENCE/E-MAIL ADDRESS: Use the TEAS form at http://www.uspto.gov/teas/eTEASpageE.htm.

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[redacted]

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EXHIBIT E

Print: Sep 12, 2012 **77225637**

DESIGN MARK

Serial Number
77225637

Status
REGISTERED

Word Mark
ALLIANCE

Standard Character Mark
No

Registration Number
3604909

Date Registered
2009/04/14

Type of Mark
TRADEMARK

Register
PRINCIPAL

Mark Drawing Code
(3) DESIGN PLUS WORDS, LETTERS AND/OR NUMBERS

Owner
Alliance Steel, Inc. CORPORATION OKLAHOMA 3333 South Council Road
Oklahoma City OKLAHOMA 73179

Goods/Services
Class Status -- ACTIVE. IC 006. US 002 012 013 014 023 025 050. G & S: Pre-engineered buildings made of metal, namely, prefabricated buildings made of metal; components for pre-engineered buildings made of metal, namely, metal framing, metal beams, metal ceiling and door panels, metal trim, metal flashing and metal gutters. First Use: 1971/07/01. First Use In Commerce: 1971/07/01.

Colors Claimed
Color is not claimed as a feature of the mark.

Filing Date
2007/07/10

Examining Attorney
RICHARDS, LESLIE

Attorney of Record

000235

[redacted]

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Exhibit 7: Abandonment of Trademark Ruling

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Side - 1

NOTICE OF ABANDONMENT
MAILING DATE: Apr 15, 2013

The trademark application identified below was abandoned in full because a response to the Office Action mailed on Sep 17, 2012 was not received within the 6-month response period.

If the delay in filing a response was unintentional, you may file a petition to revive the application with a fee. If the abandonment of this application was due to USPTO error, you may file a request for reinstatement. Please note that a petition to revive or request for reinstatement **must be received within two months from the mailing date of this notice.**

For additional information, go to http://www.uspto.gov/teas/petinfo.htm. If you are unable to get the information you need from the website, call the Trademark Assistance Center at 1-800-786-9199.

SERIAL NUMBER: 76711574
MARK: ALLIANCE RIGGERS & CONSTRUCTORS
OWNER: Alliance Riggers & Constructors, Ltd

Side - 2

UNITED STATES PATENT AND TRADEMARK OFFICE
COMMISSIONER FOR TRADEMARKS
P.O. BOX 1451
ALEXANDRIA, VA 22313-1451

FIRST-CLASS
MAIL
U.S POSTAGE
PAID

R. WAYNE PRITCHARD
Wayne Pritchard, P.C.
300 E MAIN DR STE 1240
EL PASO , TX 79901-1359

C01780

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EXHIBIT 8

CLOSE WINDOW

GO DADDY
UNIVERSAL TERMS OF SERVICE AGREEMENT

PLEASE READ THIS UNIVERSAL TERMS OF SERVICE AGREEMENT CAREFULLY, AS IT CONTAINS IMPORTANT INFORMATION REGARDING YOUR LEGAL RIGHTS AND REMEDIES.

1. OVERVIEW

This Universal Terms of Service Agreement (this "Agreement") is entered into by and between GoDaddy.com, LLC, a Delaware limited liability company ("Go Daddy") and you, and is made effective as of the date of your use of this website ("Site") or the date of electronic acceptance. This Agreement sets forth the general terms and conditions of your use of the Site and the products and services purchased or accessed through this Site (individually and collectively, the "Services"), and is in addition to (not in lieu of) any specific terms and conditions that apply to the particular Services.

Whether you are simply browsing or using this Site or purchase Services, your use of this Site and your electronic acceptance of this Agreement signifies that you have read, understand, acknowledge and agree to be bound by this Agreement, along with the following policies and the applicable product agreements, which are incorporated herein by reference:

Agreements

Auctions Membership Agreement	CashParking® Agreement	Service Change of Registrant Agreement
Direct Affiliate Program Agreement	Domain Buy Agreement	Service Domain Name Appraisal Agreement
Domain Name Proxy Agreement	Domain Name Registration Agreement	Domain Name Transfer Agreement
Hosting Agreement	Marketing Applications Agreement	GoDaddy Online Bookkeeping Service
Professional Design Services Agreement	Quick Blogcast Service Agreement	Quick Shopping Cart Agreement
Reseller Agreement	Website and Web Store Design Service	Website Builder Service Agreement
Website Protection Agreement	Workspace Agreement	Service Get Found Service Agreement

Policies

Privacy Policy	Subpoena Policy Attorney Tips	Dispute on Transfer Away Form
Uniform Domain Name Dispute Resolution Policy	ICANN Registrant Rights and Responsibilites	ICANN Registrar Transfer Dispute Resolution Policy
Trademark Copyright Infringement	Brand Guidelines and Permissions	Patent Notice

The terms "we", "us" or "our" shall refer to Go Daddy. The terms "you", "your", "User" or "customer" shall refer to any individual or entity who accepts this Agreement, has access to your account or uses the Services. Nothing in this Agreement shall be deemed to confer any third-party rights or benefits.

Go Daddy may, in its sole and absolute discretion, change or modify this Agreement, and any policies or agreements which are incorporated herein, at any time, and such changes or modifications shall be effective immediately upon posting to this Site. Your use of this Site or the Services after such changes or modifications have been made shall constitute your acceptance of this Agreement as last revised. If you do not agree to be bound by this Agreement as last revised, do not use (or continue to use) this Site or the Services. In addition, Go Daddy may occasionally notify you of changes or modifications to this Agreement by email. It is therefore very important that you keep your shopper account ("Account") information current. Go Daddy assumes no liability or responsibility for your failure to receive an email notification if such failure results from an inaccurate email address.

2. ELIGIBILITY; AUTHORITY

This Site and the Services are available only to Users who can form legally binding contracts under applicable law. By using this Site or the Services, you represent and warrant that you are (i) at least eighteen (18) years of age, (ii) otherwise recognized as being able to form legally binding contracts under applicable law, and (iii) are not a person barred from purchasing or receiving the Services found under the laws of the United States or other applicable jurisdiction.

If you are entering into this Agreement on behalf of a corporate entity, you represent and warrant that you have the legal authority to bind such corporate entity to the terms and conditions contained in this Agreement, in which case the terms "you", "your", "User" or "customer" shall refer to such corporate entity. If, after your electronic acceptance of this Agreement, Go Daddy finds that you do not have the legal authority to bind such corporate entity, you will be personally responsible for the obligations contained in this Agreement, including, but not limited to, the payment obligations. Go Daddy shall not be liable for any loss or damage resulting from Go Daddy's reliance on any instruction, notice, document or communication reasonably believed by Go Daddy to be genuine and originating from an authorized representative of your corporate entity. If there is reasonable doubt about the authenticity of any such instruction, notice, document or communication, Go Daddy reserves the right (but undertakes no duty) to require additional authentication from you. You further agree to be bound by the terms of this Agreement for transactions entered into by you, anyone acting as your agent and anyone who uses your account or the Services, whether or not authorized by you.

3. ACCOUNTS; TRANSFER OF DATA ABROAD

Accounts. In order to access some of the features of this Site or use some of the Services, you will have to create an Account. You represent and warrant to Go Daddy that all information you submit when you create your Account is accurate, current and complete, and that you will keep your Account information accurate, current and complete. If Go Daddy has reason to believe that your Account information is untrue, inaccurate, out-of-date or incomplete, Go Daddy reserves the right, in its sole and absolute discretion, to suspend or terminate your Account. You are solely responsible for the activity that occurs on your Account, whether authorized by you or not, and you must keep your Account information secure, including without limitation your customer number/login, password, Payment Method(s) (as defined below), and shopper PIN. For security purposes, Go Daddy recommends that you change your password and shopper PIN at least once every six (6) months for each Account . You must notify Go Daddy immediately of any breach of security or unauthorized use of your Account. Go Daddy will not be liable for any loss you incur due to any unauthorized use of your Account. You, however, may be liable for any loss Go Daddy or others incur caused by your Account, whether caused by you, or by an authorized person, or by an unauthorized person.

Transfer of Data Abroad. If you are visiting this Site from a country other than the country in which our servers are located, your communications with us may result in the transfer of information (including your Account information) across international boundaries. By visiting this Site and communicating electronically with us, you consent to such transfers.

4. AVAILABILITY OF WEBSITE/SERVICES

Subject to the terms and conditions of this Agreement and our other policies and procedures, we shall use commercially reasonable efforts to attempt to provide this Site and the Serviceson a twenty-four (24) hours a day, seven (7) days a week basis. You acknowledge and agree that from time to time this Site may be inaccessible or inoperable for any reason including, but not limited to, equipment malfunctions; periodic maintenance, repairs or replacements that we undertake from time to time; or causes beyond our reasonable control or that are not reasonably foreseeable including, but not limited to, interruption or failure of telecommunication or digital transmission links, hostile network attacks, network congestion or other failures. You acknowledge and agree that we have no control over the availability of this Site or the Service on a continuous or uninterrupted basis, and that we assume no liability to you or any other party with regard thereto.

From time to time, Go Daddy may offer new Services (limited preview services or new features to existing Services) in a pre-release version. New Services, new features to existing Services or limited preview services shall be known, individually and collectively, as "Beta Services". If you elect to use any Beta Services, then your use of the Beta Services is subject to the following terms and conditions: (i) You acknowledge and agree that the Beta Services are pre-release versions and may not work properly; (ii) You acknowledge and agree that your use of the Beta Services may expose you to unusual risks of operational failures; (iii) The Beta Services are provided as-is, so we do not recommend using them in production or mission critical environments; (iv) Go Daddy reserves the right to modify, change, or discontinue any aspect of the Beta Services at any time; (v) Commercially released versions of the Beta Services may change substantially, and programs that use or run with the Beta Services may not work with the commercially released versions or subsequent releases; (vi) Go Daddy may limit availability of customer service support time dedicated to support of the Beta Services; (vii) You acknowledge and agree to provide prompt feedback regarding your experience with the Beta Services in a form reasonably requested by us, including information necessary to enable us to duplicate errors or problems you experience. You acknowledge and agree that we may use your feedback for any purpose, including product development purposes. At our request you will provide us with comments that we may use publicly for press materials and marketing collateral. Any intellectual property inherent in your feedback or arising from your use of the Beta Services shall be owned exclusively by Go Daddy; (viii) You acknowledge and agree that all information regarding your use of the Beta Services, including your experience with and opinions regarding the Beta Services, is confidential, and may not be disclosed to a third party or used for any purpose other than providing feedback to Go Daddy; (ix) The Beta Services are provided "as is", "as available", and "with all faults". To the fullest extent permitted by law, Go Daddy disclaims any and all warranties, statutory, express or implied, with respect to the Beta Services including, but not limited to, any implied warranties of title, merchantability, fitness for a particular purpose and non-infringement.

5. GENERAL RULES OF CONDUCT

You acknowledge and agree that:

i. Your use of this Site and the Services , including any content you submit, will comply with this Agreement and all applicable local, state, national and international laws, rules and regulations.

ii. You will not collect or harvest (or permit anyone else to collect or harvest) any User Content (as defined below) or any non-public or personally identifiable information about another User or any other person or entity without their express prior written consent.

iii. You will not use this Site or the Services in a manner (as determined by Go Daddy in its sole and absolute discretion) that:

- Is illegal, or promotes or encourages illegal activity;
- Promotes, encourages or engages in child pornography or the exploitation of

19. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

20. NO THIRD-PARTY BENEFICIARIES

Nothing in this Agreement shall be deemed to confer any third-party rights or benefits.

21. U.S. EXPORT LAWS

This Site and the Services found at this Site are subject to the export laws, restrictions, regulations and administrative acts of the United States Department of Commerce, Department of Treasury Office of Foreign Assets Control ("OFAC"), State Department, and other United States authorities (collectively, "U.S. Export Laws"). Users shall not use the Services found at this Site to collect, store or transmit any technical information or data that is controlled under U.S. Export Laws. Users shall not export or re-export, or allow the export or re-export of, the Services found at this Site in violation of any U.S. Export Laws. None of the Services found at this Site may be downloaded or otherwise exported or re-exported (i) into (or to a national or resident of) any country with which the United States has embargoed trade; or (ii) to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Commerce Department's Denied Persons List, or any other denied parties lists under U.S. Export Laws. By using this Site and the Services found at this Site, you agree to the foregoing and represent and warrant that you are not a national or resident of, located in, or under the control of, any restricted country; and you are not on any denied parties list; and you agree to comply with all U.S. Export Laws (including "anti-boycott", "deemed export" and "deemed re-export" regulations). If you access this Site or the Services found at this Site from other countries or jurisdictions, you do so on your own initiative and you are responsible for compliance with the local laws of that jurisdiction, if and to the extent those local laws are applicable and do not conflict with U.S. Export Laws. If such laws conflict with U.S. Export Laws, you shall not access this Site or the Services found at this Site. The obligations under this section shall survive any termination or expiration of this Agreement or your use of this Site or the Services found at this Site.

22. COMPLIANCE WITH LOCAL LAWS

Go Daddy makes no representation or warranty that the content available on this Site or the Services found at this Site are appropriate in every country or jurisdiction, and access to this Site or the Services found at this Site from countries or jurisdictions where its content is illegal is prohibited. Users who choose to access this Site or the Services found at this Site are responsible for compliance with all local laws, rules and regulations.

23. GOVERNING LAW; JURISDICTION; VENUE; WAIVER OF TRIAL BY JURY

Except for disputes governed by the Uniform Domain Name Dispute Resolution Policy referenced above and available here, this Agreement shall be governed by and construed in accordance with the federal law of the United States and the state law of Arizona, whichever is applicable, without regard to conflict of laws principles. You agree that any action relating to or arising out of this Agreement shall be brought in the state or federal courts of Maricopa County, Arizona, and you hereby consent to (and waive all defenses of lack of personal jurisdiction and forum non conveniens with respect to) jurisdiction and venue in the state and federal courts of Maricopa County, Arizona. You agree to waive the right to trial by jury in any action or proceeding that takes place relating to or arising out of this Agreement.

24. TITLES AND HEADINGS; INDEPENDENT COVENANTS; SEVERABILITY

The titles and headings of this Agreement are for convenience and ease of reference only and shall not be utilized in any way to construe or interpret the agreement of the parties as otherwise set forth

herein. Each covenant and agreement in this Agreement shall be construed for all purposes to be a separate and independent covenant or agreement. If a court of competent jurisdiction holds any provision (or portion of a provision) of this Agreement to be illegal, invalid, or otherwise unenforceable, the remaining provisions (or portions of provisions) of this Agreement shall not be affected thereby and shall be found to be valid and enforceable to the fullest extent permitted by law.

25. CONTACT INFORMATION

If you have any questions about this Agreement, please contact us by email or regular mail at the following address:

Go Daddy Legal Department
14455 North Hayden Rd.
Suite 219
Scottsdale, AZ 85260
legal@godaddy.com

GO DADDY
UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY

(As Approved by ICANN on October 24, 1999)

1. PURPOSE

This Uniform Domain Name Dispute Resolution Policy (the "Policy") has been adopted by the Internet Corporation for Assigned Names and Numbers ("ICANN"), is incorporated by reference into your Registration Agreement, and sets forth the terms and conditions in connection with a dispute between you and any party other than us (the registrar) over the registration and use of an Internet domain name registered by you. Proceedings under Paragraph 4 of this Policy will be conducted according to the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules of Procedure"), which are available at dispute policy, and the selected administrative-dispute-resolution service provider's supplemental rules.

2. YOUR REPRESENTATIONS

By applying to register a domain name, or by asking us to maintain or renew a domain name registration, you hereby represent and warrant to us that (a) the statements that you made in your Registration Agreement are complete and accurate; (b) to your knowledge, the registration of the domain name will not infringe upon or otherwise violate the rights of any third party; (c) you are not registering the domain name for an unlawful purpose; and (d) you will not knowingly use the domain name in violation of any applicable laws or regulations. It is your responsibility to determine whether your domain name registration infringes or violates someone else's rights.

3. CANCELLATIONS, TRANSFERS, AND CHANGES

We will cancel, transfer or otherwise make changes to domain name registrations under the following circumstances:

i. subject to the provisions of Paragraph 8, our receipt of written or appropriate electronic instructions from you or your authorized agent to take such action;

ii. our receipt of an order from a court or arbitral tribunal, in each case of competent jurisdiction, requiring such action; and/or

iii. our receipt of a decision of an Administrative Panel requiring such action in any administrative proceeding to which you were a party and which was conducted under this Policy or a later version of this Policy adopted by ICANN. (See Paragraph 4(i) and (k) below.)

We may also cancel, transfer or otherwise make changes to a domain name registration in accordance with the terms of your Registration Agreement or other legal requirements.

4. MANDATORY ADMINISTRATIVE PROCEEDING

This Paragraph sets forth the type of disputes for which you are required to submit to a mandatory administrative proceeding. These proceedings will be conducted before one of the administrative-dispute-resolution service providers listed here (each, a "Provider").

i.

A. Applicable Disputes. You are required to submit to a mandatory administrative proceeding in the event that a third party (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure, that

- your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
- you have no rights or legitimate interests in respect of the domain name; and
- your domain name has been registered and is being used in bad faith.

In the administrative proceeding, the complainant must prove that each of these three elements are present.

B. Evidence of Registration and Use in Bad Faith. For the purposes of Paragraph 4(a)(iii), the following circumstances, in particular but without limitation, if found by the Panel to be present, shall be evidence of the registration and use of a domain name in bad faith:

- circumstances indicating that you have registered or you have acquired the domain name primarily for the purpose of selling, renting, or otherwise transferring the domain name registration to the complainant who is the owner of the trademark or service mark or to a competitor of that complainant, for valuable consideration in excess of your documented out-of-pocket costs directly related to the domain name; or
- you have registered the domain name in order to prevent the owner of the trademark or service mark from reflecting the mark in a corresponding domain name, provided that you have engaged in a pattern of such conduct; or
- you have registered the domain name primarily for the purpose of disrupting the business of a competitor; or
- by using the domain name, you have intentionally attempted to attract, for commercial gain, Internet users to your web site or other on-line location, by creating a likelihood of confusion with the complainant's mark as to the source, sponsorship, affiliation, or endorsement of your web site or location or of a product or service on your web site or location.

C. How to Demonstrate Your Rights to and Legitimate Interests in the Domain Name in Responding to a Complaint. When you receive a complaint, you should refer to Paragraph 5 of the Rules of Procedure in determining how your response should be prepared. Any of the following circumstances, in particular but without limitation, if found by the Panel to be proved based on its evaluation of all evidence presented, shall demonstrate your rights or legitimate interests to the domain name for purposes of Paragraph 4(a)(ii):

- before any notice to you of the dispute, your use of, or demonstrable preparations to use, the domain name or a name corresponding to the domain name in connection with a bona fide offering of goods or services; or
- you (as an individual, business, or other organization) have been commonly known by the domain name, even if you have acquired no trademark or service mark rights; or

- you are making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the trademark or service mark at issue.

D. Selection of Provider. The complainant shall select the Provider from among those approved by ICANN by submitting the complaint to that Provider. The selected Provider will administer the proceeding, except in cases of consolidation as described in Paragraph 4(f).

E. Initiation of Proceeding and Process and Appointment of Administrative Panel. The Rules of Procedure state the process for initiating and conducting a proceeding and for appointing the panel that will decide the dispute (the "Administrative Panel").

F. Consolidation. In the event of multiple disputes between you and a complainant, either you or the complainant may petition to consolidate the disputes before a single Administrative Panel. This petition shall be made to the first Administrative Panel appointed to hear a pending dispute between the parties. This Administrative Panel may consolidate before it any or all such disputes in its sole discretion, provided that the disputes being consolidated are governed by this Policy or a later version of this Policy adopted by ICANN.

G. Fees. All fees charged by a Provider in connection with any dispute before an Administrative Panel pursuant to this Policy shall be paid by the complainant, except in cases where you elect to expand the Administrative Panel from one to three panelists as provided in Paragraph 5(b)(iv) of the Rules of Procedure, in which case all fees will be split evenly by you and the complainant.

H. Our Involvement in Administrative Proceedings. We do not, and will not, participate in the administration or conduct of any proceeding before an Administrative Panel. In addition, we will not be liable as a result of any decisions rendered by the Administrative Panel.

I. Remedies. The remedies available to a complainant pursuant to any proceeding before an Administrative Panel shall be limited to requiring the cancellation of your domain name or the transfer of your domain name registration to the complainant.

J. Notification and Publication. The Provider shall notify us of any decision made by an Administrative Panel with respect to a domain name you have registered with us. All decisions under this Policy will be published in full over the Internet, except when an Administrative Panel determines in an exceptional case to redact portions of its decision.

K. Availability of Court Proceedings. The mandatory administrative proceeding requirements set forth in Paragraph 4 shall not prevent either you or the complainant from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded. If an Administrative Panel decides that your domain name registration should be canceled or transferred, we will wait ten (10) business days (as observed in the location of our principal office) after we are informed by the applicable Provider of the Administrative Panel's decision before implementing that decision. We will then implement the decision unless we have received from you during that ten (10) business day period official documentation (such as a copy of a complaint, file-stamped by the clerk of the court) that you have commenced a

lawsuit against the complainant in a jurisdiction to which the complainant has submitted under Paragraph 3(b)(xiii) of the Rules of Procedure. (In general, that jurisdiction is either the location of our principal office or of your address as shown in our Whois database. See Paragraphs 1 and 3(b)(xiii) of the Rules of Procedure for details.) If we receive such documentation within the ten (10) business day period, we will not implement the Administrative Panel's decision, and we will take no further action, until we receive (i) evidence satisfactory to us of a resolution between the parties; (ii) evidence satisfactory to us that your lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from such court dismissing your lawsuit or ordering that you do not have the right to continue to use your domain name.

5. ALL OTHER DISPUTES AND LITIGATION

All other disputes between you and any party other than us regarding your domain name registration that are not brought pursuant to the mandatory administrative proceeding provisions of Paragraph 4 shall be resolved between you and such other party through any court, arbitration or other proceeding that may be available.

6. OUR INVOLVEMENT IN DISPUTES

We will not participate in any way in any dispute between you and any party other than us regarding the registration and use of your domain name. You shall not name us as a party or otherwise include us in any such proceeding. In the event that we are named as a party in any such proceeding, we reserve the right to raise any and all defenses deemed appropriate, and to take any other action necessary to defend ourselves.

7. MAINTAINING THE STATUS QUO

We will not cancel, transfer, activate, deactivate, or otherwise change the status of any domain name registration under this Policy except as provided in Paragraph 3 above.

8. TRANSFERS DURING A DISPUTE

Transfers of a Domain Name to a New Holder

You may not transfer your domain name registration to another holder (i) during a pending administrative proceeding brought pursuant to Paragraph 4 or for a period of fifteen (15) business days (as observed in the location of our principal place of business) after such proceeding is concluded; or (ii) during a pending court proceeding or arbitration commenced regarding your domain name unless the party to whom the domain name registration is being transferred agrees, in writing, to be bound by the decision of the court or arbitrator. We reserve the right to cancel any transfer of a domain name registration to another holder that is made in violation of this subparagraph.

Changing Registrars

You may not transfer your domain name registration to another registrar during a pending administrative proceeding brought pursuant to Paragraph 4 or for a period of fifteen (15) business days (as observed in the location of our principal place of business) after such proceeding is concluded. You may transfer administration of your domain name registration to another registrar during a pending court action or arbitration, provided that the domain name you have registered with us shall continue to be subject to the proceedings commenced against you in accordance with the terms of this Policy. In the event that you transfer a domain name registration to us during the pendency of a court action or arbitration, such dispute shall remain subject to the domain name dispute policy of the registrar from which the domain name registration was transferred.

9. POLICY MODIFICATIONS

We reserve the right to modify this Policy at any time with the permission of ICANN. We will post our revised Policy at this location at least thirty (30) calendar days before it becomes effective. Unless this Policy has already been invoked by the submission of a complaint to a Provider, in which event the version of the Policy in effect at the time it was invoked will apply to you until the dispute is over, all such changes will be binding upon you with respect to any domain name registration dispute, whether the dispute arose before, on or after the effective date of our change. In the event that you object to a change in this Policy, your sole remedy is to cancel your domain name registration with us, provided that you will not be entitled to a refund of any fees you paid to us. The revised Policy will apply to you until you cancel your domain name registration.

United States Patent and Trademark Office

Trademarks > Trademark Electronic Search System (TESS)

TESS was last updated on Tue Oct 28 03:21:02 EDT 2014

ALLIANCE RIGGERS & CONSTRUCTORS

Word Mark	**ALLIANCE RIGGERS & CONSTRUCTORS**
Goods and Services	IC 037. US 100 103 106. G & S: Crane and erector services, namely, structural steel erection. FIRST USE: 19970701. FIRST USE IN COMMERCE: 19970701
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	17.07.04 - Carpenter squares; Drawing triangles; T-squares 26.01.02 - Circles, plain single line; Plain single line circles 26.17.13 - Letters or words underlined and/or overlined by one or more strokes or lines; Overlined words or letters; Underlined words or letters
Serial Number	76716209
Filing Date	April 21, 2014
Current Basis	1A;1B
Original Filing Basis	1A;1B
Published for Opposition	September 30, 2014

Owner	(APPLICANT) Alliance Riggers & Constructors, Ltd Cordova Alliance, LLC, a Texas limited liability company LIMITED PARTNERSHIP TEXAS 1200 Kastrin Street El Paso TEXAS 79907
Attorney of Record	R. WAYNE PRITCHARD
Disclaimer	NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "RIGGERS & CONSTRUCTORS" APART FROM THE MARK AS SHOWN
Description of Mark	Color is not claimed as a feature of the mark. The mark consists of a representation of the end of a three-pronged architectural ruler superimposed across a circle. The wording "ALLIANCE RIGGERS & CONSTRUCTORS" appears below the three-pronged design with a solid triangle between "ALLIANCE" and the rest of the wording.
Type of Mark	SERVICE MARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

EXHIBIT 10

REPORTER'S RECORD

VOLUME 1 OF 1 VOLUME

TRIAL COURT CAUSE NO. 2012-DCV04523

ALLIANCE RIGGERS & CONSTRUCTORS, LTD., Plaintiff, v. LINDA S. RESTREPO and CARLOS E. RESTREPO, d/b/a Collectively RDI GLOBAL SERVICES and R&D INTERNATIONAL, Defendants.	IN THE COUNTY COURT AT LAW NUMBER FIVE EL PASO COUNTY, TEXAS

****

MOTIONS HEARING

****

On the 7th day of December, 2012, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Carlos Villa, Judge Presiding, held in El Paso, Texas:

Proceedings reported by machine shorthand.

A P P E A R A N C E S

Mr. R. Wayne Pritchard
Attorney at Law
SBOT NO. 16340150
300 E. Main Street #1240
El Paso, Texas 79901
PHONE: 915-533-0080
FAX: 915-533-0081
ATTORNEY FOR PLAINTIFF

Mr. Carlos E. Restrepo
Pro Se
Ms. Linda S. Restrepo
Pro Se
804 Pintada Place
El Paso, Texas 79912

appealable either. But if they want to try it, fine. You certainly --

MR. RESTREPO: May I approach the Court, Your Honor?

MR. PRITCHARD: Oh, before we go, Your Honor, I have the responses to those other motions that weren't taken up today -- the first ones that were -- I just want to give it to them.

THE COURT: I know there is some trademark infringement here. Would going to mediation help anything?

MR. PRITCHARD: Yeah, Your Honor, this is a real simple case. I mean, and not to belabor any of the legal issues we've already talked about, but the simplicity of the case is this: Is that they have a domain name that is --

MS. RESTREPO: Your Honor --

MR. PRITCHARD: -- is similar to our trademark. All we want them to do is transfer the domain name to us. That's what we want. We don't want them having another -- and the law is that you can't have a domain name that is confusingly similar to a trademark. That's what the case is about.

MS. RESTREPO: Your Honor, objection to him arguing the case before the Court before it's called on

Appendix Exhibit 3

4386 000848

CAUSE NO. 13-07858

CLAYMORE HOLDINGS, LLC, Plaintiff, v. CREDIT SUISSE AG, CAYMAN ISLANDS BRANCH and CREDIT SUISSE SECURITIES (USA) LLC, Defendants.	§ § § § § § § § § § §	IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 134TH JUDICIAL DISTRICT

FINAL JUDGMENT

On November 25, 2014, on a motion by Defendants Credit Suisse AG, Cayman Islands Branch ("**Credit Suisse AG**") and Credit Suisse Securities (USA) LLC (collectively, "**Defendants**") to enforce a jury waiver clause against Plaintiff Claymore Holdings, LLC ("**Plaintiff**"), the Court bifurcated this case into two trials: (1) a jury trial on Plaintiff's fraudulent inducement claim against Defendants; and (2) a bench trial on Plaintiff's claim for breach of contract against Credit Suisse AG, and Plaintiff's claims for breach of the implied duty of good faith and fair dealing, aiding and abetting fraud, civil conspiracy, and unjust enrichment against both Defendants, as well as Plaintiff's request for rescissory damages arising from its fraudulent inducement claim against both Defendants.

On December 1, 2014, this case was called for the jury trial. Plaintiff appeared through counsel and announced ready for trial. Defendants appeared through counsel and announced ready for trial. After a jury was impaneled and sworn, it heard the evidence and arguments of counsel on Plaintiff's claim for fraudulent inducement. In response to the jury charge, the jury made findings that the Court received, filed, and entered of record. The jury found Defendants liable for fraudulently inducing Plaintiff by affirmative misrepresentation, and awarded damages of $40,000,000.

On May 27, 2015, this case was called for the bench trial. Plaintiff appeared through counsel and announced ready for trial. Defendants appeared through counsel and announced ready for trial. All matters in controversy, legal and factual, were submitted to the Court for its determination of Plaintiff's claims for breach of contract, breach of the implied duty of good faith and fair dealing, aiding and abetting fraud, civil conspiracy, and unjust enrichment, as well as Plaintiff's request for rescissory damages arising from its fraudulent inducement claim.

The Court hereby RENDERS judgment for Plaintiff. Accordingly, the Court hereby ORDERS:

1. On Plaintiff's claim for breach of contract against Credit Suisse AG and Plaintiff's claims for breach of the implied duty of good faith and fair dealing, aiding and abetting fraud, civil conspiracy, and fraudulent inducement against both Defendants—each of which caused the same amount of damages, thus

obviating the need for an election of remedies with respect to these claims—the Court orders that Plaintiff recover the following from Defendants, jointly and severally except as to breach of contract (for which Defendant Credit Suisse AG is solely liable):

a. Damages, whether calculated as expectation damages, rescissory damages, or restitution, in the amount of $211,863,998.56, after deducting the allocable portions of the CBRE settlement and Cushman & Wakefield settlement;

b. Plus pre-judgment interest on the damages awarded at the rate of nine percent from September 16, 2011, until the date of this judgment on September 4, 2015, in the amount of $75,644,154.22;

c. Plus court costs;

d. Plus post-judgment interest on all of the above at the rate of nine percent from the date this judgment is entered until all amounts are paid in full.

2. In addition, the Court orders that, at such time that Defendants pay this judgment: (a) Plaintiff shall transfer to an entity designated by Defendants any interests held by the assignor funds in the reorganized debtor LLV Holdco, LLC that they received in accordance with section II.C.1 of the confirmed Third Amended Chapter 11 Plan of Reorganization Proposed by Lake at Las Vegas Joint Venture, LLC and Its Jointly-Administered Chapter 11 Affiliates and the Official Committee of Creditors Holding Unsecured Claims, dated June 21, 2010 (the "**LLV Bankruptcy Plan**"); and (b) Plaintiff shall instruct the trustee of the LLV Creditor Trust to transfer to an entity designated by Defendants any beneficial interests in the trust units held by the assignor funds that they received in accordance with section II.C.1 of the LLV Bankruptcy Plan.

3. This judgment finally disposes of all claims and all parties, and is appealable.

4. The Court orders execution to issue for this judgment.

SIGNED on this 4th day of September, 2015.

The Honorable Dale B. Tillery
Judge, 134th Judicial District Court

Appendix Exhibit 4

Fill in this information to identify your case:

United States Bankruptcy Court for the:

DISTRICT OF DELAWARE

Case number *(If known)* _____ Chapter 11

☐ Check if this an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy

4/19

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals,* is available.

1.	**Debtor's name**	**Highland Capital Management, L.P.**
2.	**All other names debtor used in the last 8 years** Include any assumed names, trade names and *doing business as* names	
3.	**Debtor's federal Employer Identification Number** (EIN)	**75-2716725**
4.	**Debtor's address**	**Principal place of business** **300 Crescent Court** **Suite 700** **Dallas, TX 75201** Number, Street, City, State & ZIP Code **Dallas** County **Mailing address, if different from principal place of business** P.O. Box, Number, Street, City, State & ZIP Code **Location of principal assets, if different from principal place of business** Number, Street, City, State & ZIP Code
5.	**Debtor's website** (URL)	**www.highlandcapital.com**
6.	**Type of debtor**	☐ Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP)) ■ Partnership (excluding LLP) ☐ Other. Specify: _____

1934054191206000000000010

Debtor Highland Capital Management, L.P. Case number (*if known*) _____
Name

7. Describe debtor's business

A. *Check one:*

- ☐ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ☐ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ☐ Railroad (as defined in 11 U.S.C. § 101(44))
- ☐ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ☐ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ☐ Clearing Bank (as defined in 11 U.S.C. § 781(3))
- ■ None of the above

B. *Check all that apply*

- ☐ Tax-exempt entity (as described in 26 U.S.C. §501)
- ☐ Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. §80a-3)
- ■ Investment advisor (as defined in 15 U.S.C. §80b-2(a)(11))

C. NAICS (North American Industry Classification System) 4-digit code that best describes debtor. See http://www.uscourts.gov/four-digit-national-association-naics-codes.

5259

8. Under which chapter of the Bankruptcy Code is the debtor filing?

Check one:

- ☐ Chapter 7
- ☐ Chapter 9
- ■ Chapter 11. *Check all that apply:*
  - ☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,725,625 (amount subject to adjustment on 4/01/22 and every 3 years after that).
  - ☐ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D). If the debtor is a small business debtor, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if all of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ☐ A plan is being filed with this petition.
  - ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
  - ☐ The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11* (Official Form 201A) with this form.
  - ☐ The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.
- ☐ Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

If more than 2 cases, attach a separate list.

- ■ No.
- ☐ Yes.

District _____ When _____ Case number _____
District _____ When _____ Case number _____

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

List all cases. If more than 1, attach a separate list

- ■ No
- ☐ Yes.

Debtor _____ Relationship _____
District _____ When _____ Case number, if known _____

Debtor Highland Capital Management, L.P. Case number (*If known*)
Name

11. Why is the case filed in *this district?*

Check all that apply:

- ■ Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.
- ☐ A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

- ■ No
- ☐ Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (*Check all that apply.*)

- ☐ It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.
  What is the hazard? _____
- ☐ It needs to be physically secured or protected from the weather.
- ☐ It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).
- ☐ Other _____

Where is the property? _____
Number, Street, City, State & ZIP Code

Is the property insured?

- ☐ No
- ☐ Yes. Insurance agency _____
  Contact name _____
  Phone _____

Statistical and administrative information

13. Debtor's estimation of available funds

Check one:

- ■ Funds will be available for distribution to unsecured creditors.
- ☐ After any administrative expenses are paid, no funds will be available to unsecured creditors.

14. Estimated number of creditors

- ☐ 1-49
- ☐ 50-99
- ☐ 100-199
- ■ 200-999
- ☐ 1,000-5,000
- ☐ 5001-10,000
- ☐ 10,001-25,000
- ☐ 25,001-50,000
- ☐ 50,001-100,000
- ☐ More than100,000

15. Estimated Assets

- ☐ $0 - $50,000
- ☐ $50,001 - $100,000
- ☐ $100,001 - $500,000
- ☐ $500,001 - $1 million
- ☐ $1,000,001 - $10 million
- ☐ $10,000,001 - $50 million
- ☐ $50,000,001 - $100 million
- ■ $100,000,001 - $500 million
- ☐ $500,000,001 - $1 billion
- ☐ $1,000,000,001 - $10 billion
- ☐ $10,000,000,001 - $50 billion
- ☐ More than $50 billion

16. Estimated liabilities

- ☐ $0 - $50,000
- ☐ $50,001 - $100,000
- ☐ $100,001 - $500,000
- ☐ $500,001 - $1 million
- ☐ $1,000,001 - $10 million
- ☐ $10,000,001 - $50 million
- ☐ $50,000,001 - $100 million
- ■ $100,000,001 - $500 million
- ☐ $500,000,001 - $1 billion
- ☐ $1,000,000,001 - $10 billion
- ☐ $10,000,000,001 - $50 billion
- ☐ More than $50 billion

Debtor Highland Capital Management, L.P.
Name

Case number (*if known*)

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Declaration and signature of authorized representative of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is trued and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 10/16/2019
MM / DD / YYYY

X
Signature of authorized representative of debtor

Strand Advisors, Inc., General Partner
by: James D. Dondero, President
Printed name

Title

18. Signature of attorney

X
Signature of attorney for debtor

Date 10/16/2019
MM / DD / YYYY

James E. O'Neill
Printed name

Pachulski Stang Ziehl & Jones LLP
Firm name

919 N. Market Street
17th Floor
Wilmington, DE 19899
Number, Street, City, State & ZIP Code

Contact phone **302-652-4100** Email address **joneill@pszjlaw.com**

4042 DE
Bar number and State

ACTION BY WRITTEN CONSENT OF
THE SOLE GENERAL PARTNER
OF
HIGHLAND CAPITAL MANAGEMENT, L.P.
(a Delaware limited partnership)

The undersigned, being the sole general partner (the "**General Partner**") of Highland Capital Management, L.P. (the "**Company**"), hereby takes the following actions and adopts the following resolutions:

WHEREAS, the General Partner, acting pursuant to the laws of the State of Delaware, has considered the financial and operational aspects of the Company's business;

WHEREAS, the General Partner has reviewed the historical performance of the Company, the outlook for the Company's assets and overall performance, and the current and long-term liabilities of the Company;

WHEREAS, the General Partner has carefully reviewed and considered the materials presented to it by the management of and the advisors to the Company regarding the possible need to undertake a financial and operational restructuring of the Company; and

WHEREAS, the General Partner has analyzed each of the financial and strategic alternatives available to the Company, including those available on a consensual basis with the principal stakeholders of the Company, and the impact of the foregoing on the Company's business and its stakeholders.

NOW, THEREFORE, BE IT RESOLVED, that in the judgment of the General Partner, it is desirable and in the best interests of the Company, its creditors, partners, and other interested parties that a petition be filed by the Company seeking relief under the provisions of chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware;

RESOLVED, that the officers of the General Partner (each, an "**Authorized Officer**") be, and each of them hereby is, authorized, empowered and directed on behalf of the Company to execute, verify and file all petitions, schedules, lists, and other papers or documents, and to take and perform any and all further actions and steps that any such Authorized Officer deems necessary, desirable and proper in connection with the Company's chapter 11 case, with a view to the successful prosecution of such case, including all actions and steps deemed by any such Authorized Officer to be necessary or desirable to the develop, file and prosecute to confirmation a chapter 11 plan and related disclosure statement;

RESOLVED, that the Authorized Officers be, and each of them hereby is, authorized, empowered and directed, on behalf of the Company, to retain the law firm of Pachulski Stang Ziehl & Jones LLP ("**PSZ&J**") as bankruptcy counsel to represent and assist the Company in carrying out its duties under chapter 11 of the Bankruptcy Code, and to take any and all actions to advance the Company's rights in connection therewith, and the Authorized Officers are hereby authorized and directed to execute appropriate retention agreements, pay appropriate retainers prior to and immediately upon the filing of the bankruptcy, and to cause to be filed an appropriate application for authority to retain the services of PSZ&J;

RESOLVED, that the Authorized Officers be, and each of them hereby is, authorized, empowered and directed, on behalf of the Company, to retain and employ Development Specialists, Inc. ("***DSI***") to provide the Company with Bradley D. Sharp as chief restructuring officer ("***CRO***") and additional personnel to assist in the execution of the day to day duties as CRO. The CRO, subject to oversight of the General Partner will lead the Company's restructuring efforts along with the Company's advisors, and to take any and all actions to advance the Company's rights in connection therewith, and the Authorized Officers are hereby authorized and directed to execute appropriate retention agreements, pay appropriate retainers prior to and immediately upon the filing of the bankruptcy petition, and to cause to be filed an appropriate application for authority to hire the CRO and his affiliated firm, DSI;

RESOLVED, that the Authorized Officers be, and each of them hereby is, authorized, empowered and directed, on behalf of the Company, to employ any other professionals necessary to assist the Company in carrying out its duties under the Bankruptcy Code; and in connection therewith, the Authorized Officers are hereby authorized and directed to execute appropriate retention agreements, pay appropriate retainers prior to or immediately upon the filing of the chapter 11 case and cause to be filed appropriate applications with the bankruptcy court for authority to retain the services of any other professionals, as necessary, and on such terms as are deemed necessary, desirable and proper;

RESOLVED, that the Authorized Officers be, and each of them hereby is, authorized, empowered and directed, on behalf of the Company, to obtain post-petition financing and obtain permission to use existing cash collateral according to terms which may be negotiated by or on behalf of the Company, and to enter into any guaranties and to pledge and grant liens on its assets as may be contemplated by or required under the terms of such post-petition financing or cash collateral arrangement; and in connection therewith, the Authorized Officers shall be, and each of them hereby is, hereby authorized, empowered and directed, on behalf of the Company, to execute appropriate loan agreements, cash collateral agreements and related ancillary documents;

RESOLVED, that the Authorized Officers be, and each of them hereby is, authorized, empowered and directed, on behalf of the Company, to take any and all actions, to execute, deliver, certify, file and/or record and perform any and all

documents, agreements, instruments, motions, affidavits, applications for approvals or rulings of governmental or regulatory authorities or certificates and to take any and all actions and steps deemed by any such Authorized Officer to be necessary or desirable to carry out the purpose and intent of each of the foregoing resolutions and to effectuate a successful chapter 11 case;

RESOLVED, that any and all actions heretofore taken by any Authorized Officer in the name and on behalf of the Company in furtherance of the purpose and intent of any or all of the foregoing resolutions be, and hereby are, ratified, confirmed, and approved in all respects.

[Signature pages follow]

IN WITNESS WHEREOF, the undersigned have duly executed this Written Consent as of October 7, 2019.

STRAND ADVISORS, INC.
Sole General Partner of Highland Capital Management, L.P.

By: _____
James D. Dondero
President

SIGNATURE PAGE TO THE ACTION BY WRITTEN CONSENT OF THE SOLE GENERAL PARTNER OF HIGHLAND CAPITAL MANAGEMENT, L.P.

Fill in this information to identify the case:

Debtor name HIGHLAND CAPITAL MANAGEMENT, L.P.

United States Bankruptcy Court for the: District of Delaware (State)

Case number (If known): 19-

☐ Check if this is an amended filing

Official Form 204

Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders

12/15

A list of creditors holding the 20 largest unsecured claims must be filed in a Chapter 11 or Chapter 9 case. Include claims which the debtor disputes. Do not include claims by any person or entity who is an *insider*, as defined in 11 U.S.C. § 101(31). Also, do not include claims by secured creditors, unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

	Name of creditor and complete mailing address, including zip code	Name, telephone number, and email address of creditor contact	Nature of the claim (for example, trade debts, bank loans, professional services, and government contracts)	Indicate if claim is contingent, unliquidated, or disputed	Amount of unsecured claim If the claim is fully unsecured, fill in only unsecured claim amount. If claim is partially secured, fill in total claim amount and deduction for value of collateral or setoff to calculate unsecured claim.		
					Total claim, if partially secured	Deduction for value of collateral or setoff	Unsecured claim
1.	Redeemer Committee of the Highland Crusader Fund c/o Terri Mascherin, Esq. Jenner & Block 353 N. Clark Street Chicago, IL 60654-3456	Terri Mascherin Tel: 312.923.2799 Email: tmascherin@jenner.com	Litigation	Contingent Unliquidated Disputed			$189,314,946.00
2.	Patrick Daugherty c/o Thomas A. Uebler, Esq. McCollom D'Emilio Smith Uebler LLC 2751 Centerville Rd #401 Wilmington, DE 19808	Thomas A. Uebler Tel: 302.468.5963 Email: tuebler@mdsulaw.com	Litigation	Contingent Unliquidated Disputed			$11,700,000.00
3.	CLO Holdco, Ltd. Grant Scott, Esq. Myers Bigel Sibley & Sajovec, P.A. 4140 Park Lake Ave, Ste 600 Raleigh, NC 27612	Grant Scott Tel: 919.854.1407 Email: gscott@myersbigel.com	Contractual Obligation				$11,511,346.00

4.	McKool Smith, P.C. Gary Cruciani, Esq. McKool Smith 300 Crescent Court, Suite 1500 Dallas, TX 75201	Gary Cruciani Tel: 214.978.4009 Email: gcruciani@mckoolsmith.com	Professional Services	Contingent Unliquidated Disputed			$2,163,976.00
5.	Meta-e Discovery LLC Paul McVoy Six Landmark Square, 4th Floor Stamford, CT 6901	Paul McVoy Tel: 203.544.8323 Email: pmcvoy@metaediscovery.com	Professional Services				$1,852,348.54
6.	Foley Gardere Holly O'Neil, Esq. Foley & Lardner LLP 2021 McKinney Avenue Suite 1600 Dallas, TX 75201	Holly O'Neil Tel: 214.999.4961 Email: honeil@foley.com	Professional Services				$1,398,432.44
7.	DLA Piper LLP (US) Marc D. Katz, Esq. 1900 N Pearl St, Suite 2200 Dallas, TX 75201	Marc D. Katz Tel: 214.743.4534 Email: marc.katz@dlapiper.com	Professional Services				$994,239.53
8.	Reid Collins & Tsai LLP William T. Reid, Esq. 810 Seventh Avenue, Ste 410 New York, NY 10019	William T. Reid Tel: 512.647.6105 Email: wreid@rctlegal.com	Professional Services				$625,845.28
9.	Joshua & Jennifer Terry c/o Brian P. Shaw, Esq. Rogge Dunn Group, PC 500 N. Akard Street, Suite 1900 Dallas, TX 75201	Brian Shaw Tel: 214. 239.2707 email: shaw@roggedunngroup.com	Litigation	Contingent Unliquidated Disputed			$425,000.00
10.	NWCC, LLC c/o of Michael A. Battle, Esq. Barnes & Thornburg, LLP 1717 Pennsylvania Ave N.W. Ste 500 Washington, DC 20006-4623	Michael A. Battle Tel: 202.371.6350 Email: mbattle@btlaw.com	Litigation	Contingent Unliquidated Disputed			$375,000.00
11.	Duff & Phelps, LLC c/o David Landman Benesch, Friedlander, Coplan & Aronoff LLP 200 Public Square, Suite 2300 Cleveland, OH 44114-2378	David Landman Tel: 216.363.4593 Email: dlandman@beneschlaw.com	Professional Services				$350,000.00

12.	American Arbitration Association 120 Broadway, 21st Floor, New York, NY 10271	Elizabeth Robertson, Director Tel: 212.484.3299 Email: robertsone@adr.org	Professional Services				$292,125.00
13.	Lackey Hershman LLP Paul Lackey, Esq. Stinson LLP 3102 Oak Lawn Avenue, Ste 777 Dallas, TX 75219	Paul Lackey Tel: 214.560.2206 Email: paul.lackey@stinson.com	Professional Services				$246,802.54
14.	Bates White, LLC Karen Goldberg, Esq. 2001 K Street NW, North Bldg Suite 500 Washington, DC 20006	Karen Goldberg Tel: 202.747.2093 Email: karen.goldberg@bateswhite.com	Professional Services				$235,422.04
15.	Debevoise & Plimpton LLP c/o Accounting Dept 28th Floor 919 Third Avenue New York, NY 10022	Michael Harrell Tel: 212-909-6349 Email: mpharrell@debevoise.com	Professional Services				$179,966.98
16.	Andrews Kurth LLP Scott A. Brister, Esq. 111 Congress Avenue, Ste 1700 Austin, TX 78701	Scott A. Brister Tel: 512.320.9220 Email: ScottBrister@andrewskurth.com	Professional Services				$137,637.81
17.	Connolly Gallagher LLP 1201 N. Market Street 20th Floor Wilmington, DE 19801	Ryan P. Newell Tel: 302.888.6434 Email: rnewell@connollygallagher.com	Professional Services				$118,831.25
18.	Boies, Schiller & Flexner LLP 5301 Wisconsin Ave NW Washington, DC 20015-2015	Scott E. Gant Tel: 202.237.2727 Email: sgant@bsfllp.com	Professional Services				$115,714.80
19.	UBS AG, London Branch and UBS Securities LLC c/o Andrew Clubock, Esq. Latham & Watkins LLP 555 Eleventh Street NW Suite 1000 Washington, DC 20004-130	Andrew Clubock Tel: 202.637.3323 email: Andrew.Clubok@lw.com	Litigation	Contingent Unliquidated Disputed			Unliquidated

Debtor HIGHLAND CAPITAL MANAGEMENT, L.P. Case number (if known) 19-34054
Name

20.	Acis Capital Management, L.P. and Acis Capital Management GP, LLC c/o Brian P. Shaw, Esq. Rogge Dunn Group, PC 500 N. Akard Street, Suite 1900 Dallas, TX 75201	Brian Shaw Tel: 214. 239.2707 email: shaw@roggedunngroup.com	Litigation	Contingent Unliquidated Disputed			Unliquidated

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Case No. 19-_____ (___)
Debtor.	)	

CORPORATE OWNERSHIP STATEMENT (RULE 7007.1)

Pursuant to Federal Rule of Bankruptcy Procedure 7007.1 and to enable the Judges to evaluate possible disqualification or recusal, the Debtor, certifies that the following is a corporation other than the Debtor, or a governmental unit, that directly or indirectly owns 10% or more of any class of the corporation's equity interests, or states that there are no entities to report under FRBP 7007.1.

☑ None [*check if applicable*]

Name:
Address:

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Case No. 19-_____ (___)
Debtor.	)	

LIST OF EQUITY SECURITY HOLDERS

Following is the list of the Debtor's equity security holders which is prepared in accordance with rule 1007(a)(3) for filing in this Chapter 11 Case:

Name: Strand Advisors, Inc.
Address: 300 Crescent Court
Suite 700
Dallas, TX 75201

Name: The Dugaboy Investment Trust
Address: 300 Crescent Court
Suite 700
Dallas, TX 75201

Name: Mark K. Okada
Address: 300 Crescent Court
Suite 700
Dallas, TX 75201

Name: The Mark and Pamela Okada Family Trust – Exempt Trust #1
Address: 300 Crescent Court
Suite 700
Dallas, TX 75201

Name: The Mark and Pamela Okada Family Trust – Exempt Trust #2
Address: 300 Crescent Court
Suite 700
Dallas, TX 75201

Name: Hunter Mountain Investment Trust
Address: c/o Rand Advisors LLC
John Honis
87 Railroad Place Ste 403
Saratoga Springs, NY 12866

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Case No. 19-_____ (___)
Debtor.	)	

CERTIFICATION OF CREDITOR MATRIX

Pursuant to Rule 1007-2 of the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware, the above captioned debtor (the "Debtor") hereby certifies that the *Creditor Matrix* submitted herewith contains the names and addresses of the Debtor's creditors. To the best of the Debtor's knowledge, the *Creditor Matrix* is complete, correct, and consistent with the Debtor's books and records.

The information contained herein is based upon a review of the Debtor's books and records as of the petition date. However, no comprehensive legal and/or factual investigations with regard to possible defenses to any claims set forth in the *Creditor Matrix* have been completed. Therefore, the listing does not, and should not, be deemed to constitute: (1) a waiver of any defense to any listed claims; (2) an acknowledgement of the allowability of any listed claims; and/or (3) a waiver of any other right or legal position of the Debtor.

Fill in this information to identify the case:

Debtor name Highland Capital Management, L.P.

United States Bankruptcy Court for the: DISTRICT OF DELAWARE

Case number (If known) _____

☐ Check if this is an amended filing

Official Form 202

Declaration Under Penalty of Perjury for Non-Individual Debtors

12/15

An individual who is authorized to act on behalf of a non-individual debtor, such as a corporation or partnership, must sign and submit this form for the schedules of assets and liabilities, any other document that requires a declaration that is not included in the document, and any amendments of those documents. This form must state the individual's position or relationship to the debtor, the identity of the document, and the date. Bankruptcy Rules 1008 and 9011.

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Declaration and signature

I am the president, another officer, or an authorized agent of the corporation; a member or an authorized agent of the partnership; or another individual serving as a representative of the debtor in this case.

I have examined the information in the documents checked below and I have a reasonable belief that the information is true and correct:

- ☐ *Schedule A/B: Assets–Real and Personal Property* (Official Form 206A/B)
- ☐ *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D)
- ☐ *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F)
- ☐ *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G)
- ☐ *Schedule H: Codebtors* (Official Form 206H)
- ☐ *Summary of Assets and Liabilities for Non-Individuals* (Official Form 206Sum)
- ☐ Amended *Schedule* _____
- ■ *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders* (Official Form 204)
- ■ Other document that requires a declaration **Corporate Ownership Statement, List of Equity Holders, Creditor Matrix Certification**

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 10/16/2019

x _____
Signature of individual signing on behalf of debtor

Frank Waterhouse
Printed name

Treasurer of Strand Advisors, Inc., General Partner
Position or relationship to debtor

Appendix Exhibit 5

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE UNITED STATES TRUSTEE
DISTRICT OF DELAWARE

IN THE MATTER OF:	:	Chapter 11
	:	
Highland Capital Management, L.P.	:	Case No. 19-12239 (CSS)
	:	
	:	
	:	NOTICE OF APPOINTMENT OF
Debtor.	:	COMMITTEE OF UNSECURED
----------	:	CREDITORS

Pursuant to Section 1102(a)(1) of the Bankruptcy Code, I hereby appoint the following persons to the Committee of Unsecured Creditors in connection with the above captioned case:

1. **Redeemer Committee of Highland Crusader Fund**, Attn: Eric Felton, 731 Pleasant Avenue, Glen Ellyn, IL 60137, Phone: 312-953-0664, email: ericfelton@me.com

2. **Meta-e Discovery**, Attn: Paul McVoy, 93 River St., Milford, CT 06460, Phone: 203-544-8323, email: pmcvoy@metaediscovery.com

3. **UBS Securities LLC and UBS AG London Branch,** Attn: Elizabeth Kozlowski, 1285 Avenue of the Americas, New York, NY 10019, Phone: 212-713-2000

4. **Acis Capital Management, L.P. and Acis Capital Management GP, LLP**, Attn: Joshua Terry, 3100 Webb Ave, Suite 203, Dallas, TX 75025, Phone: 214-556-3405, email: josh@shorewoodmgmt.com

ANDREW R. VARA
Acting United States Trustee, Region 3

/s/ *Jane Leamy* for
T. PATRICK TINKER
ASSISTANT UNITED STATES TRUSTEE

DATED: October 29, 2019

Attorney assigned to this Case: Jane Leamy, Esq., Phone: 302-573-6491, Fax: 302-573-6497
Debtors' Counsel: James O'Neill, Esq., Phone: 302-652-4100, Fax: 302-652-4400

Appendix Exhibit 6

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.	)	**Hearing Date: TBD** **Objection Deadline: TBD**

MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR AN ORDER TRANSFERRING VENUE OF THIS CASE TO THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS

The official committee of unsecured creditors (the "Committee") of Highland Capital Management, L.P. (the "Debtor"), hereby submits this motion (this "Motion") for entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Proposed Order"), pursuant to 28 U.S.C. §§ 1408 and 1412 and Rule 1014 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), transferring the venue of the above-captioned chapter 11 case to the United States Bankruptcy Court for the Northern District of Texas.

PRELIMINARY STATEMENT

1. Although a debtor's choice of venue generally warrants deference, this case presents unique facts that make a change in venue appropriate. The Debtor has only one location in the United States—its Dallas, Texas headquarters, which houses the Debtor's management and key personnel. In fact, the Debtor's headquarters sit less than two miles from the United States Bankruptcy Court for the Northern District of Texas (the "Dallas Bankruptcy Court"), making the venue clearly more convenient for the Debtor and its management than Delaware. Additionally,

[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.

although the Debtor's creditors span the nation, a substantial number of the Debtor's creditors (including several of the top twenty unsecured creditors and Committee members) are concentrated in Texas, or the Midwest more broadly. Likewise, nearly all of the professionals active in this case are concentrated in Texas, Chicago, or Los Angeles. The Dallas Bankruptcy Court is more centrally located and easily accessible to the key parties in this case, along with their advisors. Transferring venue from Wilmington, Delaware to Dallas, Texas would result in greater efficiencies and significant cost savings for the Debtor's estate.

2. Moreover, the Dallas Bankruptcy Court is already intimately familiar with the Debtor's principals and complex organizational structure—the involuntary chapter 11 cases of the Debtor's former affiliates and current Committee members, Acis Capital Management, L.P. and Acis Capital Management GP, L.P. (collectively, "Acis") are pending in the Dallas Bankruptcy Court. Specifically, the Dallas Bankruptcy Court has (a) heard multiple days' worth of material testimony from the Debtor's principal owner (James Dondero), the Debtor's minority owner (Mark Okada), the Debtor's general counsel, at least two assistant general counsels, and numerous other employees of the Debtor and other witnesses; and (b) issued at least six published opinions to date, many of which have been affirmed on appeal to the United States District Court for the Northern District of Texas (the "Dallas District Court") in subsequent published opinions. The Dallas Bankruptcy Court is still presiding over an adversary proceeding commenced by the Debtor and its affiliates, and the Debtor's appeal of Acis's confirmed chapter 11 plan is still pending before the Fifth Circuit. As evidenced by the published opinions, the Dallas Bankruptcy Court and the Dallas District Court are intimately familiar with the Debtor's business, principal owner, and key executives. For these reasons, the Dallas Bankruptcy Court is uniquely positioned to oversee this chapter 11 case.

3. The Committee respectfully submits that, for the reasons set forth above and discussed more fully below, based on the unique facts of this case, both the interests of justice and convenience of the parties justify an exception to the general deference granted to a debtor's choice of venue and warrant the transfer of venue to the Dallas Bankruptcy Court.

JURISDICTION

4. The Court has 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. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2), and the Committee confirms its consent, pursuant to rule 9013-1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), to the entry of a final order or judgment by the Court in connection with this Motion if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

5. The statutory and other bases for the relief requested herein are 28 U.S.C. §§ 1408 and 1412, Bankruptcy Rule 1014, and Local Rule 1014-1.

BACKGROUND

6. 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 "Court"). The Committee was appointed by the United States Trustee on October 29, 2019 [Docket No. 65].

I. The Debtor's Connections to Dallas.

7. As noted in the Voluntary Petition [Docket No. 1], the Debtor's principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201, which also serves as the Debtor's

international headquarters, and, in fact, its only office in the United States. *See Declaration of Frank Waterhouse in Support of First Day Motions* [Docket No. 9] (the "First Day Declaration"), ¶ 7. Although it is unclear how many of the Debtor's 76 employees are based in the Debtor's international offices, presumably those employees based in the U.S. live in or around the Debtor's headquarters in Dallas, Texas. Furthermore, all but one of the Debtor's equity holders are also located in Dallas, Texas. *See* Voluntary Petition [Docket No. 1], at pg. 14. In sum, Dallas, Texas is the epicenter of the Debtor's operations.

II. The Dallas Bankruptcy Court's Familiarity with the Debtor.

8. Prior to the commencement of this chapter 11 case, the Debtor was (and currently remains) actively involved in the involuntary chapter 11 case of Acis, its then-affiliate and current Committee member, captioned *In re Acis Capital Mgmt., L.P.*, Case No. 18-30264 (SGJ) (the "Acis Bankruptcy"). Until 2019, Acis was the "structured credit arm of Highland." *In re Acis Capital Mgmt., L.P.*, Nos. 18-30264 (SGJ), 2019 Bankr. LEXIS 292, at *17 n. 21 (Bankr. N.D. Tex. Jan. 31, 2019) (the "Acis Confirmation Opinion"), *aff'd*, 604 B.R. 484 (N.D. Tex. 2019).[2] Acis did not have any of its own employees and, instead, contracted with the Debtor to perform all day-to-day functions, meaning that all Acis corporate representatives and witnesses in the Acis Bankruptcy were employees of the Debtor. *Id.* at *9. Moreover, there was complete overlap between Acis and the Debtor at the executive level, with the Debtor's CEO James Dondero serving as President of Acis and the Debtor's CFO, and first day declarant, Frank Waterhouse serving as Treasurer.

9. The Acis Bankruptcy commenced on January 30, 2018, when Joshua N. Terry filed involuntary petitions against Acis to commence chapter 7 cases in the Dallas Bankruptcy Court.

[2] The Acis Confirmation Opinion is attached hereto as **Exhibit B**.

In connection with a hotly-contested trial on the involuntary petitions, the Dallas Bankruptcy Court heard seven days of testimony and argument, entered orders for relief and issued a written opinion, which is attached hereto as **Exhibit C** (the "Acis Involuntary Opinion"). Testimony included that of the Debtor's co-founder and CEO, James Dondero, the Debtor's co-founder and then-Chief Investment Officer, Mark Okada, the Debtor's General Counsel, Scott Ellington, the Debtor's Controller, David Klos, and the Debtor's Assistant General Counsel, Isaac Leventon.

10. In May 2018, the Acis bankruptcy cases were converted from Chapter 7 to Chapter 11, and a Chapter 11 Trustee was appointed "due to what the bankruptcy court perceived to be massive conflicts of interest with regard to the Debtors' management." *See* Acis Confirmation Op. at *15.

11. The Debtor and its affiliates were, and remain, exceptionally active throughout the Acis Bankruptcy, objecting to virtually every action proposed by the Chapter 11 Trustee throughout the case. *See In re Acis Capital Mgmt., L.P.*, 603 B.R. 300, 302 (Bankr. N.D. Tex. 2019). As a result, the Dallas Bankruptcy Court was forced to conduct many evidentiary hearings, during which the Debtor's executives and employees were often called to testify. Overall, between the Acis Bankruptcy and related adversary proceedings, the Dallas Bankruptcy Court has to date reviewed approximately 700 exhibits, heard more than thirty days of testimony and oral argument, and issued six opinions. The Dallas District Court has also ruled on three appeals related to the Acis Bankruptcy, all of which were filed by the Debtor and/or its affiliates. The Debtor's appeal of the Acis confirmation order is now pending before the Fifth Circuit.[3]

12. The Dallas Bankruptcy Court is also currently adjudicating a number of fraudulent transfer causes of action that Acis has brought against the Debtor and certain of its non-debtor

[3] *See generally Debtor's Application for an Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel* Nunc Pro Tunc *to the Petition Date* [Docket No. 69] and

affiliates in a consolidated adversary case (the "Acis Adversary Proceeding"). Distilled to its essence, the Acis Adversary Proceeding concerns actions taken by the Debtor and its affiliates to denude the Acis debtors' estates of their value and frustrate an imminent, substantial judgment against Acis. *See Acis Capital Mgmt., GP, LLC v. Highland Capital Mgmt., L.P. (In re Acis Capital Mgmt., L.P.),* 600 B.R. 541, 549 (Bankr. N.D. Tex. 2019) (the "Acis Arbitration Opinion").[4]

13. In sum, the Dallas Bankruptcy Court and the Dallas District Court are already intimately familiar with the Debtor's complex structure, its management, and key personnel, and are well-versed in the contentious relationship between the Debtor and several of its largest creditors, including members of the Committee. Accordingly, the Dallas Bankruptcy Court is uniquely situated to oversee this chapter 11 case.

RELIEF REQUESTED

14. By this Motion, the Committee requests entry of the Proposed Order, substantially in the form attached hereto as **Exhibit A**, transferring the venue of this chapter 11 case to the Dallas Bankruptcy Court.

BASIS FOR RELIEF

III. The Dallas Bankruptcy Court is an Appropriate Venue Under 28 U.S.C. § 1408.

15. Section 1408 of title 28 of the United States Code provides that bankruptcy cases may be commenced in the district court for the district "in which the domicile, residence, principal place of business in the United States, or principal assets in the United States" of the debtor is

Debtor's Application for an Order Authorizing the Retention and Employment of Lynn Pinker Cox & Hurst LLP as Special Texas Litigation Counsel Nunc Pro Tunc *to the Petition Date* [Docket No. 70] (describing the Debtor's ongoing litigation and involvement with the Acis Bankruptcy).

[4] A copy of the Acis Arbitration Opinion is attached hereto as **Exhibit D**.

located or the district "in which there is a pending case under title 11 concerning such person's affiliate."

16. The Debtor's headquarters, and indeed its only office in the United States, is located in Dallas, Texas. Moreover, had this chapter 11 case commenced mere months ago, the Acis Bankruptcy would be a "pending case under title 11 concerning" the Debtor's affiliate.[5] The Dallas Bankruptcy Court easily satisfies the statutory venue requirements under 28 U.S.C. § 1408.

IV. The Court Should Exercise its Discretion to Transfer Venue to the Dallas Bankruptcy Court.

17. It is within a court's discretion to transfer a case to another venue if it is "in the interest of justice or for the convenience of the parties." 28 U.S.C. § 1412. Courts have interpreted this statutory provision to create two distinct bases upon which transfer of venue may be granted: interest of justice *or* convenience of the parties. *See In re Qualtec Inc.*, No. 11-12572 (KJC), 2012 WL 527669, at *6 (Bankr. D. Del. Feb. 16, 2012). Movants for transfer of venue have the burden of showing that a transfer is warranted based on the preponderance of the evidence.[6] *Id.* at *5.

A. Transferring Venue to the Dallas Bankruptcy Court Would Serve the Convenience of the Parties.

18. In determining whether a venue transfer would serve the convenience of the parties, courts generally examine the following six factors: "(a) proximity of the creditors of every kind to the court; (b) proximity of the debtor; (c) proximity of the witnesses who are necessary to the administration of the estate; (d) the location of the debtor's assets; (e) the economic administration of the estate; and (f) the necessity for ancillary administration in the event of liquidation." *In re*

[5] The Debtor ceased to be an affiliate of Acis following confirmation of the Acis plan of reorganization in January 2019, when equity in reorganized Acis was distributed to Mr. Terry in exchange for a reduction of his allowed claim.

[6] To meet its burden herein, the Committee is relying on the record of this case, including the First Day Declaration, and the established record of the Acis Bankruptcy. The Committee therefore does not anticipate there being any need to hold an evidentiary hearing on this Motion.

Rests. Acquisition I, LLC, No. 15-12406 (KG), 2016 WL 855089, at *2 (Bankr. D. Del. Mar. 4, 2016) (*quoting Commonwealth of Puerto Rico v. Commonwealth Oil Refining Co. (In re Commonwealth Oil Refining Co.)*, 596 F.2d 1239, 1247 (5th Cir. 1979)). Under this analysis, the factor given the most weight is the economic and efficient administration of the estate. *Id.*

1. Proximity of Creditors of Every Kind to the Court.

19. Of the Debtor's twenty largest unsecured creditors, at least seven[7] are listed as having Texas addresses: Acis, Joshua and Jennifer Terry, McKool Smith, P.C., Foley Gardere, DLA Piper LLP (US), Lackey Hershman LLP, and Andrews Kurth LLP. *See* Voluntary Petition [Docket No. 1]. Additionally, of the total known claims at this juncture, it appears that a significant number of the Debtor's creditors are located in Texas, and the rest of the creditors appear to be scattered across the United States. No known creditors appear to be based in Delaware. *See id.*

20. Courts may also focus on the location of the debtor's and creditors' professionals in deciding whether to transfer venue. *See In re Caesars Entm't Operating Co., Inc.*, No. 15-10047 (KG), 2015 WL 492529, at *6 (Bankr. D. Del. Feb. 2, 2015). The Committee's proposed counsel is primarily located in Chicago, Illinois, but also maintains an office in Dallas, Texas (where its litigation team for this case is based). If this case were to proceed before this Court, the Committee would have to retain Delaware co-counsel.[8] Additionally, several of the Debtor's largest creditors are separately represented by counsel based in the Midwest: the Acis is represented by the Rogge Dunne Group and Winstead PC in Dallas [Docket No. 81], the Redeemer Committee of the Highland Crusader Fund is represented by Jenner & Block LLP primarily out of its Chicago office

[7] Additionally, although listed with a North Carolina address, CLO Holdco, Ltd. is an affiliate of and controlled by the Debtor, whose principal place of business is in the Northern District of Texas. The Debtor also lists Reid Collins & Tsai's New York office, despite the fact that the firm is a Texas limited liability partnership based in Texas.

[8] Under Local Rule 9010-1(d), the Committee has until November 27, 2019, to obtain Delaware co-counsel, if necessary.

[Docket Nos. 1, 36], and USB Securities LLC and UBS AG London Branch is represented by Latham & Watkins LLP, which has an office in Houston [Docket No. 85].

21. Considering the proximity of both the Debtor's creditors and their professionals to the Dallas Bankruptcy Court, this factor should weigh in favor of transfer. *See In re Rehoboth Hosp., LP*, No. 11-12798 (KG), 2011 WL 5024267, at *3 (Bankr. D. Del. Oct. 19, 2011) (concluding that, on balance, this factor favored transfer to Texas when the overwhelming majority of creditors were located in Texas).

2. Proximity of the Debtor to the Court.

22. Courts have noted that this inquiry should focus primarily on the parties that must appear in court. *See Caesars Entm't Operating Co., Inc.*, 2015 WL 495259, at *6. The Debtor's headquarters, and only office located in the United States, is in Dallas, Texas. *See* First Day Decl., at ¶ 7. As a result, it is likely that any of the Debtor's personnel who would have to appear in court are located in Dallas, Texas. The Debtor has no connection to Delaware other than the fact that it was formed there.

23. The Committee concedes that Debtor's counsel maintains an office in Delaware but does not have an office in Dallas. That said, Debtor's counsel represents itself as having a "national presence," including in the Fifth Circuit,[9] and its lead lawyers on this matter are based in Los Angeles. The Debtor's proposed financial advisor team is also predominantly based in Los Angeles with several members located in Chicago. No proposed advisor from Development Specialists, Inc. is located on the East Coast, let alone in Delaware. *See Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) to Employ and Retain Development Specialists, Inc. to Provide a Chief Restructuring Officer, Additional Personnel, and Financial Advisory and*

[9] *See* http://www.pszjlaw.com/about-presence.html#circuit5.

Restructuring-Related Services, Nunc Pro Tunc *as of the Petition Date* [Docket No. 75], Ex. A. Accordingly, the Committee respectfully submits that this factor weighs in favor of transferring venue to the Dallas Bankruptcy Court.

3. Proximity of the Witnesses Necessary to the Administration of the Estate.

24. The Committee anticipates that the witnesses likely to be necessary in this chapter 11 case are the Debtor's management, who are all located in Dallas, Texas, or the Debtor's financial advisors, who are all located in either Chicago, Illinois, or Los Angeles, California. Dallas, Texas, is significantly closer to any potential witness than Wilmington, Delaware. Thus, the Committee respectfully submits that this factor also weighs in favor of transferring venue to the Dallas Bankruptcy Court.

4. Location of the Assets.

25. The location of the Debtor's assets is not as important as other factors where "the ultimate goal is rehabilitation rather than liquidation." *See In re Caesars Entm't Operating Co., Inc.*, 2015 WL 495259, at *6 (quoting *In re Enron Corp.*, 274 B.R. 327, 347 (Bankr. S.D.N.Y. 2002)). Although the Committee believes that the Debtor's U.S. assets would be located at the Debtor's headquarters in Dallas, Texas, the Committee does not believe this factor important to the Court's decision.

5. Economic Administration of the Estate.

26. As noted above, the most important factor is the economic and efficient administration of the Debtor's estate. *Id.* The Committee does not dispute the ability of this Court to administer this chapter 11 case in a just and efficient manner. That said, there are many factors that make the Dallas Bankruptcy Court the more economical venue. As discussed in more detail below as part of the "interests of justice" analysis: (1) there is a higher concentration of creditors

and creditors' counsel in Texas and the Midwest than elsewhere in the country; (2) the Debtor and all of its U.S. personnel are in Dallas, Texas; (3) Dallas, Texas is more centrally located in the United States than Wilmington, Delaware and arguably easier and cheaper for parties to travel to; (4) most creditors would need to obtain Delaware co-counsel if venue remains before this Court; and (5) the Dallas Bankruptcy Court and the Dallas District Court has already expended great time and effort familiarizing itself with the Debtor, the Debtor's operations, and the disputes between the Debtor and some of its largest creditors. For these reasons and the reasons set forth below in Section II.B, this factor weighs heavily in favor of transferring venue to the Dallas Bankruptcy Court. *See In re Qualteq, Inc.* 2012 WL 527669, at *6 (noting that same considerations for this factor arise in applying the "interest of justice" prong).

6. Necessity for Ancillary Administration if Liquidation Should Result.

27. "Most cases do not consider liquidation because it is illogical to focus on liquidation contingencies when the goal of the bankruptcy is reorganization." *In re Dunmore Homes, Inc.*, 380 B.R. 663, 672 (Bankr. S.D.N.Y. 2008). However, should this case be converted to a liquidation, the Debtor's personal property would be predominantly located in Dallas, Texas. As a result, this factor also weighs in favor of transfer.

B. Interests of Justice.

28. When determining whether a transfer would serve the interests of justice, courts consider whether such transfer "would promote the efficient administration of the estate, judicial economy, timeliness, and fairness." *Caesars Entm't Operating Co., Inc.*, 2015 WL 495259, at *7 (quotations omitted). The interests of justice standard is a "broad and flexible standard which must be applied on a case-by-case basis." *In re Safety-Kleen Corp.*, Adv. Proc. No. 00-1984, 2001 Bankr. LEXIS 1296, at *6 (Bankr. D. Del. Aug. 27, 2001) (citing *Gulf States Expl. Co. v. Manville Forest Prods. Corp. (In re Manville Forest Prods. Corp.)*, 896 F.2d 1384, 1391 (2d Cir. 1990)).

1. Judicial Economy.

29. Judicial economy would be served by transferring this case to the Dallas Bankruptcy Court. At the time of this filing, this Court has only held one hearing, granting interim relief for a handful of routine "first day" motions. In contrast, the Dallas Bankruptcy Court has heard at least 30 days of testimony, including that of the Debtor's executives, and conducted countless hearings in the Acis Bankruptcy. With the exception of the Debtor's proposed chief restructuring officer and Mr. Waterhouse, the Dallas Bankruptcy Court is familiar with nearly all of the Debtor's senior management. As summarized above, the Dallas Bankruptcy Court and Dallas District Court have already devoted multiple days of court time to the Debtor.

30. Additionally, Acis's claim against the Debtor (which is listed on the list of twenty largest unsecured creditors) and the Debtor's proof of claim and administrative claim against Acis (which is technically an asset of the Debtor's estate) are currently pending in the Dallas Bankruptcy Court. Judicial economy would best be served by utilizing the time and resources already extended by the Dallas Bankruptcy Court in connection with these claims. This factor weighs overwhelmingly in favor of transfer. Indeed, it is hard to imagine a case where judicial economy would be better served by a transfer of venue under 28 U.S.C. § 1412.

31. Courts in this district have historically placed a particular emphasis "on the "learning curve" that typically militates against a transfer. *See In re Rests. Acquisition I, LLC*, No. 15-12406 (KG), 2016 WL 855089, at *5 (Bankr. D. Del. Mar. 4, 2016). This case is unique in that the "learning curve" that typically militates against a transfer in the interests-of-justice basis is actually *inverted*. That is, it is not the proposed transferee court that will have a "learning curve," but rather it is this Court that would. Given that this Court has only considered first day relief, and on an interim basis, while the Dallas Bankruptcy Court and Dallas District Court both have

intimate familiarity with the parties and their businesses, transferring the venue would be in furtherance of judicial economy.

2. Economic and Efficient Administration of the Bankruptcy Estate.

32. As previously noted, there are economic efficiencies available in Dallas, Texas that are not available in Wilmington, Delaware. Venue in Dallas would allow the Debtor's employees to easily attend hearings in this case and thus eliminate the need for air travel for most witnesses. The Debtor's headquarters are located in The Crescent in Dallas, Texas, approximately 1.2 miles from the Dallas Bankruptcy Court. By contrast, this Court is located approximately 1,437 miles from the Debtor's headquarters. Travel to this Court from the Debtor's headquarters requires, at a minimum, a 30-minute car ride to Dallas/Fort Worth International Airport, approximately three hours flying time to Philadelphia International Airport, and then a 30-minute car ride to Wilmington, Delaware. The foregoing does not take into account recommended early arrival times at airports for check-in, flight delays, traffic, or the need for overnight stays in Wilmington. If this case remains in Delaware, critical management personnel will be required to spend extended periods away from their offices when they should be focused on maximizing value for all creditors.

33. Additionally, as the Debtor's professionals and proposed CRO are primarily located in Los Angeles, venue in Dallas would eliminate hours of travel time and the administrative expense associated with the same. Dallas-Fort Worth International Airport, consistently the third-busiest airport in the country (behind Chicago O'Hare and Atlanta Hartsfield-Jackson), offers nearly 1,800 flights per day. American Airlines alone offers approximately 14 non-stop flights per day from LAX to DFW. According to FlightSphere.com, there are approximately 20 total flights per day from LAX to DFW and 7 flights per day from DAL to LAX. By contrast, according to FlightSphere.com, there are approximately 10 flights per day from DFW to Philadelphia and approximately 8 flights per day from DAL to Philadelphia. The flight from LAX to DFW is

approximately 3 hours, whereas the flight from LAX to Philadelphia is approximately 6 hours. *See In re Rehoboth Hosp., LP,* No. 11-1279 (KG), 2011 Bankr. LEXIS 3992, at *15 (Bankr. D. Del. October 19, 2011) (transferring venue of a single asset real estate case from Delaware to Texas because "the estate may incur significant travel costs to obtain the testimony of witnesses that are located in Texas").

34. Additionally, Rule 45 of the Federal Rules of Civil Procedure, incorporated by Bankruptcy Rule 9016, mandates that contested non-party discovery disputes (potentially like those related to the Debtor's approximately 2,000 non-debtor affiliates) be heard in the place of compliance, which would most likely be in the Northern District of Texas. The Committee is already aware of the Debtor's history of contesting discovery. *See, e.g., Hamilton Partners, L.P. v. Highland Capital Mgmt., L.P.*, CV 6547-VCN, 2016 WL 61223, at *1 (Del. Ch. Feb. 2, 2016). It is therefore likely that the Dallas District Court and Dallas Bankruptcy Court will need to hear and resolve multiple discovery disputes. In light of that inevitability, it would be sensible to transfer this case so that related disputes aren't being heard in multiple venues.

35. There is no doubt that transferring venue to Dallas would promote the economic and efficient administration of this chapter 11 case. This factor weighs in favor of transfer.

3. Timeliness.

36. As of the date of this Motion, this case has only been pending for 16 days. The Committee is also seeking to have this Motion heard on an expedited basis, as set forth in the motion to shorten notice filed concurrently herewith. *Cf. In re Jones,* 39 B.R. 1019, 1020 (Bankr. S.D.N.Y. 1984) ("[t]he debtor's motion to change venue is untimely given the fact that this case was commenced over one and one-half years ago"). The Court has only considered the Debtor's request for first day relief on an interim basis. The next hearing is not scheduled until November 19, 2019. The Motion is timely and this factor weighs in favor of transfer.

4. Fairness.

37. Transferring this chapter 11 case to a venue where employees, creditors, and numerous other parties-in-interest may more easily participate in the restructuring process would be manifestly fair. To the extent the Debtor chose this forum in order to distance itself from largely unfavorable findings, fairness dictates that this case should be transferred.

* * * * *

38. For the foregoing reasons, it is both in the interest of justice and for the convenience of the parties that this chapter 11 case be transferred to the Dallas Bankruptcy Court. The majority of the parties and professionals involved in this chapter 11 cases are more centrally located to Dallas, Texas than Wilmington, Delaware, which would create significant costs savings to the Debtor's estate compared to keeping the case in Delaware. Moreover, the Dallas Bankruptcy Court and Dallas District Court are both well-versed in the facts and issues that will undoubtedly need to be addressed in this chapter 11 case. As such, the Committee respectfully requests that this Court transfer venue of this case to the Dallas Bankruptcy Court.

NOTICE

39. Notice of this Motion will be provided to (i) the Debtor, (ii) the Office of the United States Trustee for the District of Delaware, and (iii) any party that has requested notice pursuant to Local Rule 2002-1 as of the date of this Motion. In light of the nature of the relief requested herein, the Committee submits that no other or further notice is necessary.

[Remainder of Page Intentionally Left Blank]

WHEREFORE, the Committee respectfully requests that the Court enter the Proposed Order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested herein and such other and any further relief as the Court may deem just and proper.

Dated: November 1, 2019
Wilmington, Delaware

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PROPOSED ATTORNEYS FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

Appendix Exhibit 7

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	§	Case No. 19-12239 (CSS)
	§	
HIGHLAND CAPITAL MANAGEMENT, LP,[1]	§	Chapter 11
	§	
	§	**Re: Docket Nos. 69, 70**
Debtor.	§	

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

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

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

Statement of Facts

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

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

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

4. Foley and Lynn Pinker are both being hired to represent the Debtor in connection with Acis' post-confirmation bankruptcy case (the "Acis Bankruptcy Case"),[2] two appeals from the Acis Bankruptcy Case (both initiated by the Debtor as an appellant)[3] and an adversary proceeding pending in the Acis Bankruptcy Case.[4]

Objection

A. The Applications Lack Important Disclosures.

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

[2] Jointly administered Case Nos. 18-30264 and 18-30265 in the United States Bankruptcy Court for the Northern District of Texas.

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

[4] Adversary No. 18-03078 in the United States Bankruptcy Court for the Northern District of Texas.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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allocation-fund/ (Highland Global Allocation Fund); https://www.highlandfunds.com/income-fund/ (Highland Income Fund).

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

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

[15] Amended Complaint attached hereto as **Exhibit G**.

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

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

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

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

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

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

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

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

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

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

[Remainder of page intentionally left blank]

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

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

Dated: November 12, 2019
Wilmington, Delaware

BLANK ROME LLP

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

Appendix Exhibit 8

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.	)	**Related to Docket No. 86**

OBJECTION OF THE DEBTOR TO MOTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO TRANSFER VENUE OF THIS CASE TO THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS

The above-captioned debtor and debtor in possession (the "Debtor") hereby objects to the motion to transfer venue of this case [Docket No. 86] (the "Motion to Transfer") to the Northern District of Texas (the "Texas Bankruptcy Court"), filed by the Official Committee of Unsecured Creditors (the "Committee").

In support of this objection, the Debtor respectfully states as follows:

Preliminary Statement

1. The Debtor owns and manages a sophisticated financial services and money management business that has assets and interests all over the world. The amounts at stake in this case involve hundreds of millions of dollars in terms of asset values and asserted liabilities. The Debtor's creditors are sophisticated parties who are either represented by highly qualified counsel or are attorneys themselves. The top 20 unsecured creditors in this case consist almost entirely of litigation claimants and law firms. There are no "mom and pop" creditors who

[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.

would be prejudiced if they were not provided with ready access to a local bankruptcy court.

2. Further, the Texas Bankruptcy Court has no special familiarity with the Debtor or its current management. The Debtor's restructuring efforts are now led by Bradley Sharp as Chief Restructuring Officer (the "CRO") who has had no prior involvement with either Acis (as defined below) or the Texas Bankruptcy Court with respect to this matter. The Texas Bankruptcy Court also knows little about the Debtor's business or financial affairs, aside from its prior relationship with Acis. The Debtor is no longer affiliated with Acis and, in fact, is directly adverse to Acis, which now asserts various contested litigation claims against the Debtor. Hence, the Committee's opening position that this case should be transferred to the Texas Bankruptcy Court is little more than a litigation ploy. The Committee has decided, based on prior rulings of the Texas Bankruptcy Court in the Acis cases, that such forum would be more advantageous from a litigation perspective *vis-à-vis* the Debtor. That is not an appropriate basis to transfer venue.

3. The fact that the Debtor is headquartered in Dallas, Texas also does not mean that this case should be transferred there. The Debtor's assets, interests, and contractual entanglements are dispersed throughout this country and the world. As an example, the Debtor has assets under management, including its own proprietary assets and those of its clients, through various related parties in Asia, South America, and Europe. The Debtor has already brought a motion in this case to appoint a foreign representative in order to manage its various foreign interests [Docket No. 68], including those in pending proceedings in Bermuda and the Cayman Islands. The Debtor's principal assets in the United States consist of custodial and non-custodial interests in investments located all over the country. The Debtor's primary brokerage

accounts that hold the bulk of the Debtor's liquid and illiquid securities are located in New York City with Jefferies, LLC ("Jefferies"). The Debtor is also the subject of two pending lawsuits in the Delaware Chancery Court, one of which involves claims brought by the Redeemer Committee of the Highland Crusader Fund (the "Redeemer Committee"), a member of the Committee. Another member of the Committee, UBS Securities LLC and UBS AG London Branch ("UBS"), has longstanding litigation pending against the Debtor in New York state court (not Texas). Predictably, the Debtor's professionals and those of its creditors are located around the country. Given the amounts at stake in this case and the complexity of the Debtor's assets and liabilities, venue should not be determined by how many miles the Debtor's employees or professionals or those of its creditors are located from the courthouse. All parties reside at various commercial centers around this country and can easily travel wherever necessary in order to handle the important matters in this case.

4. Further, the pendency of the involuntary bankruptcy cases of Acis Capital Management, L.P. and Acis Capital Management GP, LLP (together, "Acis") in Dallas, Texas does not make the Texas Bankruptcy Court a preferable forum for this case. Acis's involuntary cases were commenced by Joshua Terry ("Terry"), who now owns and manages Acis and represents that entity on the Committee. Terry assumed ownership of Acis by virtue of a contested plan of reorganization that was confirmed by the Texas Bankruptcy Court and which is now the subject of a pending appeal.[2] ***The interests of Acis are directly adverse to those of this***

[2] Although a stay of the confirmation order was sought, no stay was granted despite the ongoing appeal of that order. The Texas Bankruptcy Court thus has limited ongoing jurisdiction at this juncture.

estate.[3] The Debtor and Acis have been, and continue to be, involved in highly contentious litigation, including matters that are the subject of multiple appeals from decisions of the Texas Bankruptcy Court and pending fraudulent transfer claims brought by Acis against the Debtor in the Texas Bankruptcy Court. The Debtor and Acis assert various substantial disputed and unliquidated claims against each other. Further, ***the Debtor's current business is unrelated to Acis***, which is focused on managing certain collateralized loan obligations (or CLOs) in which the Debtor no longer has any direct interest. The Committee also does not establish how the prior testimony of the Debtor's representatives in the Acis bankruptcy is relevant to the instant chapter 11 case.[4] Aside from the Debtor's prior relationship with Acis, the Texas Bankruptcy Court is not familiar with the Debtor's business and assets or the Debtor's liabilities that need to be restructured in this case. ***The Debtor's restructuring efforts are now managed by an independent and highly qualified CRO*** who has had no prior involvement with Acis or its bankruptcy proceedings. Hence, while it may be in the interests of ***the Acis estate*** for this matter to be transferred to the Texas Bankruptcy Court, it is certainly not in the best interests of ***the Debtor's estate*** or the parties to these proceedings, which is the only thing that matters.

5. As the Committee admits, the Debtor is entitled to substantial deference with respect to its choice of forum for its bankruptcy case. This Court is indisputably a legally proper forum given that the Debtor is a Delaware limited partnership. This Court also presents a convenient forum given that the Debtor's assets are so widely dispersed and there has been

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[3] Terry, in his personal capacity and on behalf of his spouse, also purports to hold an unsecured claim against the Debtor's estate in the amount of $425,000, which the Debtor has designated as contingent, unliquidated, and disputed.

[4] Presumably, senior management personnel of the Debtor have provided all manner of testimony in the various pending litigation matters around the country involving or otherwise implicating the Debtor.

extensive ongoing litigation against the Debtor in the Delaware Chancery Court, including litigation commenced by the Redeemer Committee, a member of the Committee. In sum, aside from the Committee's perceived litigation advantage before the Texas Bankruptcy Court, there is no credible, let alone valid, basis for this case to be transferred to the Texas Bankruptcy Court where an adverse proceeding is pending when this Court presents a perfectly appropriate forum for effectuating a successful reorganization of the Debtor's affairs. The Debtor therefore urges this Court to deny the Motion to Transfer filed by the Committee.

Background

A. The Debtor's Bankruptcy Filing

6. On October 16, 2019 (the "Petition Date"), the Debtor commenced this case by filing a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The factual background regarding the Debtor, including its current and historical business operations and the events precipitating the chapter 11 filing, is set forth in detail in the *Declaration of Frank Waterhouse in Support of First Day Motions*, which is incorporated herein by reference.

7. The Debtor continues in the possession of its property and continues to operate and manage its business as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

8. No trustee or examiner has been appointed in the Debtor's chapter 11 case.

9. On October 29, 2019, the United States Trustee appointed the Committee, which consists of four members: (1) the Redeemer Committee; (2) UBS; (3) Acis; and (4) Meta-e Discovery. The Committee is represented by Sidley & Austin, with one of its lead attorneys

based in New York City. Since retaining counsel, the Committee's first order of business was to file the Motion to Transfer.

B. The Debtor's Organizational Structure and Governance

10. The Debtor is a Delaware limited partnership. Its limited partnership interests are owned as follows: (a) 99.5% by Hunter Mountain Trust, a Delaware statutory trust based in New York, (b) 0.1866% by Dugaboy Investment Trust, a Delaware trust, (c) 0.0627% by Mark Okada, personally and through family trusts, and (d) 0.25% by Strand Advisors, Inc., a Delaware corporation. In sum, 99.94% of the Debtor's partnership interests are held through Delaware entities. Strand Advisors, Inc. also owns 100% of Debtor's general partnership interest. This Delaware entity, through its principal James Dondero, ultimately controlled the Debtor as of the Petition Date.

11. There is now new governance in place. On October 29, 2019, the Debtor filed its motion to retain Bradley Sharp as the CRO [Docket No. 75] (the "CRO Motion"). Pursuant to the CRO Motion, the Debtor seeks to retain the CRO with certain independent and exclusive powers and significant restrictions on termination. Specifically, the CRO will have sole authority over claims and transactions involving insiders. The CRO was previously appointed chief restructuring officer in Delaware cases such as *Variant Holding Company LLC* before Judge Brendan Shannon and *Woodbridge Group of Companies LLC* before Judge Kevin Carey (retired). The CRO Motion is set for hearing on November 19, 2019, the same date as the Motion to Transfer.[5]

[5] In an apparent effort to prevent this Court from considering the CRO Motion, the Committee sought to have the Motion to Transfer set for hearing on shortened notice for November 7, but this Court denied that request before the Debtor filed its response.

12. Also on October 29, 2019, the Debtor filed its motion for approval of certain protocols with respect to ordinary course transactions [Docket No. 77] (the "Protocols Motion"). Pursuant to the Protocols Motion, the Debtor seeks approval of certain protocols to allow the Debtor to conduct ordinary course business in an uninterrupted and transparent manner, both for the benefit of the Debtor's estate and its creditors and for the investors to whom the Debtor provides services. The Protocols Motion also is set for hearing on November 19.

13. The CRO Motion and the Protocols Motion are intended to bring independence and clarity to the Debtor's governance structure. Based on these motions, there should be no doubt that qualified, independent management is in place with the Debtor and will be operating under a specified set of protocols and procedures to ensure that estate assets are properly preserved.

C. The Debtor's Business, Assets, and Creditor Relationships are Complex and International in Scope

14. The Debtor is a multibillion-dollar global alternative investment manager. The Debtor operates a diverse investment platform, serving both institutional and retail investors worldwide. In addition to high-yield credit, the Debtor's investment capabilities include public equities, real estate, private equity and special situations, structured credit, and sector- and region-specific verticals built around specialized teams. The Debtor also provides shared services to its affiliated registered investment advisors.

15. Pursuant to various contractual arrangements, the Debtor provides money management and advisory services for approximately $2.5 billion of assets under management. Separately, the Debtor provides shared services for approximately $7.5 billion of assets managed

by a variety of affiliated and unaffiliated entities, including other affiliated registered investment advisors.

16. Although the Debtor is headquartered in Dallas, Texas, and most of its employees are based there, the Debtor's affiliates and related entities maintain offices in many international locales, including in Buenos Aires, Rio de Janeiro, Singapore, and Seoul. The Debtor primarily generates revenue from fees collected for the management and advisory services provided to funds that it manages, plus fees generated for services provided to its affiliates. These funds have investments all over the world. Specifically, the Debtor has its own proprietary investment assets and those of its clients held through various affiliates in Asia, South America, and Europe.

17. On October 29, 2019, the Debtor filed a motion to appoint a foreign representative in order to manage its various foreign interests [Docket No. 68] (the "Foreign Representative Motion"), including those in pending proceedings filed by the Redeemer Committee in Bermuda and the Cayman Islands.

18. The Debtor's principal assets in the United States consist of custodial and non-custodial interests in investments located all over the country. The Debtor has brokerage accounts at Jefferies in New York City that hold the bulk of the Debtor's liquid and illiquid securities. As of the Petition Date, the Debtor owed Jefferies approximately $30 million on account of margin borrowings. The Debtor's other principal secured creditor, Frontier State Bank, is based in Oklahoma City and is owed approximately $5.2 million as of the Petition Date.

D. The Debtor Has Litigation Pending in Delaware Chancery Court and New York

19. Aside from Acis, no Committee members are based in Dallas and two of them have litigation pending against the Debtor outside of Texas. As discussed further below, the Redeemer Committee commenced litigation against the Debtor in the Delaware Chancery Court and UBS commenced litigation against the Debtor in New York state court. The chairman and the majority of the members of the Redeemer Committee are located in Chicago. UBS's business representatives are based in or around New York City. The only trade vendor on the Committee, Meta-e Discovery, is based in Connecticut. Yet another allegedly substantial creditor of the Debtor, Patrick Daugherty ("Daugherty"), also has litigation pending against the Debtor in Delaware Chancery Court, including a matter that went to trial on October 14, 2019, just prior to the Petition Date, before it was stayed.

20. *Redeemer Committee Litigation: Delaware Chancery Court and New York Arbitration.* The Debtor's bankruptcy filing was precipitated by an arbitration award in favor of the Redeemer Committee (the "Award") initially issued against the Debtor in March 2019 by a panel of the American Arbitration Association based in New York City. The Debtor was formerly the investment manager for the Highland Crusader Fund (the "Crusader Fund"), which was based in Bermuda and the subject of insolvency proceedings there. On July 5, 2016, the Redeemer Committee (a) terminated and replaced the Debtor as investment manager of the Crusader Fund, (b) commenced an arbitration against the Debtor in New York City, and (c) commenced litigation against the Debtor in Delaware Chancery Court. In September 2018, the Debtor and the Redeemer Committee participated in a multi-day evidentiary hearing in New York City. In March 2019, following post-trial briefing, the arbitration panel issued its Award

finding in favor of the Redeemer Committee on a variety of claims and requiring the Debtor to pay a gross amount of $189 million, subject to certain offsets and deductions. The Redeemer Committee set a hearing in the Delaware Chancery Court for October 8, 2019, in order to seek entry of a judgment with respect to the Award. The hearing was subsequently continued to October 16, 2019. The Debtor filed this case just prior to that hearing. The Redeemer Committee is represented by Jenner & Block attorneys based in Chicago, Illinois.

21. *UBS Litigation: New York State Court.* The Debtor and UBS are parties to a long-running litigation originally filed by UBS in February 2009 in the New York Supreme Court, County of New York. At bottom, UBS alleges that the Debtor and certain funds fraudulently induced UBS to restructure a transaction at the expense of UBS and then these parties and other entities fraudulently diverted certain assets to prevent UBS from obtaining a recovery on its claims. There have been numerous prejudgment motions and appeals in this case. The claims that remain consist primarily of breach of contract, fraudulent inducement and alter ego claims against certain defendants, a breach of implied covenant of good faith and fair dealing claim against the Debtor, and fraudulent conveyance claims against all defendants. UBS has asserted damages in excess of $686 million in the litigation, which the Debtor and the other defendants continue to vigorously dispute. The case was bifurcated, and the contract claims against certain fund defendants as well as the Debtor's counterclaim were addressed at a bench trial in July 2018. The court has not yet ruled on phase one of the trial. If the court finds a breach of contract occurred and awards damages against the fund defendants, then the remaining claims will be tried in a second phase of the trial. While awaiting a decision on phase one, the defendants filed a motion for judgment before trial with respect to the fraudulent transfer claims

based on the fact that UBS is not a creditor of the parties who made the alleged fraudulent transfers. The motion was withdrawn due to its timing without prejudice to defendants' right to refile the motion after a decision has been made on phase one of the trial. UBS is represented by Latham & Watkins attorneys based in Washington, DC.

22. *Daugherty Litigation: Delaware Chancery Court.* Another allegedly substantial creditor of the Debtor who is not on the Committee, Daugherty, also commenced litigation against the Debtor in Delaware Chancery Court. Daugherty appears on the top 20 list in this case in the amount of $11.7 million, scheduled as contingent, unliquidated, and disputed. Daugherty is a former senior management employee of the Debtor. Among other matters, Daugherty sued the Debtor and certain of its affiliates in Delaware Chancery Court in July 2017 arising from his separation from the Debtor. In June 2018, the Delaware Chancery Court dismissed many of the claims asserted by Daugherty in the litigation. The remaining counts went to trial just prior to the Petition Date and have since been stayed by virtue of the Debtor's bankruptcy filing. Daugherty is represented by Delaware counsel.

E. The Debtor's Relationship with Acis and Ongoing Adverse Claims and Litigation

23. The Debtor previously provided sub-manager and sub-advisory services to Acis pursuant to certain contractual agreements that were terminated during the course of the Acis bankruptcy in or around August 2018. Since that time, the Debtor has not had, and does not currently have, any direct business dealings with respect to Acis or the CLO assets for which Acis serves as the CLO portfolio manager.[6]

[6] The Debtor, through an affiliate, manages a client account that owns a notional value of approximately $150 million in securities issued by Acis CLOs. All of the Debtor's affiliated CLOs are currently in wind-down, meaning that they are not making any new investments.

24. Prior to his termination in June 2016, Terry was one of the Debtor's senior management employees who handled Acis and also had a partnership interest in Acis. After Terry was discovered surreptitiously tape recording internal meetings and conversations with numerous Highland personnel, he was terminated by the Debtor and subsequently asserted claims against Acis that went to arbitration. Terry ultimately obtained an arbitration award against Acis is the approximate amount of $8 million. Notably, although Terry asserted claims against the Debtor and other persons at Highland, the arbitration panel did not find liability against any party besides Acis.

25. Terry commenced involuntary chapter 7 bankruptcy cases against Acis in the Texas Bankruptcy Court in January 2018 on his own behalf. No other creditors joined in the petitions, which Terry asserted was appropriate on the basis that Acis had fewer than 12 creditors. The Debtor is a major prepetition creditor of Acis, owed in excess of $8 million for various contractual services provided to Acis before and after the Acis bankruptcy filings. Acis, the alleged debtor in those matters, objected to the involuntary bankruptcy filings and presented evidence from certain of the Debtor's employees relating to whether the technical requirements for involuntary bankruptcy filings were met. These objections were ultimately overruled by the Texas Bankruptcy Court, which decision remains on appeal. Acis's bankruptcy cases were later converted to chapter 11 and a chapter 11 trustee (Robin Phelan) (the "Acis Trustee") was appointed in May 2018. No Chief Restructuring Officer was ever appointed in the Acis cases, much less a CRO with expanded powers.

26. Subsequently, the Debtor and two of its related, affected parties in interest objected to the confirmation of a chapter 11 plan proposed by the Acis Trustee (and supported by

Terry) for a multitude of reasons, including that certain injunctive provisions were inappropriately targeted at the Debtor and related parties. The Texas Bankruptcy Court ultimately overruled all objections and confirmed the plan in January 2019, which decision remains on appeal. During the course of the Acis bankruptcy cases, the Texas Bankruptcy Court heard no material evidence from the Debtor's employees about the details of its business, assets, or liabilities, aside from its prior involvement with Acis. The Committee does not establish how the prior testimony of the Debtor's representatives in the Acis bankruptcy is relevant to the instant chapter 11 case. Hence, the Texas Bankruptcy Court has no specialized knowledge with respect to the Debtor generally or the issues that will be relevant in this chapter 11 case.

27. Pursuant to the Acis Trustee's confirmed chapter 11 plan, Terry is Acis's sole equity holder and controls and manages that entity. The Acis Trustee had previously commenced litigation in the Texas Bankruptcy Court against the Debtor and other parties for breach of contract, breach of fiduciary duties, fraudulent transfers, and conspiracy, and has sought to offset and/or subordinate the Debtor's claims against Acis. In a nutshell, the causes of action in that lawsuit revolve around the hotly contested allegations that the Debtor conspired to strip Acis of its assets at Terry's expense. Through his ownership and control of Acis pursuant to the Acis Trustee's confirmed plan, Terry now controls these claims against the Debtor, which remain at an early stage in the Texas Bankruptcy Court and have been stayed as to the Debtor.[7]

[7] The defendants have filed motions to withdraw the reference as well as motions to dismiss. The Texas Bankruptcy Court held a status conference on the motions to withdraw the reference on September 4, 2019 and was required to submit a "Report and Recommendation" to the United States District Court for the Northern District of Texas. As of the Petition Date, the Texas Bankruptcy Court had not issued its Report and Recommendation. This adversary proceeding is now subject to the automatic stay of 11 U.S.C. §362(a). This proceeding has yet to reach the procedural stage where any of the defendants have had to file their answers.

28. The respective bankruptcy estates of Acis and the Debtor are adverse to each other. Acis has claims and pending litigation against the Debtor and the Debtor has outstanding claims against Acis that total no less than $8 million for services rendered. The various litigation claims of Acis against the Debtor are prepetition claims that have been stayed.

29. The Committee now seeks to move the Debtor's bankruptcy case to the Texas Bankruptcy Court -- Acis's "home court" -- in order to obtain some perceived litigation advantage. The Debtor objects to the Motion to Transfer as completely contrary to the interests of this estate.

Legal Basis for Objection to Motion to Transfer

A. The Debtor's Case is Properly Venued in This District Because the Debtor is Organized in the State of Delaware

30. The Debtor is a limited partnership formed under the laws of Delaware. Consequently, venue of this case is proper in Delaware as a matter of law under 28 U.S.C. § 1408. *See, e.g., In re Restaurants Acquisition I, LLC*, 2016 Bankr. LEXIS 684, at *6 (Bankr. D. Del. Mar. 4, 2016) ("Because the Debtor is organized under the laws of Delaware, this forum is proper under the statute."); *In re Innovative Communication Co., LLC*, 358 B.R. 120, 125 (Bankr. D. Del. 2006) ("Venue is appropriate in the state of incorporation, 28 U.S.C. § 1408(1), so venue is proper in Delaware with respect to the corporate Debtors."). The Committee does not (and cannot) challenge this point.

B. The Debtor's Choice of Forum in Delaware is Entitled to Substantial Weight and Should Not Be Disturbed

31. Given that venue in this District is legally proper, the Debtor's choice of this forum is entitled to great weight. *See, e.g., Restaurants Acquisition*, 2016 Bankr. LEXIS at

*7 ("movant bears the burden of demonstrating that the factors strongly weigh in favor of a transfer as courts will generally grant substantial deference to a debtor's choice of forum"); *In re Ocean Properties of Delaware, Inc.*, 95 B.R. 304, 305 (Bankr. D. Del. 1988) (same). Therefore, a court considering a venue transfer motion "should exercise its power to transfer cautiously, and the party moving for the transfer must show by a preponderance of the evidence that the case should be transferred." *In re Commonwealth Oil Refining Co., Inc. (Commonwealth of Puerto Rico v. Commonwealth Oil Refining Co., Inc.)*, 596 F.2d 1239, 1241 (5th Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980) ("*CORCO*") (internal citations omitted); *accord In re Fairfield Puerto Rico, Inc.*, 333 F. Supp. 1187, 1989 (D. Del. 1971) ("This Court should not freely abandon to any other district its duty to determine a matter clearly within its jurisdiction."); *In re Rehoboth Hospitality, LP*, 2011 WL 5024267, at *3 (Bankr. D. Del. 2011) ("The burden of proof is on the moving party requesting transfer.").

32. These principles apply with even greater force in a case such as this where a Delaware-organized partnership seeks the protection of Delaware courts. As noted above, over 99% of the Debtor's limited interests and 100% of its general partnership interests are held by Delaware entities. There is a "fundamental legal tenet that every citizen of a state is entitled to take advantage of the state and federal judicial process available in that state." *In re PWS Holdings*, 1998 Bankr. LEXIS 549, at *14 (Bankr. D. Del. Apr. 28, 1998). Further, "Delaware has an interest in protecting the rights of its citizens," and correspondingly, change of venue can only be granted upon a strong showing of equities favoring the transfer. *Intel Corp. v. Broadcom Corp.*, 167 F. Supp. 2d 692, 706 (D. Del. 2001).

33. Given the strong presumption that a debtor's choice of forum should not be disturbed, courts rarely grant such relief. In those few cases where venue has been transferred, there was generally some unique compelling factor that justified transfer, such as the debtor's consent, the matter was a single asset real estate case, or there was non-stayed litigation that warranted consolidation of cases before a single court or judge. None of these factors are present here.

34. In fact, the various adversary claims pending against the Debtor that currently linger in the Texas Bankruptcy Court weigh strongly ***against*** a transfer of venue there. The claims asserted by Acis against the Debtor are prepetition claims that are stayed. Whether those claims are ever unstayed, they are clearly adverse to the interests of the Debtor's estate, particularly where Acis is asserting such claims as a basis to offset and/or subordinate the large claims that the Debtor holds against Acis. Notably, Acis is no longer affiliated with the Debtor. It is merely a litigation claimant. Yet, the Committee chose to file the Motion to Transfer to the Texas Bankruptcy Court in order to achieve a litigation advantage at the expense of this estate. The Debtor urges the Court to see through this blatant litigation tactic which fails to come close to overcoming the strong presumption in favor of the Debtor's proper choice of venue in Delaware.

C. <u>The Convenience of the Parties Weighs in Favor of Retaining Venue in Delaware</u>

35. When a bankruptcy court is asked to transfer an entire bankruptcy case to another bankruptcy court, it must examine whether the transfer would be (a) in the interest of justice, or (b) the convenience of the parties. 28 U.S.C. § 1412. In considering the "convenience

of the parties," courts have identified six factors, among others, to help guide their discretion. These six factors are:

i. the economic administration of the estate;

ii. the location of the assets;

iii. the proximity of creditors of every kind to the court;

iv. the proximity of the debtor to the court;

v. the proximity of the witnesses necessary to the administration of the estate; and

vi. the necessity for ancillary administration if liquidation should result.

See, e.g., *CORCO*, 596 F.2d at 1247; *Restaurants Acquisition*, 2016 Bankr. LEXIS at *7 (applying *CORCO* factors); *Innovative*, 358 B.R. at 125 (citing *CORCO* factors and other private and public interests that may be relevant). As discussed herein, the Committee has failed to meet its "heavy burden of proof . . . to demonstrate that the balance of convenience weighs in [its] favor." *Lionel Leisure, Inc. v. Trans Cleveland Warehouses, Inc. (In re Lionel Corp.)*, 24 B.R. 141, 142 (Bankr. S.D.N.Y. 1982). Consequently, the Motion to Transfer must be denied.

i. The Economic Administration of the Estate

36. The economic and efficient administration of the estate is the most important factor when considering a motion to transfer venue. *CORCO*, 596 F.2d at 1247; *In re Caesars Entertainment Operating Co.*, 2015 Bankr. LEXIS 314, at *22 (Bankr. D. Del. Feb. 2, 2015); *In re Industrial Pollution Control, Inc.*, 137 B.R. 176, 182 (Bankr. W.D. Pa. 1992). Despite the importance of this factor, however, the Committee makes little effort to explain why

the economic administration of the estate would be improved if this case was transferred, other than to argue that the Texas Bankruptcy Court heard days of evidence in an unrelated matter of questionable relevance to the chapter 11 proceedings at hand. *See* Motion to Transfer at ¶¶11 – 13, 29 – 31. The pendency of the Acis bankruptcy in the Texas Bankruptcy Court should not form a basis for transferring venue for the following six (6) reasons.

37. First, the Debtor is now managed by the CRO, who is charged with administering the restructuring efforts of the Debtors in this case and has independent authority as to insider claims and insider transactions. Whatever may have been said by the Debtor's management in the context of the Acis bankruptcy is irrelevant to the tasks at hand in this case that will be carried out by the CRO, an independent and highly qualified professional who has had no involvement in the Acis cases.

38. Second, the evidence presented by the Debtor's employees in the Acis bankruptcy cases is irrelevant to the case at hand. Their testimony generally focused on (a) whether Terry satisfied the legal requirements to file involuntary cases against Acis and (b) the structure of actively managed CLOs. None of this testimony by the Debtor's employees is relevant to the Debtor's present chapter 11 case. Acis was the sole branch of the Debtor's affiliated structure that managed active CLOs. As a result of the confirmed chapter 11 plan in the Acis cases, Acis is no longer part of the Debtor's organizational structure. The Debtor owns no equity in Acis. The Debtor no longer advises or sub-advises any active CLOs. The Debtor only has CLOs that are in liquidation -- monetizing their underlying assets and paying off their remaining investors. While the Texas Bankruptcy Court learned much about the complexities of managing active CLOs, that information is irrelevant to this Debtor.

39. Third, the core issue in the reorganization of Acis was maintaining the cash flows from Acis's managed CLOs. However, the CLOs currently managed by the Debtor provide just 10% of the Debtor's revenue, and that number will shrink over time as the CLOs liquidate. The Debtor derives the other 90% of its revenue from managing asset classes that were never implicated in the Acis proceeding, including private equity, mutual funds, open-ended retail funds, hedge funds, and real estate funds.

40. Fourth, the Committee neither attaches evidence demonstrating what relevant facts the Texas Bankruptcy Court learned about the Debtor, nor explains how any such evidence could possibly implicate an insurmountable "learning curve" for this Court. *See* Motion to Transfer at ¶31. The Committee does not attach any of the 700 allegedly relevant exhibits or any of the testimony from the Acis proceeding. The Committee references three published opinions of the Texas Bankruptcy Court from the Acis proceeding, but provides no reasoning or even citations demonstrating how these opinions evidence the Texas Bankruptcy Court's purportedly extensive knowledge of the Debtor's current structure and management.

41. Fifth, even assuming it learned anything relevant about the Debtor's corporate structure, the Texas Bankruptcy Court knows little about the details of the Debtor's business, assets, or liabilities, or its restructuring efforts. To the extent it addressed the Debtor's business, the evidence in the Acis proceeding focused on a CLO business that the Debtor no longer operates nor manages in any way. The evidence in the Acis proceeding never focused on the Debtor's assets and liabilities. Even at this early stage of the Debtor's chapter 11 case, this Court is already more familiar with the Debtor than the Texas Bankruptcy Court, which is appropriately charged with overseeing the Acis proceeding and not this one.

42. Sixth, the level of conflicts between the Debtor and Acis make the economic and fair administration of this case in the Texas Bankruptcy Court highly problematic. There is a pending adversary proceeding by Acis against the Debtor, which proceeding has been stayed. The Committee does not explain how the Texas Bankruptcy Court is supposed to preside over the Debtor's estate and the pending adversary proceeding in the Acis case concurrently.[8] Indeed, the only reason for the Committee to seek a transfer of venue to the Texas Bankruptcy Court in the first place is to obtain some perceived litigation advantage *vis-à-vis* the Debtor's estate, which is not a proper basis to transfer venue.[9] Given the substantial adverse interests that exist between the Debtor and Acis, the Debtor submits that this chapter 11 case can be much more effectively administered by this Court.

ii. The Location of the Assets

43. Although the Debtor's headquarters is located in Dallas, Texas and most of its employees are based there, the Debtor's assets are widely dispersed all over the world. The Debtor has over $2.5 billion of assets under management and receives management and advisory fees from a multitude of sources around the world. The Debtor also provides shared services for approximately $7.5 billion of assets managed by a variety of affiliated and unaffiliated entities, including other affiliated registered investment advisors. The Debtor's affiliates and related parties maintain offices in many international locales, including Buenos Aires, Rio de Janeiro,

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[8] *See supra* n. 8.

[9] As part of this ongoing litigation strategy, Acis has objected to the Debtor retaining Foley & Lardner LLP ("Foley") and Lynn, Pinker, Cox, & Hurst LLP ("Lynn Pinker") as counsel to pursue the Debtor's claims against Acis and to defend the Debtor and certain of its wholly owned subsidiaries against Acis's claims. *See* Dkt. 116. Acis's objection to Foley and Lynn Pinker's retention does not even attempt to explain the benefit to the Debtor's estate of stripping the Debtor of its counsel litigating both affirmative and defensive claims against Acis. This highlights the conflict that the Texas Bankruptcy Court would face in handling both the Acis and Highland matters.

Singapore, and Seoul. And the Debtor has its own proprietary investment assets and those of its clients held through various affiliates in Asia, South America, and Europe. The Debtor has already filed the Foreign Representative Motion in order to assist the Debtor in managing its various foreign interests.

44. Similarly, the Debtor's principal assets in the United States consist of custodial and non-custodial interests in investments located across the country. The Debtor has brokerage accounts at Jefferies in New York City that hold the bulk of the Debtor's liquid and illiquid securities. As of the Petition Date, the Debtor owed Jefferies approximately $30 million on account of margin borrowings. The Debtor's other principal secured creditor, Frontier State Bank, is based in Oklahoma City and is owed approximately $5.2 million as of the Petition Date. Relatively speaking, the Debtor has minimal assets in Texas.

45. Nonetheless, even if most of the Debtor's assets were construed to be located in Texas (which they are not), numerous courts have found that the location of assets is not a significant factor in deciding whether venue should be transferred unless the case involves liquidation as opposed to rehabilitation or is a single asset real estate case. *See Restaurants Acquisition*, 2016 Bankr. LEXIS at *12 ("the location of a company's assets is not as crucial to the analysis where the ultimate goal is rehabilitation rather than liquidation"); *In re Safety-Kleen Corp.*, 2001 Bankr. LEXIS 1296, at *10 (Bankr. D. Del. Aug. 27, 2001) ("location of assets is generally only significant in a single asset real estate case or liquidation"); *see also In re Enron Corp.*, 274 B.R. 327, 348 (Bankr. S.D.N.Y. 2002) ("[W]hile a debtor's location and the location of its assets are often important considerations in single asset real estate cases, these factors take on less importance in a case where a debtor has assets in various locations.").

46. The outcome of this case will not turn on the day-to-day management of the Debtor's assets, but instead will be driven by the Debtor's ability to restructure its balance sheet and maximize the value of its assets, many of which are illiquid. This Court will be focused on matters such as plan confirmation and governance, which the Debtor proposes to place into the capable hands of the CRO pursuant to the terms of the pending CRO Motion and subject to the guidelines set forth in the Protocols Motion. Most of the objections to the key issues that will arise in this case will be grounded in the Bankruptcy Code and not based on any particular facts or circumstances unique to the Debtor's assets wherever located. However, to the extent this Court gives weight to the location of the Debtor's assets, this factor weighs in favor of denying the Motion to Transfer because the Debtor's interests and assets are widely dispersed throughout the country and the world.

iii. The Proximity of Creditors of Every Kind

47. The Committee spends a substantial portion of the Motion to Transfer evaluating the location of the Debtor's creditors and their professionals, and the relative amount of time that it takes to travel to this Court as compared to the Texas Bankruptcy Court. This analysis is misguided and irrelevant under the circumstances of this case. The Debtor does not have thousands of small or unsophisticated creditors who cannot navigate their way to Delaware. The creditors here are generally litigants or attorneys. They are located in commercial centers all over the country. The amounts at stake total hundreds of millions of dollars. It is of no consequence whether a creditor or an attorney is based in Chicago, New York, or Los Angeles. The creditors and professionals involved in this case will travel wherever necessary in order to advocate their respective positions, and Delaware is certainly just as convenient as Dallas.

Caesars, 2015 Bankr. LEXIS 314, at *23 ("in this day of law firms with multiple offices across the nation, convenient and accessible airports, electronic access to information and court dockets at every lawyer's fingertips, it is fair to say that both this [Delaware Bankruptcy] Court and the Illinois Court are convenient forums for purposes of the *CORCO* analysis.").

48. Further, one of the Committee members and the Debtor's largest creditor, the Redeemer Committee, has commenced litigation that is pending in the Delaware Chancery Court. In fact, the main trigger for the Debtor's bankruptcy filing was a hearing set by the Redeemer Committee in the Delaware Chancery Court to obtain a judgment on a $189 million Award. If Delaware is convenient enough for the Redeemer Committee, it is certainly an appropriate forum for this case. Daugherty is another allegedly significant creditor of the Debtor who chose to commence litigation in Delaware Chancery Court, which matter commenced trial just prior to the Petition Date. UBS, another member of the Committee, has litigation pending against the Debtor in New York.

49. The bottom line is that in a case of the size and complexity of this one, involving highly sophisticated and well-represented creditors, there is absolutely no reason to transfer venue on the basis of the proximity of creditors to the Texas Bankruptcy Court.

iv. The Proximity of the Debtor and Witnesses Necessary to the Administration of the Estate

50. As discussed in *CORCO*, the Court's consideration of the location of the Debtor should focus on the proximity to the Court of the Debtor's employees and representatives who must appear in court, not with the employees who conduct the day-to-day business activities of the Debtor. *CORCO*, 596 F.2d at 1248; *see also Restaurants Acquisition*, 2016 Bankr. LEXIS

at *11 ("Courts have noted the inquiry should focus primarily on the location of parties that must appear in court.").

51. In this case, the CRO is expected to take the lead in managing the Debtor's restructuring efforts and testifying on behalf of the Debtor. The CRO is a highly accomplished and independent professional based in Los Angeles who regularly appears in this Court and was previously chief restructuring officer in Delaware cases such as *Variant Holding Company LLC* before Judge Brendan Shannon and *Woodbridge Group of Companies LLC* before Judge Kevin Carey (retired). Few Debtor employees should be required to testify in this case on a going forward basis and, even if they were, travel to this Court is easily accomplished and consistent with the many prior trips required of such employees by the Redeemer Committee and Daugherty in choosing to commence litigation in Delaware Chancery Court. The Debtor's bankruptcy counsel also has an office in Delaware and has no need to hire local counsel here, whereas in Dallas, local counsel would need to be retained.

52. Given what is at stake, the Debtor and its employees, including the CRO, are conveniently located within sufficient proximity of this Court such that this factor does not weigh in favor of a venue transfer to the Texas Bankruptcy Court.

v. The Necessity for Ancillary Administration if Liquidation Should Result

53. The final factor relates to the necessity for ancillary administration if liquidation should result. As the courts in *CORCO*, *Enron* and *Fairfield Puerto Rico* recognized, "anticipation of the failure of the [Chapter 11] proceeding is an illogical basis upon which to predicate a transfer." *CORCO*, 596 F.2d at 1248; *see also Enron*, 274 B.R. at 349; *In re Fairfield Puerto Rico, Inc.*, 333 F. Supp. at 1191. Indeed, "[t]his factor is often discounted by

courts." *Enron*, 274 B.R. at 343, n. 11. The Debtor's focus in this case is to propose a chapter 11 plan that will maximize value for all constituents, and the Committee offers no factual basis for this Court to contemplate the failure of the Debtor's chapter 11 case. *See In re Fairfield Puerto Rico, Inc.*, 333 F. Supp. at 1191. Accordingly, this factor does not favor transfer of venue.

D. The Interest of Justice is Not Served By Transferring Venue

54. In determining whether a transfer would be "in the interest of justice," the court should consider "whether transfer of venue will promote the efficient administration of the estate, judicial economy, timeliness, and fairness." *Enron,* 274 B.R. at 387. These factors have generally been discussed above and support keeping this case in Delaware. Additional concerns that would speak to the "interest of justice" include facts such as the importance of a debtor to the welfare and economic stability of a jurisdiction, and are not present in this case. *See CORCO,* 596 F.2d at 1248 (even though the importance of the debtor, a major supplier of petroleum to Puerto Rico, to the welfare and economic stability of Puerto Rico implicated "interest of justice" considerations, the court determined not to transfer venue to Puerto Rico).

55. As noted above, venue is legally proper in this Court and the Debtor is entitled to substantial deference as to its choice of forum. But even if the Court considered the interests of justice and the convenience of the parties, there is no legitimate basis to transfer this case to the Texas Bankruptcy Court given the sophistication, complexity, and scope of the Debtors' business, domestic and foreign assets, and creditor constituents, and pendency of creditor actions in the Delaware Chancery Court and New York.

56. The Texas Bankruptcy Court is also the venue where the unaffiliated and adverse bankruptcy case of Acis has been pending. Acis has asserted fraudulent transfer and other disputed claims against the Debtor, which claims are all prepetition in nature. The Debtor, in turn, has contract claims against Acis totaling in excess of $8 million. The efficient administration of this estate, judicial economy, timeliness, and fairness would not be served by having the Texas Bankruptcy Court adjudicate these countervailing claims and interests. The interests of justice also would not be served by transferring venue in order for the Committee to realize a tactical litigation advantage before the Texas Bankruptcy Court.

57. For all these reasons, the Debtor urges this Court to maintain venue of this case in Delaware.

WHEREFORE, the Debtor respectfully requests that this Court enter an order denying the Motion to Transfer and granting such other and further relief as this Court deems appropriate.

Dated: November 12, 2019

PACHULSKI STANG ZIEHL & JONES LLP

/s/ James E. O'Neill

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Proposed Counsel for the Debtor and Debtor in Possession

Appendix Exhibit 9

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.	**Hearing Date: Nov. 19, 2019, at 12:00 p.m. (ET)** **Obj. Deadline: Nov. 12, 2019, at 4:00 p.m. (ET)**
	Docket Ref. No. 76

LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE MOTION OF THE DEBTOR FOR AN ORDER AUTHORIZING THE DEBTOR TO RETAIN, EMPLOYEE, AND COMPENSATE CERTAIN PROFESSIONALS UTILIZED BY THE DEBTORS IN THE ORDINARY COURSE OF BUSINESS

The official committee of unsecured creditors (the "Committee") of Highland Capital Management, L.P. (the "Debtor" or "Highland"), hereby submits this limited objection (this "Limited Objection") to the *Motion of the Debtor for an Order Authorizing the Debtor to Retain, Employ, and Compensate Certain Professionals Utilized by the Debtors in the Ordinary Course of Business* (the "Motion") [Docket No. 76].[2] In support of this Objection, the Committee respectfully states as follows:

INTRODUCTION

1. The Committee was formed two weeks ago, on October 29, 2019,[3] and is in the process of gathering information and familiarizing itself with the Debtor's opaque and complex

[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] All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

[3] On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief commencing this chapter 11 case, and the United States Trustee appointed the Committee nearly two weeks later on October 29, 2019 [Docket No. 65]. The Committee moved quickly following its appointment to bring in Sidley Austin LLP ("Sidley") as its proposed counsel on October 30, 2019 and FTI Consulting Inc. ("FTI") as its proposed

organizational structure, business operations, and assets under management. Importantly, the Committee has requested relevant information, but, as of yet has not been able to fully familiarize itself with the Debtor's business operations and web of contractual relationships. Without the benefit of an understanding of the Debtor's normal course of business, the Committee feels compelled to object to the Motion. The Committee's chief concern is the use of the Debtor's assets to benefit non-debtor entities without an expected corresponding reimbursement from the non-debtor entity.

2. The Committee is fully aware that, in normal course, the Debtor routinely pays the fees of Ordinary Course Professionals that provide services directly to Related Entities and the Debtor is ultimately reimbursed. The Committee also fully understands that the services provided to Related Entities by the Ordinary Course Professionals may be crucial for those entities, and may very well ultimately benefit the Debtor and the Debtor's estate. For these reasons, the Committee does not object to the retention of Ordinary Course Professionals *per se*. However, as detailed more fully in the Committees' Omnibus Objection filed contemporaneously herewith,[4] the Committee has serious concerns about the potential for value to be siphoned away from the Debtor, and believes that rigorous oversight of the Debtor's assets and operations and, in particular, its transactions with other entities that may be controlled by Mr. James Dondero, or individuals who may be acting in concert with him, is needed to ensure

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financial advisor on November 6, 2019. Sidley and FTI quickly engaged the Debtor's advisors to get up to speed on this chapter 11 case, but there has not yet been sufficient time for the Committee to even familiarize itself with the Debtor's prepetition transactions.

[4] Contemporaneously with the filing of this Objection, the Committee filed the *Omnibus Objection of the Official Committee of Unsecured Creditors to the Debtor's (I) Motion for Final Order Authorizing Continuance of the Existing Cash management System, (II) Motion to Employ and Retain Development Specialists, Inc. to Provide a Chief Restructuring Officer, and (III) Precautionary Motion for Approval of Protocols for "Ordinary Course" Transactions*.

that the rights of the Debtor's creditors are protected and the value of the Debtor's assets is maximized.

OBJECTION

3. The Committee is concerned with the lack of proposed disclosures regarding the services to be performed by Ordinary Course Professionals. Specifically, the Committee notes that the Declaration required by Ordinary Course Professionals attached as Exhibit C to the Motion does not explicitly require the Ordinary Course Professional to list the full names of each legal entity it is proposed to provide services to. The Committee requests that such requirement be added to the Declaration. The Committee also requests that the Declaration include a requirement that the Ordinary Course Professional state that it is not directly or indirectly owned or controlled by the Debtor, its principals, or any affiliate thereof.

4. The Committee is concerned with the ability of Related Entities to reimburse the Debtor. The Committee requests that Related Entities be required to deposit funds with the Debtor equivalent to the highest amount of costs incurred by such Related Entity within a single month in the prior year with respect to the Ordinary Course Professionals. The Committee also requests that the total annual fees paid to Ordinary Course Professionals not exceed $3,500,000 in the aggregate. The Committee also requests that the Debtor confirm that no amounts will be paid to an Ordinary Course Professional on account of any prepetition services provided, unless pursuant to another order of the Court.

5. Lastly, the Committee is concerned with the timely availability of information related to services provided by Ordinary Course Professionals. Specifically, the Committee notes that the proposed order approving the Motion requires the Debtors to file and serve a summary, quarterly, that describes, among other things, the total amounts paid to each Ordinary

Course Professional, such amounts allocable to Related Entities, and any amounts reimbursed by Related Entities. The Committee requests that these summaries be filed monthly, list the full names of each entity that the Ordinary Course Professional provided services to, and include projected total fees and expenses to be incurred by the Ordinary Course Professional and amounts budgeted to be reimbursed by Related Entities within the following month.

* * * * *

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WHEREFORE, the Committee respectfully requests that the Court sustain this Limited Objection, require the proposed language be included in any order confirming the Motion, and provide such other and any further relief as the Court may deem just and proper.

Date: November 12, 2019
Wilmington, Delaware

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Appendix Exhibit 10

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.	**Hearing Date: Nov. 19, 2019, at 12:00 p.m. (ET)** **Obj. Deadline: Nov. 12, 2019, at 4:00 p.m. (ET)**
	Docket Ref. Nos. 69 & 70

LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE DEBTOR'S APPLICATION FOR AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF FOLEY GARDERE, FOLEY & LARDNER LLP AND LYNN PINKER COX & HURST AS SPECIAL TEXAS COUNSEL AND SPECIAL TEXAS LITIGATION COUNSEL, *NUNC PRO TUNC* TO THE PETITION DATE

The official committee of unsecured creditors (the "Committee") of Highland Capital Management, L.P. (the "Debtor" or "Highland"), hereby submits this limited objection (this "Limited Objection") to the Debtors' applications, pursuant to Sections 327(e), 328(a), and 330 of the Bankruptcy Code, for entry of orders authorizing the retention and employment of Foley Gardere, Foley & Lardner LLP ("Foley") and Lynn Pinker Cox & Hurst LLP ("Lynn Pinker," and together with Foley, the "Proposed Special Counsel") as Special Texas Litigation Counsel and Special Texas Litigation Counsel, respectively, *nunc pro tunc* to the Petition Date (collectively, the "Applications") [Docket Nos. 69 & 70].[2] In support of this Objection, the Committee respectfully states as follows:

[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] Citations to "Foley Application" are to Docket No. 69 and citations to "Lynn Pinker Application" are to Docket No. 70. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Applications.

INTRODUCTION

1. Proposed Special Counsel have represented the both the Debtor and non-debtor defendants – including Mr. James Dondero, the founder of the Debtor – in various matters since 2016.[3] The Committee was formed two weeks ago, on October 29, 2019,[4] and is in the process of gathering information and familiarizing itself with the Debtor's opaque and complex organizational structure, business operations, and assets under management. Importantly, the Committee has requested relevant information, but as of yet has not been able to fully familiarize itself with the Debtor's web of contractual relationships and transaction histories with its many non-debtor affiliates.[5] Without the benefit of a full understanding of the Debtor's relationships and prepetition transactions with its affiliates, the Committee is unable to determine the appropriateness of Proposed Special Counsel representing both the Debtor and non-debtors in matters going forward, and whether it is appropriate for the costs of such non-debtor representation, especially in matters wholly unrelated to the Debtor, to be borne by the Debtor.[6]

2. The Committee recognizes that Proposed Special Counsel have developed knowledge and expertise from their pre-petition representation of the Debtor. The Committee

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[3] See Lynn Pinker Application Ex. A ¶ 3.

[4] On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief commencing this chapter 11 case, and the United States Trustee appointed the Committee nearly two weeks later on October 29, 2019 [Docket No. 65]. The Committee moved quickly following its appointment to bring in Sidley Austin LLP ("Sidley") as its proposed counsel on October 30, 2019 and FTI Consulting Inc. ("FTI") as its proposed financial advisor on November 6, 2019. Sidley and FTI quickly engaged the Debtor's advisors to get up to speed on this chapter 11 case, but there has not yet been sufficient time for the Committee to even familiarize itself with the Debtor's prepetition transactions.

[5] The Committee and its advisors intend to closely scrutinize all prepetition transactions involving the Debtor to determine whether any are avoidable and/or give rise to claims against affiliated entities.

[6] Relatedly, both the Foley Application and the Lynn Pinker Applications disclose large sums of unpaid fees and expenses that have been billed to the Debtor but remain unpaid as of the Petition Date. *See* Foley Application ¶ 16; Lynn Pinker Application ¶ 19. The Committee is uncertain whether such amounts should be borne by the Debtor and reserves the right to challenge such unsecured claims at the appropriate time.

therefore has no objection to the Proposed Special Counsel continuing to represent the Debtor in matters which provide a benefit to the Debtor's estate. The Committee does object, however, to any continuation of Proposed Special Counsels' joint representation of Debtor and non-debtor defendants without certainty of reimbursement for such fees and costs and with no justifying benefit to the Debtor's estate.

OBJECTION

3. The principal concern the Committee has with respect to the Applications is the lack of clear delineation of the Proposed Special Counsel's proposed engagements and representation, and the Debtor's obligation to pay for the same. For example, the Hurst Declaration discloses Lynn Pinker's representation of Mr. Dondero in the Texas Lawsuit,[7] and within the application itself describes the services to be provided by Lynn Pinker as "Subject to approval by the Bankruptcy Court, the services that the Debtor proposes that the Firm render, and the Firm has agreed to provide, include advising the Debtor in connection with all aspects of the Pending Acis Proceedings and the Texas Lawsuit, and performing the range of services normally associated with matters such as this as the Debtor's Special Texas Litigation Counsel, which the Firm is in a position to provide in connection with the matter referred to above."[8] It is unclear whether Lynn Pinker's proposed retention is limited to representing the Debtor, or includes representation of non-debtors, including Mr. Dondero. It is also unclear if Lynn Pinker will be limited to representing the Debtor (and others) in connection with the Acis Proceedings and the Texas Lawsuit, or if these are just two matters which have been mentioned in the Lynn

[7] *See* Lynn Pinker Application Ex. A ¶ 3.

[8] *See* Lynn Pinker Application ¶ 17

Pinker Application.[9] As the proposed order approving the Lynn Pinker Application merely approves the retention of Lynn Parker as Special Texas Litigation Counsel "pursuant to the terms set forth in the Application,"[10] the Committee is unsure which parties Lynn Pinker proposes to represent, and in what matters, and whether the Debtor has agreed to pay for such representations.

4. The Committee also notes that the Applications do not provide for an allocation of attorneys' fees and expenses among the Debtor and non-debtor defendants.[11] The Committee is concerned that the Debtor may be bearing the cost for representations of non-debtors without any justifiable benefit to the Debtor's estate, and without any regard for whether such representations may cause a conflict of interest. Courts have found that such arrangements where the Debtor pays all fees of non-debtor defendants without explicitly justifying such arrangement in the application are improper under Section 327(e). *See In re Perez*, 389 B.R. 180, 184 (Bankr. D. Colo. 2008) (denying application pursuant to Section 327(e) where bankruptcy estate alone was to pay attorneys' fees of special counsel representing debtor and non-debtor co-defendants in appeal of a state court judgment; that "arrangement *may* have been benign enough and 'all in the family' before the Debtor's bankruptcy was filed, but once the bankruptcy case was filed, things changed" and "Debtor became a fiduciary and others had a stake") (emphasis in original).

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[9] The Lynn Pinker Application also mentions representation of non-debtor related entity Charitable Donor Advised Fund, L.P. in an unrelated matter.

[10] *See* Lynn Pinker Application Ex. B ¶ 8.

[11] The absence of such an allocation is alone grounds to deny any fee request submitted by Proposed Special Counsel. *See In re B.E.S. Concrete Prods., Inc.*, 93 B.R. 228, 234 (Bankr. E.D. Cal. 1988) (finding proposed special counsel under Section 327(e) retained to represent debtors and non-debtors in lawsuit not entitled to recovery of fees because "[t]here [was] no allocation of the bill among the various clients" and "[s]ome services were rendered for the ultimate benefit of persons other than the debtor"). In the event this Court authorizes the retention of Proposed Special Counsel to represent Debtor and non-debtor defendants, the Committee reserves its right to contest fee applications for failure to properly allocate fees and expenses among clients.

5. Without greater clarity into the proposed representations included in the Applications, the Committee must request that the Court reject the Applications to the extent that they seek authorization for the Proposed Special Counsel to represent both the Debtor and non-debtor parties and, to the extent the Court is otherwise inclined to approve the Applications, the Court should require the non-debtor entities to deposit on a monthly basis the highest amount incurred in a single month in the prior 12 months to ensure the Debtor's estate will be reimbursed for the fees and costs incurred in connection with the representation of the non-debtor entities.

* * * * *

[Remainder of Page Intentionally Left Blank]

WHEREFORE, the Committee respectfully requests that the Court deny the relief requested in the Applications to the extent they seek authorization for the Proposed Special Counsel to represent both the Debtor and non-debtor parties and provide such other and any further relief as the Court may deem just and proper.

Date: November 12, 2019
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Jaclyn C. Weissgerber
Michael R. Nestor (No. 3526)
Edmon L. Morton (No. 3856)
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1000 North King Street
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-and-

SIDLEY AUSTIN LLP

Bojan Guzina, Esq. (*admitted pro hac vice*)
Matthew Clemente, Esq. (*admitted pro hac vice*)
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- and –

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Dallas, TX 74201
Telephone: (214) 981-3300

Proposed Counsel for the Official Committee of Unsecured Creditors

Appendix Exhibit 11

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

- -x

In the Matter of:

HIGHLAND CAPITAL MANAGEMENT, L.P., Case No.

Debtor. 19-12239(CSS)

- -x

United States Bankruptcy Court

824 North Market Street

Wilmington, Delaware

December 2, 2019

10:07 AM

B E F O R E:

HON. CHRISTOPHER S. SONTCHI

CHIEF U.S. BANKRUPTCY JUDGE

ECR OPERATOR: LESLIE MURIN

transactions and is in charge of the debtor's restructuring efforts, and that he has no prior relationship with either Acis or the Texas bankruptcy court with respect to this matter. He would testify that his goal in this case is to maximize the value of the debtor's estate for the benefit of all constituents, and he intends to evaluate all available strategic options for accomplishing the goal, and hopes to work constructively with the committee in that regard.

He believes that the outcome of this case will not turn on the day-to-day management of the debtor's assets but instead will be driven by the debtor's ability to restructure its balance sheet and maximize the value of its assets, many of which are liquid. He would testify that either he or Fred Caruso would provide substantially all the testimony that would be provided for the debtor in this case.

Lastly, he would testify that he's been on the job for over a month-and-a-half, that the debtor has been following the protocols set out in the motion for which approval is being sought today. He would testify the debtor's being transparent with the creditors' committee, has met with and communicated with FTI on many occasions, and shared a lot of information. And he would testify that there have been no allegations made by the committee or any other party, regarding any post-petition impropriety by the debtor.

That concludes my proffer of Mr. Sharp's testimony.

necessary in order for this -- if it's going to be a successful restructure, they're the ones that are necessary to make it a successful restructure. Thank you.

THE COURT: You're welcome.

All right, let's break for lunch until 1:45. And when I come back at 1:45 -- when we come back at 1:45, I am going to issue an oral decision on this motion. All right.

(Recess at 12:39 p.m. until 1:47 p.m.)

THE CLERK: All rise.

THE COURT: Please be seated.

Okay, good afternoon. Thank you for coming back. I'm now prepared to rule on the motion to transfer venue, which I'm going to grant.

So I think, as I hinted at during argument, that the case law that we're kind of clinging to on motions to transfer venue, really do not reflect the modern reality of Chapter 11 practice in the U.S. and internationally. And I think a lot of the parts of the test really don't reflect what's going on generally in Chapter 11 cases.

The thing I take greatest umbrage -- no, "umbrage" isn't the right word -- but disagree with the most is the idea that there's somehow a strong presumption of the debtor's choice of forum.

Look, every debtor that files bankruptcy -- certainly every sophisticated Chapter 11 debtor that files bankruptcy --

is engaged in forum-shopping. There is an element to that. Where you file will depend on a lot of things that are unique to the forum.

I don't think you need to be ashamed of that. I don't think that's bad. As long as the venue you're choosing is appropriate under the law, certainly you're going to make decisions based on what the law is in that particular district, perhaps even a preference to individual judges or judge in that district.

To compound that with a strong presumption in favor of the debtor is to really give a boost to the debtor's choice of forum, which is made -- included in the decision-making process is an element of forum-shopping, to a level that makes it very difficult to overcome that presumption.

Of course, the creditors that file a motion to transfer venue are engaged in forum-shopping themselves. Otherwise, why would they be switching forums and going for a different location. Again, I don't think that the word "forum-shopping" should have the negative connotation that it has come to have in the law. It is the reality of bankruptcy practice.

Now, if that's involved -- if that goes a step further and somehow involves chicanery or something inappropriate just from an ethical standpoint, of course that's problematic. But there's absolutely no indication here whatsoever that anyone, on behalf of the debtor or the creditors or the Dallas court or

the Delaware court, is doing anything other than acting appropriately.

The question about a motion to transfer venue is whether the motion should be granted by a preponderance of the evidence. If you add a strong presumption, you're turning it into a harder motion to be granted; and I don't think that's appropriate.

However, I find the laundry list of factors that are generally discussed to be irrelevant or almost irrelevant to the actual issues that are going on, particularly in a case like this. And I'll get to that in a second.

So six of the debtors are located in Texas; UBS is located in New York. UBS is located everywhere. Wells Fargo is located everywhere. Certainly companies have executive suites. But whether or not that should be the decision about where a case should file, to me, isn't particularly clear. It depends on the facts of the case.

I think a more general approach that would involve looking at the facts and circumstances of a case and seeing whether it points to a specific jurisdiction might be a more helpful way of proceeding. And that's what this case is really about.

This is a unique case, I think. It is a different case than those that we usually run into. And although maybe not completely different from every case, but in any event,

this case is very focused on responding to existing litigation. And that existing litigation of a former affiliate, as of a few months ago, and a pending appeal that could make it a current affiliate, is located in the Northern District of Texas.

The judge in the Northern District of Texas has done a tremendous amount of work and has done -- issued a number of opinions, had a number of trials. That work creates a familiarity with the facts, issues, and players in a case which, while it may not affect the actual decision based on evidence on a motion-by-motion basis, certainly could color a judge's approach to a case.

Judges are human. Judges make judgments over time as to the parties, as to the lawyers. That's not inappropriate, as long as you stick by the rules of evidence. But it certainly can color what credibility you might give to a witness or to counsel.

I think here we have a situation where the real gravitas of this case is in Dallas. The two facts that really come out to me are, in this case, the fact that the executive suite is very focused and very Dallas-oriented. It's a global empire, but it's clearly focused in Dallas. And the existing litigation in the Acis bankruptcy that's been going on for some time; those are the two predominant factors.

Everything else kind of falls away. The creditors are scattered. The assets are scattered. The economic

administration isn't being affected one way or the other. I mean, people can get on planes and you can go to Philly or you can go to Dallas. Either way, you're stuck on American Airlines. But so be it.

It can be done. And as a result, I think that the best solution here, to give the debtors a fair shot at reorganization, but to balance the creditors' rights and the creditors' desires, is to move the case to Texas.

And on that latter point, just to finish up. As I said with my previous decision in EFH, it was striking in that case that only one creditor moved to transfer venue and that none of the other creditors either actively opposed or simply stayed silent with regard to that motion, including significant creditors, like the official committee.

In this case, we have the opposite. We have the debtor defending its venue choice, of course. But there's a lot of silence, because there's no one else on that side. I thought it highly significant that Jefferies and -- is it Fortress?

UNIDENTIFIED SPEAKER: Frontier.

THE COURT: Frontier, thank you. That Jefferies and Frontier did not take a position. And no other creditors opposed the committee's motion. And the committee consists of a series of very large creditors.

So I think that given these facts and circumstances,

particularly the unique nature of the ongoing litigation and the existing tie to Dallas, the executive suite and management, principal place of business, if you will, being focused in Dallas, and creditors -- as Counsel said -- voting with their feet to move the case to Dallas, and applying just a good old fashioned preponderance of the evidence standard, that the Court should grant the motion, which I will do.

Now, I need an order. And we will get the machinery in place, as soon as I get the order signed, to transfer the file as quickly as possible.

I did call Judge Jernigan prior -- right before I came out -- well, right before I went and got lunch and then came out -- to inform her what I was going to do, so the Dallas court is aware that this is -- that this is an issue that's coming their way.

Is there anything -- I'm not going to create a lot of law of the case for Judge Jernigan on matters that don't need to be decided today. Is there anything the parties actually agree on that needs to go forward today or can go forward today? If not, I'd rather just save everything for Judge Jernigan to have a fresh look at. I know that she did mention that she has availability on her calendar over the next several weeks. So you should be able to get on it rather quickly, once the case gets transferred.

We used to send big boxes in the mail to do this, but

C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.

December 3, 2019

_____ _____

CLARA RUBIN DATE

eScribers, LLC
352 Seventh Avenue, Suite #604
New York, NY 10001
(973) 406-2250
operations@escribers.net

Appendix Exhibit 12

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

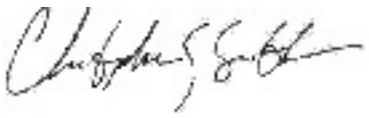
Upon the motion (the "Motion")[2] of the Committee requesting entry of an order (this "Order") transferring the venue of the above-captioned chapter 11 case to the United States Bankruptcy Court for the Northern District of Texas; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 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.



25658315.1

Dated: December 4th, 2019
Wilmington, Delaware

CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE

Appendix Exhibit 13

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**

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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.

[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:

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Dated: December 4th, 2019
Wilmington, Delaware

CHRISTOPHER S. SONTCHI
UNITED STATES BANKRUPTCY JUDGE

Appendix Exhibit 14

Fill in this information to identify the case:

Debtor name **Highland Capital Management, L.P.**

United States Bankruptcy Court for the: NORTHERN DISTRICT OF TEXAS

Case number (if known) **19-34054-SGJ**

☐ Check if this is an amended filing

Official Form 207

Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy

04/19

The debtor must answer every question. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and case number (if known).

Part 1: Income

1. **Gross revenue from business**

☐ None.

Identify the beginning and ending dates of the debtor's fiscal year, which may be a calendar year	**Sources of revenue** Check all that apply	**Gross revenue** (before deductions and exclusions)
From the beginning of the fiscal year to filing date: From **1/01/2019** to **Filing Date**	☑ Operating a business ☑ Other **Exhibit A**	**$28,431,156.97**
From the beginning of the fiscal year to filing date: From **1/01/2019** to **Filing Date**	☐ Operating a business ☑ Other **Exhibit A - Other Gain/(Loss)**	**$125,310,540.63**
For prior year: From **1/01/2018** to **12/31/2018**	☑ Operating a business ☑ Other **Exhibit A**	**$50,365,069.40**
For prior year: From **1/01/2018** to **12/31/2018**	☐ Operating a business ☑ Other **Exhibit A - Other Gain/(Loss)**	**$-52,929,268.33**
For year before that: From **1/01/2017** to **12/31/2017**	☑ Operating a business ☑ Other **Exhibit A**	**$67,911,079.00**
For year before that: From **1/01/2017** to **12/31/2017**	☐ Operating a business ☑ Other **Exhibit A - Other Gain/(Loss)**	**$47,701,590.21**

1934054191213000000000007

Debtor **Highland Capital Management, L.P.** Case number *(if known)* **19-34054-SGJ**

2. **Non-business revenue**
Include revenue regardless of whether that revenue is taxable. *Non-business income* may include interest, dividends, money collected from lawsuits, and royalties. List each source and the gross revenue for each separately. Do not include revenue listed in line 1.

☑ None.

Description of sources of revenue	Gross revenue from each source (before deductions and exclusions)

Part 2: List Certain Transfers Made Before Filing for Bankruptcy

3. **Certain payments or transfers to creditors within 90 days before filing this case**
List payments or transfers--including expense reimbursements--to any creditor, other than regular employee compensation, within 90 days before filing this case unless the aggregate value of all property transferred to that creditor is less than $6,825. (This amount may be adjusted on 4/01/22 and every 3 years after that with respect to cases filed on or after the date of adjustment.)

☐ None.

Creditor's Name and Address	Dates	Total amount of value	Reasons for payment or transfer *Check all that apply*
3.1. **Exhibit B**		**$23,255,006.86**	☐ Secured debt ☐ Unsecured loan repayments ☐ Suppliers or vendors ☐ Services ☐ Other__

4. **Payments or other transfers of property made within 1 year before filing this case that benefited any insider**
List payments or transfers, including expense reimbursements, made within 1 year before filing this case on debts owed to an insider or guaranteed or cosigned by an insider unless the aggregate value of all property transferred to or for the benefit of the insider is less than $6,825. (This amount may be adjusted on 4/01/22 and every 3 years after that with respect to cases filed on or after the date of adjustment.) Do not include any payments listed in line 3. *Insiders* include officers, directors, and anyone in control of a corporate debtor and their relatives; general partners of a partnership debtor and their relatives; affiliates of the debtor and insiders of such affiliates; and any managing agent of the debtor. 11 U.S.C. § 101(31).

☐ None.

Insider's name and address Relationship to debtor	Dates	Total amount of value	Reasons for payment or transfer
4.1. **Exhibit C**		**$36,608,252.91**	

5. **Repossessions, foreclosures, and returns**
List all property of the debtor that was obtained by a creditor within 1 year before filing this case, including property repossessed by a creditor, sold at a foreclosure sale, transferred by a deed in lieu of foreclosure, or returned to the seller. Do not include property listed in line 6.

☑ None

Creditor's name and address	Describe of the Property	Date	Value of property

6. **Setoffs**
List any creditor, including a bank or financial institution, that within 90 days before filing this case set off or otherwise took anything from an account of the debtor without permission or refused to make a payment at the debtor's direction from an account of the debtor because the debtor owed a debt.

☑ None

Creditor's name and address	Description of the action creditor took	Date action was taken	Amount

Part 3: Legal Actions or Assignments

7. **Legal actions, administrative proceedings, court actions, executions, attachments, or governmental audits**
List the legal actions, proceedings, investigations, arbitrations, mediations, and audits by federal or state agencies in which the debtor was involved in any capacity—within 1 year before filing this case.

☐ None.

	Case title Case number	Nature of case	Court or agency's name and address	Status of case
7.1.	**Exhibit D**			☐ Pending ☐ On appeal ☐ Concluded
7.2.	**Internal dispute resolution department within the IRS**	**IRS Appeal**	**Department of the Treasury 4050 Alpha Road Suite 517, MC: 8000NDAL Dallas, TX 75201-7849**	☐ Pending ☑ On appeal ☐ Concluded

8. Assignments and receivership
List any property in the hands of an assignee for the benefit of creditors during the 120 days before filing this case and any property in the hands of a receiver, custodian, or other court-appointed officer within 1 year before filing this case.

☑ None

Part 4: Certain Gifts and Charitable Contributions

9. **List all gifts or charitable contributions the debtor gave to a recipient within 2 years before filing this case unless the aggregate value of the gifts to that recipient is less than $1,000**

☐ None

	Recipient's name and address	Description of the gifts or contributions	Dates given	Value
9.1.	**Exhibit E** **Recipients relationship to debtor**	**Debtor does not track recipient of gift or contribution.**		**$445,725.61**

Part 5: Certain Losses

10. **All losses from fire, theft, or other casualty within 1 year before filing this case.**

☑ None

Description of the property lost and how the loss occurred	Amount of payments received for the loss If you have received payments to cover the loss, for example, from insurance, government compensation, or tort liability, list the total received. List unpaid claims on Official Form 106A/B *(Schedule A/B: Assets – Real and Personal Property)*.	Dates of loss	Value of property lost

Part 6: Certain Payments or Transfers

11. **Payments related to bankruptcy**
List any payments of money or other transfers of property made by the debtor or person acting on behalf of the debtor within 1 year before the filing of this case to another person or entity, including attorneys, that the debtor consulted about debt consolidation or restructuring, seeking bankruptcy relief, or filing a bankruptcy case.

☐ None.

Who was paid or who received the transfer? Address	If not money, describe any property transferred	Dates	Total amount or value

Debtor **Highland Capital Management, L.P.** Case number *(if known)* **19-34054-SGJ**

	Who was paid or who received the transfer? Address	If not money, describe any property transferred	Dates	Total amount or value
11.1.	**Development Specialists, Inc. 10 South LaSalle Suite 3300 Chicago, IL 60603** Email or website address: **dsiconsulting.com** Who made the payment, if not debtor?		**10/07/2019**	**$250,000.00**
11.2.	**Pachulski Stang Ziehl & Jones LLP 10100 Santa Monica Blvd. 13th Floor Los Angeles, CA 90067** Email or website address: **http://www.pszjlaw.com/** Who made the payment, if not debtor?		**10/02/2019**	**$500,000.00**
11.3.	**Kurtzman Carson Consultants LLC Dept CH 16639 Palatine, IL 60055** Email or website address: **https://www.kccllc.com/** Who made the payment, if not debtor?		**10/07/2019**	**$50,000.00**

12. **Self-settled trusts of which the debtor is a beneficiary**
List any payments or transfers of property made by the debtor or a person acting on behalf of the debtor within 10 years before the filing of this case to a self-settled trust or similar device.
Do not include transfers already listed on this statement.

☑ None.

Name of trust or device	Describe any property transferred	Dates transfers were made	Total amount or value

13. **Transfers not already listed on this statement**
List any transfers of money or other property by sale, trade, or any other means made by the debtor or a person acting on behalf of the debtor within 2 years before the filing of this case to another person, other than property transferred in the ordinary course of business or financial affairs. Include both outright transfers and transfers made as security. Do not include gifts or transfers previously listed on this statement.

☐ None.

Debtor **Highland Capital Management, L.P.** Case number *(if known)* **19-34054-SGJ**

	Who received transfer? Address	Description of property transferred or payments received or debts paid in exchange	Date transfer was made	Total amount or value
13.1.	**Highland Select Equity Fund, L.P.** **300 Crescent Ct.** **Dallas, TX 75201** **Relationship to debtor** **Fund managed by the debtor.**	**Transfer of 888,731 shares of public security in exchange for LP interest.**	**12/26/2018**	**$19,632,067.79**
13.2.	**Highland Select Equity Fund, L.P.** **300 Crescent Ct.** **Dallas, TX 75201** **Relationship to debtor** **Fund managed by the debtor**	**Transfer of 214,000 shares of public security in exchange for LP interest.**	**3/12/2018**	**$6,385,760.00**
13.3.	**Highland Select Equity Fund, L.P.** **300 Crescent Ct.** **Suite 700** **Dallas, TX 75201** **Relationship to debtor** **Fund managed by the debtor**	**Transfer of 250,000 shares of public security for LP interest**	**7/23/2019**	**$10,297,500.00**

Part 7: Previous Locations

14. **Previous addresses**
List all previous addresses used by the debtor within 3 years before filing this case and the dates the addresses were used.

☐ Does not apply

	Address	Dates of occupancy From-To
14.1.	**Parkway Bent Tree** **17130 Dallas Parkway** **Suite 230** **Dallas, TX 75248**	**10/16/2016 – 8/30/2018**
14.2.	**2200 Ross Avenue** **Suite 4700E** **Storage Site** **Dallas, TX 75201**	**10/16/2016 – 12/31/2018**

Part 8: Health Care Bankruptcies

15. **Health Care bankruptcies**
Is the debtor primarily engaged in offering services and facilities for:
- diagnosing or treating injury, deformity, or disease, or
- providing any surgical, psychiatric, drug treatment, or obstetric care?

☑ No. Go to Part 9.
☐ Yes. Fill in the information below.

Facility name and address	Nature of the business operation, including type of services the debtor provides	If debtor provides meals and housing, number of patients in debtor's care

Debtor **Highland Capital Management, L.P.** Case number *(if known)* **19-34054-SGJ**

Part 9: Personally Identifiable Information

16. **Does the debtor collect and retain personally identifiable information of customers?**

- ☐ No.
- ☑ Yes. State the nature of the information collected and retained.

Debtor has information including SS#, tax ID, mailing address, email address, and limited KYC for fund investors.

Does the debtor have a privacy policy about that information?

- ☐ No
- ☑ Yes

17. **Within 6 years before filing this case, have any employees of the debtor been participants in any ERISA, 401(k), 403(b), or other pension or profit-sharing plan made available by the debtor as an employee benefit?**

- ☐ No. Go to Part 10.
- ☑ Yes. Does the debtor serve as plan administrator?

☐ No Go to Part 10.
☑ Yes. Fill in below:

Name of plan	Employer identification number of the plan
Highland 401(K) Plan	EIN: **75-2716725**

Has the plan been terminated?

- ☑ No
- ☐ Yes

☐ No Go to Part 10.
☑ Yes. Fill in below:

Name of plan	Employer identification number of the plan
Highland Capital Management, L.P. Retirement Plan and Trust (Defined Benefit Plan)	EIN: **75-2716725**

Has the plan been terminated?

- ☑ No
- ☐ Yes

Part 10: Certain Financial Accounts, Safe Deposit Boxes, and Storage Units

18. **Closed financial accounts**
Within 1 year before filing this case, were any financial accounts or instruments held in the debtor's name, or for the debtor's benefit, closed, sold, moved, or transferred?
Include checking, savings, money market, or other financial accounts; certificates of deposit; and shares in banks, credit unions, brokerage houses, cooperatives, associations, and other financial institutions.

☑ None

Financial Institution name and Address	Last 4 digits of account number	Type of account or instrument	Date account was closed, sold, moved, or transferred	Last balance before closing or transfer

19. **Safe deposit boxes**
List any safe deposit box or other depository for securities, cash, or other valuables the debtor now has or did have within 1 year before filing this case.

☑ None

Depository institution name and address	Names of anyone with access to it Address	Description of the contents	Do you still have it?

20. **Off-premises storage**
List any property kept in storage units or warehouses within 1 year before filing this case. Do not include facilities that are in a part of a building in which the debtor does business.

☐ None

Facility name and address	Names of anyone with access to it	Description of the contents	Do you still have it?
Iron Mountain PO BOX 915004 Dallas, TX 75391	**Employee has login access to request documents.**	**Firm-wide documents sent off-site to retain documents per the firm's retention policy.**	☐ No ☑ Yes
Natural Disasters Site 900 Venture Dr. Allen, TX 75013	**Highland Capital Management IT Department**	**Primary Data Center - Storage**	☐ No ☑ Yes
Natural Disasters Site 3010 Waterview Parkway Richardson, TX 75080	**Highland Capital Management IT Department**	**Natural Disasters Site - Storage**	☐ No ☑ Yes

Part 11: Property the Debtor Holds or Controls That the Debtor Does Not Own

21. **Property held for another**
List any property that the debtor holds or controls that another entity owns. Include any property borrowed from, being stored for, or held in trust. Do not list leased or rented property.

☐ None

Owner's name and address	Location of the property	Describe the property	Value
James Dondero	**300 Crescent Court Suite 700 Dallas, TX 75201**	**Artwork**	**Unknown**

Part 12: Details About Environment Information

For the purpose of Part 12, the following definitions apply:
Environmental law means any statute or governmental regulation that concerns pollution, contamination, or hazardous material, regardless of the medium affected (air, land, water, or any other medium).

Site means any location, facility, or property, including disposal sites, that the debtor now owns, operates, or utilizes or that the debtor formerly owned, operated, or utilized.

Hazardous material means anything that an environmental law defines as hazardous or toxic, or describes as a pollutant, contaminant, or a similarly harmful substance.

Report all notices, releases, and proceedings known, regardless of when they occurred.

22. **Has the debtor been a party in any judicial or administrative proceeding under any environmental law? Include settlements and orders.**

☑ No.
☐ Yes. Provide details below.

Case title Case number	Court or agency name and address	Nature of the case	Status of case

23. **Has any governmental unit otherwise notified the debtor that the debtor may be liable or potentially liable under or in violation of an environmental law?**

☑ No.
☐ Yes. Provide details below.

Site name and address	Governmental unit name and address	Environmental law, if known	Date of notice

24. **Has the debtor notified any governmental unit of any release of hazardous material?**

Debtor **Highland Capital Management, L.P.** Case number *(if known)* **19-34054-SGJ**

☑ No.
☐ Yes. Provide details below.

Site name and address	Governmental unit name and address	Environmental law, if known	Date of notice

Part 13: Details About the Debtor's Business or Connections to Any Business

25. **Other businesses in which the debtor has or has had an interest**
List any business for which the debtor was an owner, partner, member, or otherwise a person in control within 6 years before filing this case. Include this information even if already listed in the Schedules.

☐ None

Business name address	Describe the nature of the business	Employer Identification number Do not include Social Security number or ITIN. Dates business existed
25.1. **Exhibit F**		**EIN:** **From-To**

26. **Books, records, and financial statements**
26a. List all accountants and bookkeepers who maintained the debtor's books and records within 2 years before filing this case.
☐ None

	Name and address	Date of service From-To
26a.1.	**Frank Waterhouse 300 Crescent Court Suite 700 Dallas, TX 75201**	**10/23/06 - Current**
26a.2.	**David Klos 300 Crescent Court Suite 700 Dallas, TX 75201**	**03/30/09 - Current**
26a.3.	**Kristin Hendrix 300 Crescent Court Suite 700 Dallas, TX 75201**	**12/16/04 - Current**
26a.4.	**Sean Fox 300 Crescent Court Suite 700 Dallas, TX 75201**	**06/25/13 - Current**
26a.5.	**Drew Wilson 300 Crescent Court Suite 700 Dallas, TX 75201**	**02/06/12 - 09/14/18**
26a.6.	**Hayley Eliason 300 Crescent Court Suite 700 Dallas, TX 75201**	**11/26/18 - Current**
26a.7.	**Blair Roeber 300 Crescent Court Suite 700 Dallas, TX 75201**	**09/01/15 - Current**

26b. List all firms or individuals who have audited, compiled, or reviewed debtor's books of account and records or prepared a financial statement within 2 years before filing this case.

☐ None

	Name and address	Date of service From-To
26b.1.	**PricewaterhouseCoopers LLP** **2121 N Pearl St** **Dallas, TX 75201**	**2003 - Current**

26c. List all firms or individuals who were in possession of the debtor's books of account and records when this case is filed.

☐ None

	Name and address	If any books of account and records are unavailable, explain why
26c.1.	**Boyd Gosserand** **300 Crescent Ct.** **St 700** **Dallas, TX 75201**	
26c.2.	**Deloitte - Tax** **PO Box 844736** **Dallas, TX 75284**	
26c.3.	**Centroid -Accounting Software Consultant** **6860 Dallas Pkwy Suite 560** **Dallas, TX 75204**	
26c.4.	**Oracle - Accounting Software** **PO Box 203448** **Dallas, TX 75320**	
26c.5.	**Wolters Kluwer - Tax** **PO Box 71882** **Chicago, IL 60694**	

26d. List all financial institutions, creditors, and other parties, including mercantile and trade agencies, to whom the debtor issued a financial statement within 2 years before filing this case.

☐ None

	Name and address
26d.1.	**AgeeFisherBarrett, LLC** **750 Hammond Dr BLDG 17** **Atlanta, GA 30328**
26d.2.	**Bowman Law LLC** **840 Tom Wheeler Lane** **Mc Ewen, TN 37101**
26d.3.	**CBIZ Valuation Group, Inc.** **3030 LBJ Freeway, Ste 1650** **Dallas, TX 75234**
26d.4.	**Cole Schotz** **Court Plaza North** **25 Main Street, PO Box 800** **Hackensack, NJ 07602**
26d.5.	**Colorado FSC** **188 Inverness Drive West** **Ste. 100** **Centennial, CO 80112**

	Name and address
26d.6.	**Concordeis** **1120 East Long Lake Road** **Ste 207** **Troy, MI 48085**
26d.7.	**Courtland T Group** **PO Box 11929** **Newport Beach, CA 92658**
26d.8.	**Crown Capital Securities** **725 Town & Country Rd** **Ste 530** **Orange, CA 92868**
26d.9.	**Deloitte Tax LLP** **PO Box 844736** **Dallas, TX 75284**
26d.10.	**DFPG Investments, Inc.** **9017 S. Riverside Dr.** **Ste 210** **Sandy, UT 84070**
26d.11.	**Discipline Advisors** **14135 G-100 Midway Rd.** **Dallas, TX 75244**
26d.12.	**Development Specialists, Inc.** **10 S. LaSalle St.** **Chicago, IL 60603**
26d.13.	**Emerson Equity** **155 Bovet Rd. #725** **San Mateo, CA 94402**
26d.14.	**Frontier Bank** **5100 S I-35 Service Rd.** **Oklahoma City, OK 73129**
26d.15.	**Grant Thornton LLP** **33570 Treasury Center** **Chicago, IL 60694**
26d.16.	**Great Southern Bank** **8201 Preston Road** **Suite 305** **Dallas, TX 75225**
26d.17.	**Key Bank** **ATTN: KREC Loan Services** **4910 Tiedman Road** **3rd Floor** **Cleveland, OH 44144**
26d.18.	**KPMG** **3 Chesnut Ridge Rd** **Montvale, NJ 07645**
26d.19.	**Maples & Calder** **Ugland House PO Box 309** **S. Church Street George Town** **Grand Cayman, Cayman Island**

Debtor **Highland Capital Management, L.P.** Case number *(if known)* **19-34054-SGJ**

	Name and address
26d.20.	**Payne and Smith** **5952 Royal Lane** **Suite 158** **Dallas, TX 75230**
26d.21.	**PWC** **PO Box 952282** **Dallas, TX 75395**
26d.22.	**Squire Patton Boggs** **PO Box 643051** **Cincinnati, OH 45264**
26d.23.	**WC Capital Partners**
26d.24.	**Western International Securities, Inc.** **70 S. Lake Ave** **Ste 700** **Pasadena, CA 91101**
26d.25.	**Jean Francois Lemay** **52 Harold Street** **Etobicoke M8Z 3R3**

27. **Inventories**
Have any inventories of the debtor's property been taken within 2 years before filing this case?

- [x] No
- [ ] Yes. Give the details about the two most recent inventories.

Name of the person who supervised the taking of the inventory	Date of inventory	The dollar amount and basis (cost, market, or other basis) of each inventory

28. **List the debtor's officers, directors, managing members, general partners, members in control, controlling shareholders, or other people in control of the debtor at the time of the filing of this case.**

Name	Address	Position and nature of any interest	% of interest, if any
Strand Advisors, Inc.	**300 Crescent Ct, Ste 700** **Dallas, TX 75201**	**General Partner**	**0.2508%**
Name	**Address**	**Position and nature of any interest**	**% of interest, if any**
The Dugaboy Investment Trust	**300 Crescent Ct, Ste 700** **Dallas, TX 75201**	**Voting Limited Partner**	**0.1866%**
Name	**Address**	**Position and nature of any interest**	**% of interest, if any**
Mark Okada	**300 Crescent Ct, Ste 700** **Dallas, TX 75201**	**Voting Limited Partner**	**0.0487%**
Name	**Address**	**Position and nature of any interest**	**% of interest, if any**
Mark and Pamela Okada Family Trust	**300 Crescent Ct, Ste 700** **Dallas, TX 75201**	**Voting Limited Partner**	**0.0098%**
Name	**Address**	**Position and nature of any interest**	**% of interest, if any**
Mark and Pamela Okada Family Trust - #2	**300 Crescent Ct, Ste 700** **Dallas, TX 75201**	**Voting Limited Partner**	**0.0042%**

Debtor **Highland Capital Management, L.P.** Case number *(if known)* **19-34054-SGJ**

Name	Address	Position and nature of any interest	% of interest, if any
Hunter Mountain Investment Trust	**1100 N Market St Wilmington, DE 19890**	**Non-voting Limited Partner**	**99.50%**

Name	Address	Position and nature of any interest	% of interest, if any
James Dondero	**300 Crescent Ct, Ste 700 Dallas, TX 75201**	**Sole Shareholder of General Partner**	**100%**

Name	Address	Position and nature of any interest	% of interest, if any
James Dondero	**300 Crescent Ct, Ste 700 Dallas, TX 75201**	**President of General Partner**	**100% of the General Partner**

Name	Address	Position and nature of any interest	% of interest, if any
Scott Ellington	**300 Crescent Ct, Ste 700 Dallas, TX 75201**	**Secretary of General Partner**	**0.00%**

Name	Address	Position and nature of any interest	% of interest, if any
Frank Waterhouse	**300 Crescent Ct, Ste 700 Dallas, TX 75201**	**Treasurer of General Partner**	**0.00%**

29. **Within 1 year before the filing of this case, did the debtor have officers, directors, managing members, general partners, members in control of the debtor, or shareholders in control of the debtor who no longer hold these positions?**

- [ ] No
- [x] Yes. Identify below.

Name	Address	Position and nature of any interest	Period during which position or interest was held
Mark Okada	**300 Crescent Ct, Ste 700 Dallas, TX 75201**	**Executive Vice President**	**Since inception to 9/30/2019**

Name	Address	Position and nature of any interest	Period during which position or interest was held
Trey Parker	**300 Crescent Ct, Ste 700 Dallas, TX 75201**	**Assistant Secretary**	**8/21/2015 - 4/15/2019**

30. **Payments, distributions, or withdrawals credited or given to insiders**
Within 1 year before filing this case, did the debtor provide an insider with value in any form, including salary, other compensation, draws, bonuses, loans, credits on loans, stock redemptions, and options exercised?

- [ ] No
- [x] Yes. Identify below.

	Name and address of recipient	Amount of money or description and value of property	Dates	Reason for providing the value
30.1.	**Exhibit G**	**8,722,414.86**		

Relationship to debtor

31. **Within 6 years before filing this case, has the debtor been a member of any consolidated group for tax purposes?**

Debtor **Highland Capital Management, L.P.** Case number *(if known)* **19-34054-SGJ**

☑ No
☐ Yes. Identify below.

Name of the parent corporation | **Employer Identification number of the parent corporation**

32. **Within 6 years before filing this case, has the debtor as an employer been responsible for contributing to a pension fund?**

☑ No
☐ Yes. Identify below.

Name of the pension fund | **Employer Identification number of the parent corporation**

Part 14: Signature and Declaration

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

I have examined the information in this *Statement of Financial Affairs* and any attachments and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **December 13, 2019**

Signature of individual signing on behalf of the debtor

Bradley Sharp
Printed name

Position or relationship to debtor Chief Restructuring Officer

Are additional pages to *Statement of Financial Affairs for Non-Individuals Filing for Bankruptcy* (Official Form 207) attached?

☐ No
☑ Yes

Highland Capital Management LP
Case # 19-34054-SGJ
Exhibit A - SOFA 1

Revenue Account	Year 2019 [1]	Year 2018	Year 2017
Operating Revenue			
Management fees	$ 18,776,701.38	$ 35,264,426.88	$ 37,098,010.50
Shared services fees	6,002,769.24	9,187,200.55	9,445,221.98
Incentive fees	150,925.36	18,465.92	10,042,499.76
Interest and Investment Income	2,625,221.26	4,857,157.03	4,478,946.34
Miscellaneous Income	875,539.73	1,037,819.02	6,846,400.42
Total Operating Revenue	**$ 28,431,156.97**	**$ 50,365,069.40**	**$ 67,911,079.00**
Other Gain/(Loss)			
Interest income	$ 5,765,215.32	$ 7,503,164.74	$ 7,049,038.53
Other income/expense	838,191.46	658,514.02	3,723,833.60
Net realized gains on sales of investment transactions	3,959,534.93	13,396,884.40	6,494,555.20
Net change in unrealized gains/(losses) of investments	(6,692,741.56)	(56,529,224.39)	27,322,977.50
Net earnings/(losses) from equity method investees	121,440,340.48	(17,958,607.10)	3,111,185.38
Total Other Gain/(Loss)	**$ 125,310,540.63**	**$ (52,929,268.33)**	**$ 47,701,590.21**

[1] Date ranges from 12/31/2018 to end of business 10/15/2019.

Appendix Exhibit 15

United States Department of Justice
Office of the United States Trustee
1100 Commerce Street
Dallas, Texas 75242
(214) 767-1080

Lisa L. Lambert,
For the United States Trustee

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

IN RE:	§	
	§	
HIGHLAND CAPITAL	§	**Case No. 19-34054-SGJ**
MANAGEMENT, L.P.	§	
	§	
Debtors-in-Possession.	§	**(Chapter 11)**

UNITED STATES TRUSTEE'S MOTION FOR AN ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE

A hearing will be held on January 21, 2020. The objection and response deadlines will be governed by the Scheduling Order, ECF No. 269. The Court orally denied the U.S. Trustee's request to have this motion considered in connection with any Governance Motion. See Scheduling Order, ECF. No. 269 and transcript.

TO THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

The United States Trustee for Region 6 moves for an order directing the appointment of a Chapter 11 Trustee based on cause and the best interests of the creditors. 11 U.S.C. § 1104(a).

The United States Trustee would show:

Overview

Documented management concerns mandate a trustee in this case. This Court has recognized that Highland's management concerns involve a culture that surpasses the officers and board. Steps such as replacing the board or having a chief restructuring officer who reports to the Court rather do not fix Highland's problems.

Prior efforts to use external oversight to curtail Highland management's self-dealing have failed. As the Acis case demonstrated, the Highland Capital cases have many inter-connected relationships. A trustee can nimbly evaluate whether the inter-company transactions are in the best interests of the estate and creditors. In the Acis case, the trustee concluded other options were either superior, cheaper, or less-conflicted. A board is farther from the impact of the related-entity transactions and the culture of the debtor. It meets periodically. Here, the inter-connected relationships include the Debtor's bank as well as other legal entities.

The remedy Congress defined for these facts is a trustee. The Court should direct the appointment of a trustee.

Jurisdiction, Power, and Standing

1. The Court has subject matter jurisdiction under 28 U.S.C. § 1334, 28 U.S.C. § 157(a)(1), and the standing order of reference. Appointing a trustee or examiner impacts the case administration and therefore is a core matter that the Court has the power to resolve. 28 U.S.C. § 157(b)(2)(A).

2. The United States Trustee has standing to seek appointment of a trustee or examiner. 11 U.S.C. §§ 307, 1104.

Facts

The Acis case involved findings of fraud, self-dealing, and mismanagement by this debtor:

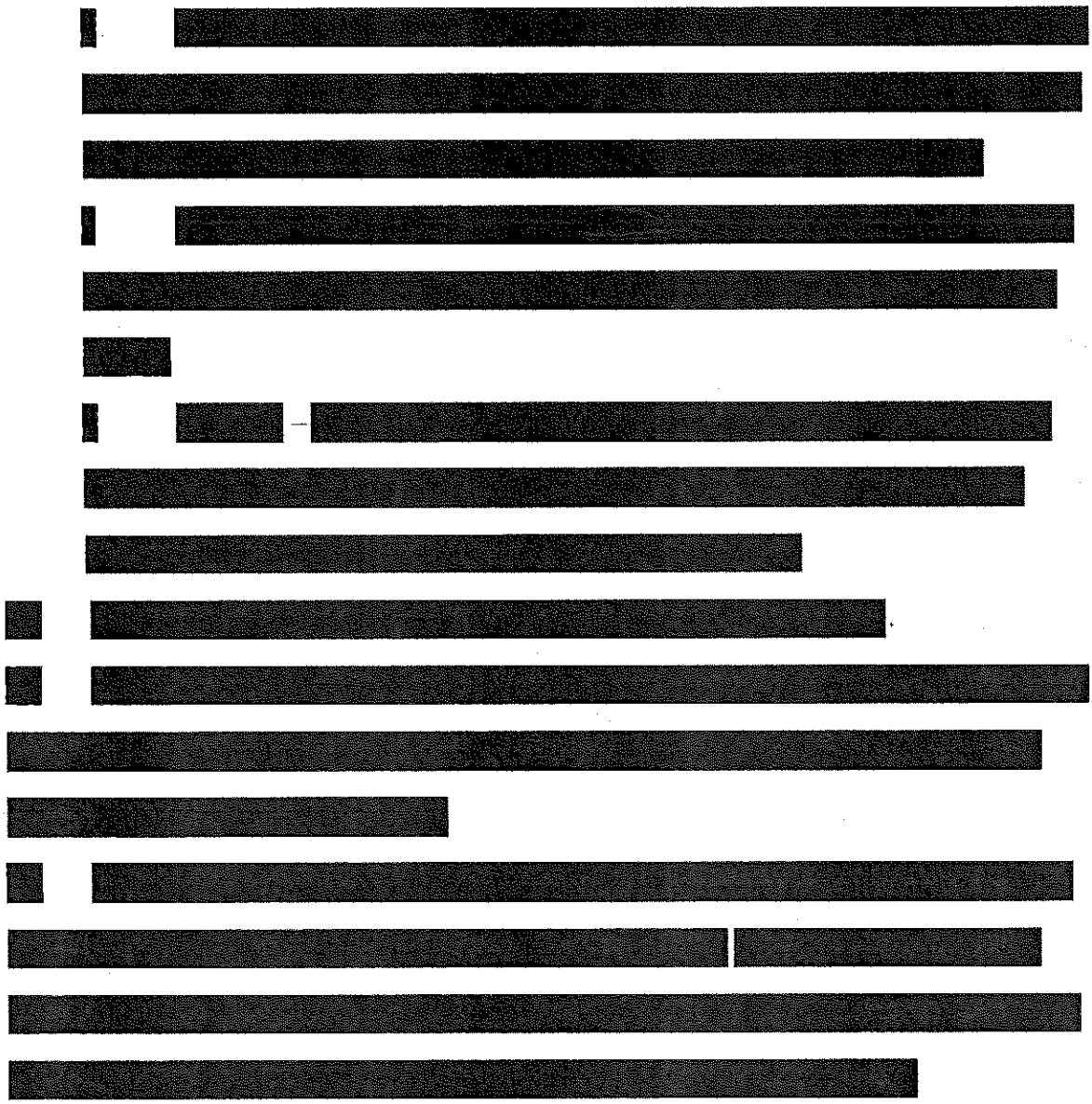
3. This Court presided over the Acis bankruptcy case, case number 18-30264. In *Acis*, the Court catalogued the decision-making authority as belonging to James Dondero, as president; Mark K. Akada, chief investment officer with a decreasing role; Frank Waterhouse, as treasurer; and –by delegation of authority – Highland in-house counsel Scott Levington and Isaac Leventon. With the exception of Mark K. Akada, the same individuals have decision-making authority for the debtor-in-possession. *In re Acis Capital Mgmt., Inc.*, 584 B.R. 115, 119, 131. The Court found the Acis witnesses' testimony "of questionable reliability and, oftentimes, there seemed to be an effort to convey plausible deniability." *Acis*, 584 B.R. at 131.

4. "[S]ince the arbitration award [in favor of Terry, the petitioning creditor], there has been a calculated effort (largely by Highland) to effectively liquidate the Alleged [Acis] Debtors." *Acis*, 584 B.R. at 148. The Court found the Alleged Debtors were "really out to protect –Highland and Highland-affiliates" in contravention of their fiduciary duties of loyalty. *Acis*, 584 B.R. at 149.

5. In addition to finding breaches of fiduciary duty when Highland promoted its self-interests over those of Acis creditors, the Court found "evidence of both intentional and constructive fraudulent transfers." *In re Acis Capital Mgmt., L.P.*, 2019 WL 417149, at *11 (confirmation opinion also referencing "actual intent to hinder, delay, or defraud").

6. After the Court directed the appointment of the Acis chapter 11 trustee, the chapter 11 trustee found service providers unrelated to Highland entities. These providers were cheaper and decreased conflicts.

The following section is redacted to honor the interim sealing order. The United States Trustee has simultaneously filed an objection to the motion to seal.



Prior Efforts to Cabin Highland Capital Management's Self-Dealing and Other Willful and Intentional Acts Have Failed.

14. Highland has been found to engage in self-dealing and other misconduct for years. The prior efforts to remediate and change the culture have failed.

15. In 2014, the SEC determined that Highland had historically engaged in multiple transactions in its client advisory accounts without disclosing that Highland was acting as principal or obtaining client consent before the trades were completed. The SEC required

Highland to retain an outside compliance consultant and to implement that consultant's recommendations.

16. [redacted]

17. Cumulatively, the findings of this Court and other tribunals establish that the problems exist in the management culture at Highland. These problems go beyond the officers and directors.

18. The general partner of Highland is controlled by Dondero.

19. Moreover, the integrated nature of the board for Highland-related entities allows for the possibility that individuals removed from the board and from management may still monitor the financial transactions and use their relationships with the Highland's employees to direct outcomes. For example, Highland proposes to bank, in part, with NexBank. The NexBank website reflects that Dondero chairs the board and Okada is a director. Similarly, Highland Management, the debtor, has intercompany transactions with Highland Capital Management Korea Limited, Highland Capital Management Latin America, L.P., and Highland Capital Management (Singapore) Pte Ltd.

Legal Analysis and Argument

20. The United States Trustee is charged with monitoring the federal bankruptcy system. *See* 28 U.S.C. § 586(a)(3); *see also United States Trustee v. Columbia Gas Sys., Inc.* (*In re Columbia Gas Sys., Inc.*) 33 F.3d 294, 295-96 (3d Cir. 1994).

21. Before confirmation, the Court "shall order the appointment of a trustee . . . for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, *either* before *or* after the commencement of the case, or similar

cause." 11 U.S.C. §1104(a)(1) (emphasis added). In addition, by adding appointment of a trustee as a remedy in section 1112, "cause" also may be factors traditionally resulting in dismissal or conversion. 11 U.S.C. §1112(b)(1). Here, an additional factor is "bad faith." Alternatively, the Court must appoint a trustee "if such appointment is in the interest of the creditors, any equity security holders, and other interests of the estate." 11 U.S.C. § 1104(a)(2).

22. The Fifth Circuit has indicated that the burden of proof for the appointment of a trustee is "clear and convincing" evidence, but the Court later adopted the dissent's opinion. *Cajun Elec. Co. v. Louisiana Elec. Co. (In re Cajun Electric Power Co-Op, Inc.)*, 69 F.3d 746, *on reh'g*, 74 F.3d 599 (5th Cir. 1996) (adopting dissent).[1]

23. The duties of a trustee are defined in section 1106, and the Court has the ability to tailor some of them. 11 U.S.C. § 1106(a).

24. The "cause" to appoint an examiner or a trustee may be a reason other than the enumerated factors. *Oklahoma Ref. Co. v. Blaik (In re Oklahoma Ref. Co.)*, 838 F.2d 1133, 1136 (10th Cir. 1988); *cf. Little Creek Dev. Corp. v. Commonwealth Mortg. Corp. (In re Little Creek Dev. Corp.)*, 779 F.2d 1068, 1072 (5th Cir. 1986) (defining "cause" in context of dismissal statute).

25. For example, courts have appointed trustees or examiners when the debtor's insiders have conflicts of interest arising from the sale of the Debtor's assets. In *Cajun Electric*, the Fifth Circuit affirmed the appointment of a trustee, in part, because the co-operative members

[1] In *Grogan v. Garner*, the United States Supreme Court held that the burden of proof for dischargeability fraud actions was preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991). In reaching this holding, the Supreme Court cataloged both bankruptcy and non-bankruptcy fraud statutes and held that Congress generally imposed a preponderance standard for fraud in civil proceedings.

were interested in purchasing part or all of Cajun Electric's assets. *Cajun Elec. Power Cooperative, Inc. v. Central Louisiana Elec. Co., Inc. (In re Cajun Elec. Power Cooperative, Inc.)*, 69 F.3d 746, 751 (5th Cir. 1995) (Garza, J., dissenting), *adopted as majority opinion on reh'g*, 74 F.3d 599 (5th Cir. 1996). The Fifth Circuit held that "a trustee may be the only effective way to pursue reorganization" when the management has cross-purposes. *Cajun Elec.*, 69 F.2d at 751.

Cause exists to appoint a chapter 11 trustee:

26. Here, both express statutory standards and the common law case standards for "cause" exist. Specifically, "fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor" and bad faith exist under the facts of this case.[2]

27. The record regarding a series of self-dealing categories reflects both incompetence and gross mismanagement. *SEC Judgment, pp. 5-7.*

28. Other "cause" exists to appoint a trustee because tribunals have historically found the management's testimony unreliable and the Debtor's actions as reflecting willfulness and intent. This Court has found that the Debtor's management had fraudulent intent when it removed assets from Acis.

It is in the best interests of creditors to appoint a chapter 11 trustee.

29. Appointment of chapter 11 trustee is also in the interests of creditors, equity security holders, and other interests of the estate. The Court should direct the appointment of a chapter 11 trustee to serve the "interests of creditors, any equity security holders, and other interests of the estate." 11 U.S.C. §1104(a)(2).

[2] "The United States trustee shall move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive officer . . . participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting." 11 U.S.C. §1104(e).

30. First, it is in the best interest of the creditors to have an independent trustee to assume control over the estate in order to evaluate any alter ego claims, avoidance actions, and other tort claims.

31. Second, it is in the best interest of the creditors and other parties-in-interest to have accurate financial information. Accurate financial information ensures parties understand the facts of the case and avoids post-petition liabilities for violations. Like the information provided to investors in securities filings, the information provided in a bankruptcy case depends on affirmative disclosure.

32. Other efforts to check or monitor the Debtor's management have failed. The Acis trustee's actions reflect a need to be able to bid competing services and replace related-entities when conflicts of interest or cost concerns arise.

33. Congress has defined the remedy for the facts of this case. "The court shall order the appointment of a trustee." 11 U.S.C. § 1104(a).

Conclusion

For the foregoing reasons, the United States Trustee requests the Court to

a order the United States Trustee to appoint a Chapter 11 Trustee; or

b grant to the United States Trustee such other and further relief as is just and proper.

Dated: December 23, 2019

Respectfully Submitted,
WILLIAM T. NEARY
UNITED STATES TRUSTEE

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Certificate of Service

I certify that on December 23, 2019, I sent copies of the foregoing document on to the attached service lists by first class United States mail and by ECF notification to those listed below.

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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]	§	Case No. 19-34054-sgj11
Debtor.	§	

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

The above-captioned debtor and debtor in possession (the "Debtor") files this motion (the "Motion") for the entry of an order (the "Order") approving the terms of a settlement

[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.

between the Debtor and the Committee (as defined below) regarding governance of the Debtor and procedures for operations in the ordinary course of business, as embodied in the term sheet attached hereto as **Exhibit A** (the "Term Sheet"). In support of this Motion, the Debtor respectfully represents as follows:

Preliminary Statement

1. Following weeks of negotiations, the Debtor and the Committee have reached a proposed settlement, which contemplates the creation of a new independent board of directors (the "Independent Directors") at Strand Advisors, Inc. ("Strand"), the Debtor's general partner and ultimate party in control, and the implementation of certain protocols governing the operation of the Debtor's business in the ordinary course. The Independent Directors will consist of the following three highly qualified and independent individuals: James Seery, John Dubel, and a third director to be selected by or otherwise acceptable to the Committee.[2] Two of the Independent Directors were chosen by the Committee and the third Independent Director will be selected by or otherwise acceptable to the Committee. Background information for each of the Independent Directors is attached hereto as **Exhibit B**.

2. Pursuant to the Term Sheet, and effective upon entry of the Order, James Dondero will no longer be a director, officer, managing member, or employee of the Debtor or Strand and will have no authority, directly or indirectly, to act on the Debtor's behalf. Going forward, the Independent Directors, through Strand, will have sole and exclusive management and control of the Debtor. The Independent Directors will have the discretion to appoint an interim

[2] The Committee's agreement to the Term Sheet in its entirety is contingent upon the selection of a third Independent Director acceptable to the Committee. In the event the Committee and the Debtor cannot reach an agreement on an acceptable Independent Director to fill the third seat of the Board of Directors, the Term Sheet shall be null and void.

Chief Executive Officer (the "CEO") who will manage the Debtor's day-to-day business operations. Subject to Court approval, the Debtor still intends to retain Development Specialists, Inc. ("DSI") to provide a Chief Restructuring Officer (the "CRO") that will serve at the direction of the Independent Directors (or CEO, if appointed).

3. It bears emphasis that the Independent Directors will not be mere figureheads. The Debtor and the Committee envision that the Independent Directors will be actively involved and intimately familiar with all material aspects of the Debtor's business and restructuring efforts. Moreover, with guidance of the CRO and CEO (if appointed), the Independent Directors will endeavor to prevent any negative influence Mr. Dondero or any of his affiliates or agents may have on the Debtor and its employees. Further, as part of the Term Sheet, the Committee will be granted standing to pursue estate claims against Mr. Dondero and other former insiders of the Debtor who were not employed by the Debtor as of the execution of the Term Sheet. The Committee will also retain the right to move for a chapter 11 trustee.

4. In sum, the Term Sheet resolves months of litigation between the Debtor and the Committee over the Debtor's governance structure and operating protocols, allowing all parties to refocus on a path forward for this chapter 11 case. With the Independent Directors in place, the Debtor can move forward expeditiously, efficiently, and effectively with the substantive aspects of this case and consider any available restructuring options that will maximize value for all constituents. The Debtor therefore urges the Court to approve the Term Sheet and allow the key economic interest holders to proceed with a productive restructuring effort.

Jurisdiction and Venue

5. The United States Bankruptcy Court for the District of Northern District of Texas, Dallas Division (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

6. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

7. The statutory bases for the relief requested herein are sections 105(a) and 363 of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

Background

8. 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").

9. To assist and coordinate the restructuring process, the Debtor retained DSI and Bradley D. Sharp to serve as the CRO on October 7, 2019. On October 29, 2019, the Debtor filed the *Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) to Employ and Retain Development Specialists, Inc. to Provide a Chief Restructuring Officer, Additional Personnel, and Financial Advisory and Restructuring Related Services, Nunc Pro Tunc as of the Petition Date* [Docket No. 74] (the "CRO Motion") seeking to formally retain the CRO. The CRO Motion remains pending, and the Debtor is filing a supplement to the CRO Motion concurrently herewith.

10. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in the Delaware Court. On November 12, 2019, the Committee filed an omnibus objection to the CRO Motion, cash management motion, and

motion for approval of ordinary course protocols [Docket No. 130] (the "Committee Objection"), raising various concerns regarding the Debtor's governance and business practices.

11. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's bankruptcy case to this Court [Docket No. 186].[3] 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.

12. On December 23, 2019, the U.S. Trustee filed a motion in this Court to appoint a chapter 11 trustee for the Debtor [Docket No. 271] (the "Trustee Motion"). Although the Debtor will be filing a separate response to the Trustee Motion, it suffices to say that the Trustee Motion (filed without even considering the proposed Term Sheet) completely lacks merit given the governance changes and other resolutions encompassed in the Term Sheet agreed to by the Committee, as the representative of the primary economic stakeholders here.

Terms of the Proposed Settlement

13. Pursuant to the Term Sheet, the Debtor and the Committee have agreed to: (a) implement certain changes to the Debtor's governance, including the appointment of the Independent Directors; (b) provide the Committee with additional transparency into the operation of the Debtor's business; (c) retain the CRO on updated terms; and (d) implement certain protocols governing the ordinary course business operations of the Debtor. The terms of this agreement are contained in the Term Sheet.[4] A summary of the Term Sheet is as follows:

[3] All docket numbers refer to the docket maintained by this Court.

[4] In the event of any inconsistency between the summary of the Term Sheet contained herein and the Term Sheet, the Term Sheet will govern.

Independent Directors

The Debtor's general partner, Strand will appoint the following three (3) Independent Directors: James Seery, John Dubel, and a third director to be selected by or otherwise acceptable to the Committee. The Independent Directors will be granted exclusive control over the Debtor and its operations. Among other things, the Independent Directors shall conduct a review of all current employees as soon as practicable following the Independent Directors' appointment, determine whether and which employees should be subject to a key employee retention plan and/or key employee incentive plan and, if applicable, propose plan(s) covering such employees. The appointment and powers of the Independent Directors and the corporate governance structure shall be pursuant to the documents attached to the Term Sheet (the "Governing Documents"), which documents shall be satisfactory to the Committee. Once appointed, the Independent Directors (i) cannot be removed without the Committee's written consent or Order of the Court, and (ii) may be removed and replaced at the Committee's direction upon approval of the Court (subject in all respects to the right of any party in interest, including the Debtor and the Independent Directors, to object to such removal and replacement).

The Independent Directors shall be compensated in a manner to be determined, with an understanding that the source of funding, whether directly or via reimbursement, will be the Debtor.

As soon as practicable after their appointments, the Independent Directors shall, in consultation with the Committee, determine whether a CEO should be appointed for the Debtor. If the Independent Directors determine that appointment of a CEO is appropriate, the Independent Directors shall appoint a CEO acceptable to the Committee as soon as practicable, which may be one of the Independent Directors. Once appointed, the CEO cannot be removed without the Committee's written consent or Order of the Court.

The Committee shall have regular, direct access to the Independent Directors, provided, however that (1) if the communications include FTI Consulting Inc. ("FTI"), Development Specialists Inc. ("DSI") shall also

	participate in such communications; and (2) if the communications include counsel, then either Debtor's counsel or, if retained, counsel to the Independent Directors shall also participate in such communications.
Role of Mr. James Dondero	Upon approval of the Term Sheet by the Bankruptcy Court, Mr. Dondero will (1) resign from his position as a Board of Director of Strand Advisors, Inc., (2) resign as an officer of Strand Advisors, Inc., and (3) resign as an employee of the Debtor.
CRO	Bradley Sharp and DSI shall, subject to approval of the Court, be retained as the CRO to the Debtor and report to and be directed by the Independent Directors and, if and once appointed, the CEO. Mr. Sharp's and DSI's retention is subject to this Court's approval. The Debtor has filed the CRO Motion, as supplemented as of the date hereof, which requests authority to retain Mr. Sharp and DSI.[5] DSI and all other Debtor professionals shall serve at the direction of the CEO, if any, and the Independent Directors.
Estate Claims	The Committee is granted standing to pursue any and all estate claims and causes of action against Mr. Dondero, Mr. Mark Okada, other insiders of the Debtor, and each of the Related Entities, including any promissory notes held by any of the foregoing (collectively, the "Estate Claims"); provided, however, that the term Estate Claims will not include any estate claim or cause of action against any then-current employee of the Debtor.
Document Management, Preservation, and Production	The Debtor shall be subject to and comply with the document management, preservation, and production requirements attached to the Term Sheet, which requirements cannot be modified without the consent of the Committee or Court order (the "Document Production Protocol"). Solely with respect to the investigation and pursuit of Estate Claims, the document production protocol will acknowledge that the Committee will have access to the privileged documents and communications that are

[5] For the avoidance of doubt, the Debtor is not seeking retention of the CRO pursuant to this Motion. The Debtor is seeking such relief pursuant to the CRO Motion (as supplemented).

	within the Debtor's possession, custody, or control ("Shared Privilege"). With respect to determining if any particular document is subject to the Shared Privilege, the following process shall be followed: (i) the Committee will request documents from the Debtor, (ii) the Debtor shall log all documents requested but withheld on the basis of privilege, (iii) the Debtor shall not withhold documents it understands to be subject to the Shared Privilege; (iv) the Committee will identify each additional document on the log that the Committee believes is subject to the Shared Privilege, and (v) a special master or other third party neutral agreed to by the Committee and the Debtor shall make a determination if such documents are subject to the Shared Privilege. The Committee further agrees that the production of any particular document by the Debtor under this process will not be used as a basis for a claim of subject matter waiver.
Reporting Requirements	The Debtor shall be subject to and comply with the reporting requirements attached to the Term Sheet, which reporting requirements cannot be modified without the consent of the Committee or Court order (the "Reporting Requirements").
Plan Exclusivity	The Independent Directors may elect to waive the Debtor's exclusive right to file a plan under section 1121 of the Bankruptcy Code.
Operating Protocols	The Debtor shall comply with the operating protocols attached to the Term Sheet, regarding the Debtor's operation in the ordinary course of business, which protocols cannot be modified without the consent of the Committee or Court order (the "Operating Protocols" and, together with the Reporting Requirements, the "Protocols").

14. By this Motion, the Debtor is seeking the Court's approval of the Term Sheet, the terms contained therein, and the exhibits attached thereto. For the avoidance of doubt, approval of the Term Sheet includes the approval of the following:

- Independent Directors: The appointment of James Seery, John Dubel, and a third director to be selected by or otherwise acceptable to the Committee as the Independent Directors of Strand, the Debtor's general partner, with power to oversee the operations of the Debtor as set forth in the Term Sheet. Mr. Seery and Mr. Dubel were selected by the Committee, and the Debtor agreed to their appointment as Independent Directors. The Debtor is also seeking approval of the Governing Documents appointing the Independent Directors, to the extent required, and the authority to compensate the Independent Directors either directly from the assets of the Debtor or via the reimbursement of Strand of any compensation paid to the Independent Directors.

- Document Management and Preservation: The implementation of the Document Production Protocol, which will govern how the Debtor retains and produces documents and information to the Committee during the pendency of its bankruptcy case. The Debtor is also agreeing to the allow the Committee to access certain documents that are otherwise subject to the Shared Privilege to assist the Debtor in investigating the Estate Claims.

- Estate Claims. The Debtor has agreed to grant the Committee standing to pursue any Estate Claims. Estate Claims do not include claims or causes of action against any current employees of the Debtor; however, if any employee ceases to be employed by the Debtor, the Committee will have standing to pursue claims against such former employee.

- Reporting Requirements and Operating Protocols: The Debtor has agreed to provide certain reporting to the Committee and to operate under certain protocols, which set forth the parameters of how the Debtor can conduct its business without the requirement of Court approval. The Protocols provide, in certain circumstances, how the CRO and the Independent Directors will oversee the Debtor's operations. The purpose of the Protocols is to allow the Debtor to function in the ordinary course of its business while providing transparency to the Committee.

15. The Debtor believes that appointing the Independent Directors and otherwise effectuating the terms of the Term Sheet is in the best interests of the Debtor, its estate, and its creditors. The Term Sheet will allow the Debtor to proceed with a productive reorganization effort that will maximize value for all constituents. Accordingly, the Debtor seeks approval of the Term Sheet.

Relief Requested

16. By this Motion, the Debtor seeks entry of an order pursuant to sections 105(a), 363(b)(1), and 363(c)(1) of the Bankruptcy Code and Bankruptcy Rule 9019: (a) approving the Debtor's settlement with the Committee as set forth in the Term Sheet and outlined herein; (b)

authorizing the Debtor to take any action as may be reasonably required to effectuate the terms of the Term Sheet, including entering into the Governing Documents and compensating – either directly or through reimbursement – the Independent Directors; (c) granting the Committee standing to pursue the Estate Claims; and (d) granting related relief.

Authority for the Relief Requested

A. Section 363(c)(1) of the Bankruptcy Code Authorizes the Debtor to Enter Into Certain Aspects of the Term Sheet in the Ordinary Course

17. Because the Debtor is not settling any claims or causes of action through the Term Sheet or otherwise expending estate resources, the Debtor believes that it has the authority to effectuate the majority of the transactions and compromises set forth in the Term Sheet without Court approval under section 363(c)(1) of the Bankruptcy Code. Specifically, section 363(c)(1) provides:

> [i]f the business of the debtor is authorized to be operated under section. . . 1108. . . of this title. . . the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1). As such, a debtor may engage in postpetition actions if the debtor is authorized to operate its business under section 1108 and such transactions are "in the ordinary course of business."

18. An activity is "ordinary course" if it satisfies both the "horizontal test" and the "vertical test." *See, e.g., Denton Cty. Elec. Coop. v. Eldorado Ranch, Ltd.* (*In re Denton Cty. Elec. Coop.*), 281 B.R. 876, 882 n.12 (Bankr. N.D. Tex. 2002); *see also In re Roth American, Inc.*, 975 F.2d 949, 952 (3d Cir. 1992). The vertical test looks to "whether the transaction subjects a

hypothetical creditor to a different economic risk than existed when the creditor originally extended credit." *In re Patriot Place, Ltd.*, 486 B.R. 773, 793 (Bankr. W.D. Tex. 2013). The horizontal test considers "whether the transaction was of the sort commonly undertaken by companies in the industry." *Id.* Here, both the vertical test and horizontal test are satisfied.

19. Under the Term Sheet, the Debtor is seeking authority to (a) appoint the Independent Directors at Strand (a non-debtor entity), (b) have Mr. Dondero removed from his role at the Debtor and Strand; (c) agree to seek the retention of the CRO under a revised engagement letter that provides that the CRO will report to the Independent Directors; (d) grant the Committee standing to pursue the Estate Claims; (e) enter into and implement the Document Production Protocols; (f) grant the Independent Directors the exclusive right to determine whether to waive exclusivity; and (g) enter into and implement the Protocols. Only the compensation of the Independent Directors, the entrance into the Protocols (which provide the Committee with certain right to object to the Debtor engaging in a "Transaction" (as defined in the Protocols) and allow the Debtor to seek a hearing before this Court on an expedited basis), and the grant of standing to the Committee to pursue Estate Claims could be construed as outside of the ordinary course of business. The balance of the terms of the Term Sheet either involve non-debtors[6] or will be the subject of separate motions seeking Court approval at the appropriate time.

B. The Court Should Approve the Term Sheet Under Rule 9019 of the Bankruptcy Code

20. Although the Debtor believes that it has authority to implement the majority of the Term Sheet in the ordinary course of its business under section 363(c), the Debtor is seeking

[6] With respect to the Independent Directors, they are being appointed to a new independent board of Strand, the Debtor's general partner, and Strand is not a debtor in this case or subject to this Court's jurisdiction.

this Court's approval of the Term Sheet under section 105 of the Bankruptcy Code and Rule 9019 of the Bankruptcy Rules out of an abundance of caution. Section 105(a) of the Bankruptcy Code provides in relevant part that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 105(a) has been interpreted to expressly empower bankruptcy courts with broad equitable powers to "craft flexible remedies that, while not expressly authorized by the Code, effect the result the Code was designed to obtain." *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568 (3d Cir. 2003) (en banc); *see also Southmark Corp. v. Grosz* (*In re Southmark Corp.*), 49 F.3d 1111, 1116 (5th Cir. 1995) (stating that section 105(a) of the Bankruptcy Code "authorizes bankruptcy courts to fashion such orders as are necessary to further the substantive provisions of the Code").

21. Bankruptcy Rule 9019 governs the procedural prerequisites to approval of a settlement, providing that:

> On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a).

22. Settlements in bankruptcy are favored as a means of minimizing litigation, expediting the administration of the bankruptcy estate, and providing for the efficient resolution of bankruptcy cases. *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *see also Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980). Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may, after appropriate notice and a hearing, approve

a compromise or settlement so long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, "approval of a compromise is within the sound discretion of the bankruptcy court." *See United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Jackson Brewing*, 624 F.2d at 602–03.

23. In making this determination, the United States Court of Appeals for the Fifth Circuit applies a three-party test, "with a focus on comparing 'the terms of the compromise with the rewards of litigation.'" *Official Committee of Unsecured Creditors v. Cajun Elec. Power Coop. by & through Mabey (In re Cajun Elec. Power Coop.)*, 119 F. 3d 349, 356 (5th Cir. 1997) (citing *Jackson Brewing*, 624 F.2d at 602). The Fifth Circuit has instructed courts to consider the following factors: "(1) The probability of success in the litigation, with due consideration for the uncertainty of law and fact, (2) The complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and (3) All other factors bearing on the wisdom of the compromise." *Id.*

24. Under the rubric of the third factor referenced above, the Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. First, the court should consider "the paramount interest of creditors with proper deference to their reasonable views." *Id.; Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995). Second, the court should consider the "extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." *Age Ref. Inc.*, 801 F.3d at 540; Foster Mortg. Corp., 68 F.3d at 918 (citations omitted).

25. Here, the Debtor submits that effectuating the transactions set forth in the Term Sheet satisfies the Fifth Circuit's three-part test. The settlement embodied in the Term Sheet was driven in large part by the Debtor's creditors and has the support of the Committee, which consists of the Debtor's principal creditors. The Term Sheet was negotiated at arm's length, and there was no fraud or collusion in its negotiation. The settlement is also fair and reasonable and in the best interests of the Debtor's estate and also resolves the open disputes regarding the CRO Motion, the *Motion of Debtor for Interim and Final Orders Authorizing (A) Continuance of Existing Cash Management System, (B) Continued Use of the Prime Account, (C) Limited Waiver*, as supplemented [Docket Nos. 51 & 259], and *Precautionary Motion of the Debtor for Order Approving Protocols for the Debtor to Implement Certain Transactions in the Ordinary Course of Business* [Docket No. 76].

26. The Debtor and members of the Committee have been entangled in highly contentious litigation that has spanned many years and multiple venues. As evidenced by the brief history of the Debtor's bankruptcy case,[7] that contention and mistrust has carried over into this proceeding and could derail any chance that the Debtor has to successfully reorganize and structure a plan to pay its creditors. The governance and operational changes set forth in the Term Sheet, will provide greater transparency to the Committee and start the process of rebuilding the trust necessary to negotiate a successful resolution of this case. Without the Term Sheet, the Debtor

[7] *See, e.g., Declaration of Frank Waterhouse in Support of First Day Motions* [Docket No. 11], *Motion of the Official Committee of Unsecured Creditors for an Order Transferring Venue of this Case to the United States Bankruptcy Court for the Northern District of Texas* [Docket No. 85], *Omnibus Objection of the Official Committee of Unsecured Creditors to the Debtor's (I) Motion for Final Order Authorizing Continuance of the Existing Cash Management System, (II) Motion to Employ and Retain Development Specialists, Inc. to Provide a Chief Restructuring Officers, and (III) Precautionary Motion for Approval of Protocol for "Ordinary Course" Transactions* [Docket No. 130], and *United States Trustee's Motion for an Order Directing the Appointment of a Chapter 11 Trustee* [Docket No. 271].

anticipates that the Committee would move to appoint a chapter 11 trustee and the U.S. Trustee has already done so (without even seeing the Term Sheet). The Debtor will contest such motions because the appointment of a chapter 11 trustee could gravely harm the Debtor's business. The implementation of the Term Sheet will head off any potential issues that could arise, eliminate costly, time consuming and uncertain litigation, and give the Debtor sufficient breathing room to work towards rebuilding trust with its creditor body and allow the Debtor to exit bankruptcy and preserve the value of its business. The Debtor's bankruptcy case has been pending for over two and a half months, and it is time for the parties to put the acrimony that marked the initial stages of this case behind them and to move forward in a productive manner – precisely what the Term Sheet seeks to accomplish.

C. Consummating the Settlement Agreement is a Sound Exercise of the Debtors' Business Judgment.

27. Section 363(b)(1) of the Bankruptcy Code authorizes a debtor in possession to "use, sell, or lease, other than in the ordinary course of business, property of the estate," after notice and a hearing. It is well established in this jurisdiction that a debtor may use property of the estate outside the ordinary course of business under this provision if there is a good business reason for doing so. *See, e.g., ASARCO, Inc. v. Elliott Mgmt. (In re ASARCO, L.L.C.)*, 650 F.3d 593, 601 (5th Cir. 2011) ("[F]or the debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors, and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business.") (*quoting In re Cont'l Air Lines, Inc.*, 780 F.3d 1223, 1226 (5th Cir. 1986)); 441 B.R. 813, 830 (Bankr. S.D. Tex.

2010); *GBL Holding Co., Inc. v. Blackburn/Travis/Cole, Ltd. (In re State Park Bldg. Grp., Ltd.)*, 331 B.R. 251, 254 (Bankr. N.D. Tex. 2005).

28. The transactions contemplated by the Term Sheet are within the sound business judgment of the Debtor. The Term Sheet resolves potentially costly and protracted litigation with the Committee over the Debtor's corporate governance and will give the Debtor the breathing room necessary to negotiate and effectuate the terms of a plan acceptable to the Debtor's creditors. Further, providing standing to the Committee to investigate Estate Claims and the payment of the Independent Directors from the assets of the estate are each necessary components of the Term Sheet. The Committee would not have agreed to the Term Sheet without the grant of standing to investigate Estate Claims. Moreover, Strand, a non-debtor, is unable to cover the costs of the Independent Directors. As such, there is a good business reason for the Debtor's payment of the Independent Directors' compensation: the Term Sheet and the appointment of the Independent Directors would not have been agreed to or possible without that condition.[8] The foregoing is sufficient grounds to approve the Term Sheet and authorize the Debtor to effectuate the terms of the Term Sheet under Section 363(b)(1).

No Prior Request

29. No previous request for the relief sought herein has been made to this, or any other, Court.

[8] Further, although the Debtor seeks to reimburse Strand for the cost of the Independent Directors, the Debtor is otherwise obligated to reimburse Strand for any costs or expenses incurred by Strand in its management of the Debtor. *See* Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P., § 3.10(b).

Notice

30. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) the Office of the United States Trustee; (b) the Office of the United States Attorney for the Northern District of Texas; (c) the Debtor's principal secured parties; (d) counsel to the Committee; and (e) parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, for the reasons set forth herein, the Debtor respectfully requests that the Court enter an Order, substantially in the form attached hereto as **Exhibit C**, (a) approving the Debtor's settlement with the Committee as set forth in the Term Sheet and outlined herein; (b) authorizing the Debtor to take any action as may be reasonably required to effectuate the terms of the Term Sheet, including entering into the Governing Documents and compensating – either directly or through reimbursement – the Independent Directors; and (c) granting related relief.

Dated: December 27, 2019

PACHULSKI STANG ZIEHL & JONES LLP
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(*admitted pro hac vice*)
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Counsel and Proposed Counsel for the Debtor and Debtor in Possession

Highland Capital Management, L.P.

Preliminary Term Sheet

This term sheet ("Term Sheet") outlines the principal terms of a proposed settlement between Highland Capital Management, L.P. (the "Debtor") and the Official Committee of Unsecured Creditors (the "Committee") in the chapter 11 case captioned In re Highland Capital Mgm't, L.P, Case No. 19-34054 (SGJ) (the "Chapter 11 Case"), pending in the Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court"), to resolve a good faith dispute between the parties related to the Debtor's corporate governance, and specifically, the Committee's various objections to certain relief being sought by the Debtors in the Chapter 11 Case [Del. Docket No. 125]. *This Term Sheet shall be subject to approval by the Bankruptcy Court.*

Topic	Proposed Terms
Parties	Highland Capital Management, L.P. (the "Debtor"). The Official Committee of Unsecured Creditors of Highland Capital Management, L.P. (the "Committee").
Independent Directors	The Debtor's general partner, Strand Advisors, Inc., will appoint the following three (3) independent directors (the "Independent Directors"): James Seery, John Dubel, and a third director to be selected by or otherwise acceptable to the Committee. The Independent Directors will be granted exclusive control over the Debtor and its operations. Among other things, the Independent Directors shall conduct a review of all current employees as soon as practicable following the Independent Directors' appointment, determine whether and which employees should be subject to a key employee retention plan and/or key employee incentive plan and, if applicable, propose plan(s) covering such employees. The appointment and powers of the Independent Directors and the corporate governance structure shall be pursuant to the documents attached hereto as **Exhibit A**, which documents shall be satisfactory to the Committee. Once appointed, the Independent Directors (i) cannot be removed without the Committee's written consent or Order of the Court, and (ii) may be removed and replaced at the Committee's direction upon approval of the Court (subject in all respects to the right of any party in interest, including the Debtor and the Independent Directors, to object to such removal and replacement). The Independent Directors shall be compensated in a manner to be determined with an understanding that the

	source of funding, whether directly or via reimbursement, will be the Debtor. As soon as practicable after their appointments, the Independent Directors shall, in consultation with the Committee, determine whether an interim Chief Executive Officer (the "CEO") should be appointed for the Debtor. If the Independent Directors determine that appointment of a CEO is appropriate, the Independent Directors shall appoint a CEO acceptable to the Committee as soon as practicable, which may be one of the Independent Directors. Once appointed, the CEO cannot be removed without the Committee's written consent or Order of the Court. The Committee shall have regular, direct access to the Independent Directors, provided, however that (1) if the communications include FTI Consulting Inc. ("FTI"), Development Specialists Inc. ("DSI") shall also participate in such communications; and (2) if the communications include counsel, then either Debtor's counsel or, if retained, counsel to the Independent Directors shall also participate in such communications.
Role of Mr. James Dondero	Upon approval of this Term Sheet by the Bankruptcy Court, Mr. Dondero will (1) resign from his position as a Board of Director of Strand Advisors, Inc., (2) resign as an officer of Strand Advisors, Inc., and (3) resign as an employee of the Debtor.
CRO	DSI shall, subject to approval of the Bankruptcy Court, be retained as chief restructuring officer ("CRO") to the Debtor and report to and be directed by the Independent Directors and, if and once appointed, the CEO. The retention and scope of duties of DSI shall be pursuant to the Further Amended Retention Agreement, attached hereto as **Exhibit B**. DSI and all other Debtor professionals shall serve at the direction of the CEO, if any, and the Independent Directors.
Estate Claims	The Committee is granted standing to pursue any and all estate claims and causes of action against Mr. Dondero, Mr. Okada, other insiders of the Debtor, and each of the Related Entities, including any promissory notes held by any of the foregoing (collectively, the "Estate Claims"); provided, however, that the term Estate Claims will not

	include any estate claim or cause of action against any then-current employee of the Debtor.
Document Management, Preservation, and Production	The Debtor shall be subject to and comply with the document management, preservation, and production requirements attached hereto as **Exhibit C**, which requirements cannot be modified without the consent of the Committee or Court order (the "Document Production Protocol"). Solely with respect to the investigation and pursuit of Estate Claims, the document production protocol will acknowledge that the Committee will have access to the privileged documents and communications that are within the Debtor's possession, custody, or control ("Shared Privilege"). With respect to determining if any particular document is subject to the Shared Privilege, the following process shall be followed: (i) the Committee will request documents from the Debtor, (ii) the Debtor shall log all documents requested but withheld on the basis of privilege, (iii) the Debtor shall not withhold documents it understands to be subject to the Shared Privilege; (iv) the Committee will identify each additional document on the log that the Committee believes is subject to the Shared Privilege, and (v) a special master or other third party neutral agreed to by the Committee and the Debtor shall make a determination if such documents are subject to the Shared Privilege. The Committee further agrees that the production of any particular document by the Debtor under this process will not be used as a basis for a claim of subject matter waiver.
Reporting Requirements	The Debtor shall be subject to and comply with the reporting requirements attached hereto as **Exhibit D**, which reporting requirements cannot be modified without the consent of the Committee or Court order (the "Reporting Requirements").
Plan Exclusivity	The Independent Directors may elect to waive the Debtor's exclusive right to file a plan under section 1121 of the Bankruptcy Code.
Operating Protocols	The Debtor shall comply with the operating protocols set forth in **Exhibit D** hereto, regarding the Debtor's operation in the ordinary course of business, which protocols cannot be modified without the consent of the Committee or Court order.

Reservation of Rights	This agreement is without prejudice to the Committee's rights to, among other things, seek the appointment of a trustee or examiner at a later date. Nothing herein shall constitute or be construed as a waiver of any right of the Debtor or any other party in interest to contest the appointment of a trustee or examiner, and all such rights are expressly reserved.

Exhibit A

Debtor's Corporate Governance Documents

Exhibit B

Amended DSI Retention Letter

Exhibit C

Document Production Protocol

PSZJ Revisions 12/23/19
Privileged & Confidential
Subject to FRE 408

Exhibit D

Reporting Requirements

WRITTEN CONSENT OF SOLE STOCKHOLDER AND DIRECTOR

OF

STRAND ADVISORS, INC.

[_____]

Pursuant to the provisions of the General Corporation Law of the State of Delaware (the "DGCL") and consistent with the provisions of the Certificate of Incorporation (the "Certificate") and Bylaws (the "Bylaws") of Strand Advisors, Inc., a Delaware corporation (the "Company"), the undersigned, being the holder of all of the issued and outstanding shares of common stock, par value $0.01 per share, of the Company and the sole director of the Company (the "Stockholder"), acting by written consent without a meeting pursuant to Section 228 of the DGCL and Article IV, Section 6, and Article XII of the Bylaws, does hereby consent to the adoption of the following resolutions and to the taking of the actions contemplated thereby, in each case with the same force and effect as if presented to and adopted at a meeting of the stockholders:

I. AMENDMENT OF BYLAWS

WHEREAS, it is acknowledged that the Board of Directors of the Company (the "Board") has heretofore been fixed at one (1) and that the Board currently consists of James Dondero;

WHEREAS, pursuant to Article XII of the Bylaws, the Stockholder wishes to amend the Bylaws in the manner set forth on **Appendix A** hereto (the "Bylaws Amendment") to increase the size of the Board from one (1) to three (3) directors; and

NOW, THEREFORE, BE IT RESOLVED, that the Bylaws Amendment is hereby authorized and approved and the Board is increased from one (1) to three (3) directors;

RESOLVED FURTHER, that any officer of the Company is authorized to take any such actions as may be required to effectuate the Bylaws Amendment; and

RESOLVED FURTHER, that any action taken by any officer of the Company on or prior to the date hereof to effectuate such Bylaws Amendment is hereby authorized and affirmed.

II. ELECTION OF DIRECTORS

WHEREAS, the Stockholder desires to appoint James Seery, John Dubel, and _____ to the Board and desires that such individuals constitute the whole Board;

NOW, THEREFORE, BE IT RESOLVED, that James Seery, John Dubel, and _____, having consented to act as such, be, and each of them hereby is, appointed as a director, to serve as a director of the Company and to hold such office until such director's respective successor shall have been duly elected or appointed and shall qualify, or until such director's death, resignation or removal;

RESOLVED FURTHER, that any officer of the Company is authorized to take any such actions as

may be required to effectuate the appointment of the foregoing directors, including executing an indemnification agreement in favor of such directors in substantially the form attached hereto as **Appendix B** (each, an "Indemnification Agreement");

RESOLVED FURTHER, that any action taken by any officer of the Company on or prior to the date hereof to effectuate the appointment of such directors, including the execution of an Indemnification Agreement, is hereby authorized and affirmed.

RESOLVED FURTHER, that James Dondero and any other directors of the Company are hereby removed as directors of the Company;

RESOLVED FURTHER, that the directors appointed pursuant to these resolutions shall, pursuant to the terms of the Bylaws, appoint a Chairman of the Board.

III. STIPULATION WITH THE BANKRUPTCY COURT

WHEREAS, on October 16, 2019, Highland Capital Management, L.P. ("HCMLP") filed for chapter 11 bankruptcy protection in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Bankruptcy Case");

WHEREAS, the Company is the general partner for HCMLP;

WHEREAS, the Bankruptcy Case was transferred to the Bankruptcy Court for the Northern District of Texas, Case No. 19-34054-sgj11 (the "Texas Court") by order of the Bankruptcy Court for the District of Delaware on December 4, 2019;

WHEREAS, the Company and the Stockholder wish to enter into a stipulation with HCMLP and the Official Unsecured Creditors Committee appointed in the Bankruptcy Case (the "Committee"), such stipulation to be approved by the Texas Court, whereby the Stockholder will agree (a) not to transfer or assign his shares in the Company or exercise the voting power of such shares to remove any member of the Board appointed pursuant to these resolutions or further change the authorized number of directors from three (3) directors; (b) to exercise the voting power of his shares so as to cause each member of the Board appointed by this resolutions to be re-elected at upon the expiration of his or her term; and (c) upon the death, disability, or resignation of _____, will exercise the voting power of such shares so as to cause the resulting vacancy to be filled by a successor that is both independent and acceptable to the Stockholder and the Committee (the "Stipulation");

WHEREAS, for purposes of the Stipulation, "independent" would exclude the Stockholder, any affiliate of the Stockholder, and any member of management of the Company; and

WHEREAS, it is in the intent of the parties that the Stipulation will no longer be effective or bind Strand or the Stockholder following the termination of the Bankruptcy Case.

NOW, THEREFORE, BE IT RESOLVED, that the Company is authorized to take such actions as may be necessary to enter into and effectuate the Stipulation in the manner and on the terms set forth above, including, but not limited to, further amending the Certificate, Bylaws, or any other corporate governance documents; and

RESOLVED FURTHER, that Scott Ellington, as an officer of the Company, is authorized to take any such actions as may be required to enter into and effectuate the Stipulation in the manner set forth herein; and

RESOLVED FURTHER, that any action taken by Scott Ellington or any other officer of the Company on or prior to the date hereof to effectuate such Stipulation is hereby authorized and affirmed.

[Signature pages follow.]

IN WITNESS WHEREOF, the undersigned has executed this Written Consent as of the respective date and year first appearing above.

STOCKHOLDER:

_____
James Dondero

[Signature Page to Written Consent of Sole Stockholder of Strand Advisors, Inc.]

First Amendment to Bylaws of
Strand Advisors, Inc.

Strand Advisors, Inc. (the "Company"), a corporation organized and existing under and by virtue of the General Corporation Law of the State of Delaware, does hereby certify that the Company's sole stockholder, acting by written consent without a meeting, resolved to amend the Company's Bylaws (the "Bylaws") as follows:

1. Article III, Section 2, of the Bylaws is hereby deleted in its entirety and replaced with the following:

> Section 2. Number of Directors. The number of directors which shall constitute the whole Board shall be three (3).

2. The following shall be added as Section 6 to Article III of the Bylaws:

> Section 6. Director Qualifications. Each director appointed to serve on the Board shall (A) (i) be an independent director, (ii) not be affiliated with the corporation's stockholders, and (iii) not be an officer of the corporation; and (B) have been (x) nominated by the stockholders, (y) a retired bankruptcy judge and nominated jointly by the stockholders and any official committee of unsecured creditors in the chapter 11 bankruptcy of Highland Capital Management, L.P. (the "Committee") currently pending in the Bankruptcy Court for the Northern District of Texas (the "Court"), Case No. 19-34054-sgj11; or (z) nominated by the Committee and reasonably acceptable to the stockholders.

3. The following shall be added as Section 7 to Article III of the Bylaws:

> Section 7. Removal of Directors. Once appointed, the Independent Directors (i) cannot be removed without the Committee's written consent or Order of the Court, and (ii) may be removed and replaced at the Committee's direction upon approval of the Court (subject in all respects to the right of any party in interest, including the Debtor and the Independent Directors, to object to such removal and replacement).

Except as expressly amended hereby, the terms of the Company's Bylaws shall remain in full force and effect.

[Signature Page Follows]

IN WITNESS WHEREOF, the Company has caused this amendment to be signed this [__] day of [__], 20__.

STRAND ADVISORS, INC.

_____
By: Scott Ellington
Its: Secretary

INSERT STRAND ADVISORS, INC. LETTERHEAD

[_____]

[NAME]
[ADDRESS]
[ADDRESS]
[ADDRESS]

Re: Strand Advisors, Inc. – Director Agreement

Dear [_____]:

On behalf of Strand Advisors, Inc. (the "Company"), I am pleased to have you join the Company's Board of Directors. This letter sets forth the terms of the Director Agreement (the "Agreement") that the Company is offering to you.

1. APPOINTMENT TO THE BOARD OF DIRECTORS.

a. Title, Term and Responsibilities.

i. Subject to terms set forth herein, the Company agrees to appoint you to serve as a Director on the Company's Board of Directors (the "Board"), and you hereby accept such appointment the date you sign this Agreement (the "Effective Date"). You will serve as a Director of the Board from the Effective Date until you voluntarily resign, are removed from the Board, or are not re-elected (the "Term"). Your rights, duties and obligations as a Director shall be governed by the Certificate of Incorporation and Bylaws of the Company, each as amended from time to time (collectively, the "Governing Documents"), except that where the Governing Documents conflict with this Agreement, this Agreement shall control.

ii. You acknowledge and understand that the Company is the general partner of Highland Capital Management, L.P. ("HCMLP") and that HCMLP is currently the debtor in possession in a chapter 11 bankruptcy proceeding pending in the Northern District of Texas (the "Bankruptcy"). Your rights, duties, and obligations may in certain instances require your involvement, either directly or indirectly, in the Bankruptcy and such rights, duties, and obligations may be impacted in whole or in part by the Bankruptcy.

b. Mandatory Board Meeting Attendance. As a Director, you agree to apply all reasonable efforts to attend each regular meeting of the Board and no fewer than fifty percent (50%) of these meetings of the Board in person, and no more than fifty percent (50%) of such meetings by telephone or teleconference. You also agree to devote sufficient time to matters that may arise at the Company from time to time that require your attention as a Director.

c. Independent Contractor. Under this Agreement, your relationship with the Company will be that of an independent contractor as you will not be an employee of the Company nor eligible to participate in regular employee benefit and compensation plans of the Company.

d. Information Provided by the Companies. The Company shall: (i) provide you with reasonable access to management and other representatives of the Company, except to the extent that any such access may impair any attorney client privilege to which the Company may be entitled; and (ii) furnish all data, material, and other information concerning the business, assets, liabilities, operations, cash flows,

properties, financial condition and prospects of the Company that you reasonably request in connection with the services to be provided to the Company. You will rely, without further independent verification, on the accuracy and completeness of all publicly available information and information that is furnished by or on behalf of the Company and otherwise reviewed by you in connection with the services performed for the Company. The Company acknowledges and agrees that you are not responsible for the accuracy or completeness of such information and shall not be responsible for any inaccuracies or omissions therein, provided that if you become aware of material inaccuracies or errors in any such information you shall promptly notify the Board of such errors, inaccuracies or concerns. You are under no obligation to update data submitted to you or to review any other information unless specifically requested by the Board to do so.

2. COMPENSATION AND BENEFITS.

a. Retainer. The Company will pay you a retainer for each month you serve on the Board (the "Retainer") to be paid in monthly installments of $[TBD]. The Company's obligation to pay the Retainer will cease upon the termination of the Term.

b. Expense Reimbursement. The Company will reimburse you for all reasonable travel or other expenses, including expenses of counsel, incurred by you in connection with your services hereunder, in accordance with the Company's expense reimbursement policy as in effect from time to time.

c. Invoices; Payment.

i. In order to receive the compensation and reimbursement set forth in this Section 2, you are required to send to the Company regular monthly invoices indicating your fees, costs, and expenses incurred. Payment will be due to you within 10 business days after receipt of each such invoice, subject to the Company's receipt of appropriate documentation required by the Company's expenses reimbursement policy.

ii. You further agree that the Company's obligation to pay the compensation and reimbursement set forth in this Section 2 is conditioned in all respects on the entry of a final order in the court overseeing the Bankruptcy that authorizes and requires HCMLP to reimburse the Company for all such payments to you.

d. Indemnification; D&O Insurance. You will receive indemnification as a Director of the Company on the terms set forth in that certain Indemnification Agreement, dated December 5, 2019, a copy of which is attached hereto as **Appendix A** (the "Indemnification Agreement"). You will also be provided coverage under the Company's directors' and officers' insurance policy as set forth in the Indemnification Agreement.

e. Tax Indemnification. You acknowledge that the Company will not be responsible for the payment of any federal or state taxes that might be assessed with respect to the Retainer and you agree to be responsible for all such taxes.

3. PROPRIETARY INFORMATION OBLIGATIONS.

a. Proprietary Information. You agree that during the Term and thereafter that you will take all steps reasonably necessary to hold all information of the Company, its affiliates, and related entities, which a reasonable person would believe to be confidential or proprietary information, in trust and confidence, and not disclose any such confidential or proprietary information to any third party without first obtaining the Company's express written consent on a case-by-case basis.

b. Third Party Information. The Company has received and will in the future receive from third parties confidential or proprietary information ("Third Party Information") subject to a duty on the Company's part to maintain the confidentiality of such information and to use it only for certain limited purposes. You agree to hold such Third Party Information in confidence and not to disclose itto anyone (other than Company personnel who need to know such information in connection with their work for Company) or to use, except in connection with your services for Company under this Agreement, Third Party Information unless expressly authorized in writing by the Company.

c. Return of Company Property. Upon the end of the Term or upon the Company's earlier request, you agree to deliver to the Company any and all notes, materials and documents, together with any copies thereof, which contain or disclose any confidential or proprietary information or Third Party Information.

4. OUTSIDE ACTIVITIES.

a. Investments and Interests. Except as permitted by Section 4(b), you agree not to participate in, directly or indirectly, any position or investment known by you to be materially adverse to the Company or any of its affiliates or related entities.

b. Activities. Except with the prior written consent of the Board, you will not during your tenure as a member of the Company's Board undertake or engage in any other directorship, employment or business enterprise in direct competition with the Company or any of its affiliates or related entities, other than ones in which you are a passive investor or other activities in which you were a participant prior to your appointment to the Board as disclosed to the Company.

c. Other Agreements. You agree that you will not disclose to the Company or use on behalf of the Company any confidential information governed by any agreement between you and any third party except in accordance with such agreement.

5. TERMINATION OF DIRECTORSHIP.

a. Voluntary Resignation, Removal Pursuant to Bylaws and Stockholder Action. You may resign from the Board at any time with or without advance notice, with or without reason. Subject to any orders or agreements entered into in connection with the Bankruptcy, you may be removed from the Board at any time, for any reason, in any manner provided by the Governing Documents and applicable law or by an affirmative vote of a majority of the stockholders of the Company.

b. Continuation. The provisions of this Agreement that give the parties rights or obligations beyond the termination of this Agreement will survive and continue to bind the parties.

c. Payment of Fees; Reimbursement. Following termination of this Agreement, any undisputed fees and expenses due to you will be remitted promptly following receipt by the Company of any outstanding invoices.

6. GENERAL PROVISIONS.

a. Severability. Whenever possible, each provision of this Agreement will be interpreted in such manner as to be effective and valid under applicable law. If any provision of this Agreement is held to be invalid, illegal or unenforceable such provision will be reformed, construed and enforced to render it valid, legal, and enforceable consistent with the intent of the parties insofar as possible.

b. Entire Agreement. This Agreement constitutes the entire agreement between you and the Company with respect to your service as a Director and supersedes any prior agreement, promise, representation or statement written between you and the Company with regard to this subject matter. It is entered into without reliance on any promise, representation, statement or agreement other than those expressly contained or incorporated herein, and it cannot be modified or amended except in a writing signed by the party or parties affected by such modification or amendment.

c. Successors and Assigns. This Agreement is intended to bind and inure to the benefit of and be enforceable by you and the Company and our respective successors, assigns, heirs, executors and administrators, except that you may not assign any of your rights or duties hereunder without the written consent of the Company.

d. Governing Law. This Agreement will be governed by the law of the State of Delaware as applied to contracts made and performed entirely within Delaware.

We are all delighted to be able to extend you this offer and look forward to working with you. To indicate your acceptance of the Company's offer, please sign and date this Agreement below.

Sincerely,

STRAND ADVISORS, INC.

By: Scott Ellington
Its: Secretary

[Signature Page Follows]

ACCEPTED AND AGREED:

_____
[NAME]
Date: _____

INDEMNIFICATION AGREEMENT

This Indemnification Agreement ("**Agreement**"), dated as of [_____], is by and between STRAND ADVISORS, INC., a Delaware corporation (the "**Company**"), and [_____] (the "**Indemnitee**").

WHEREAS, Indemnitee has agreed to serve as a member of the Company's board of directors (the "**Board**") effective as of the date hereof;

WHEREAS, the Board has determined that enhancing the ability of the Company to retain and attract as directors the most capable Persons is in the best interests of the Company and that the Company therefore should seek to assure such Persons that indemnification and insurance coverage is available; and

WHEREAS, in recognition of the need to provide Indemnitee with protection against personal liability, in order to procure Indemnitee's service as a director of the Company, in order to enhance Indemnitee's ability to serve the Company in an effective manner and in order to provide such protection pursuant to express contract rights (intended to be enforceable irrespective of, among other things, any amendment to the Company's Bylaws (as may be amended further from time to time, the "**Bylaws**"), any change in the composition of the Board or any change in control, business combination or similar transaction relating to the Company), the Company wishes to provide in this Agreement for the indemnification of, and the advancement of Expenses (as defined in Section 1(g) below) to, Indemnitee as set forth in this Agreement and for the coverage of Indemnitee under the Company's directors' and officers' liability or similar insurance policies ("**D&O Insurance**").

NOW, THEREFORE, in consideration of the foregoing and the Indemnitee's agreement to provide services to the Company, the parties agree as follows:

1. Definitions. For purposes of this Agreement, the following terms shall have the following meanings:

(a) "**Change in Control**" means the occurrence of any of the following: (i) the direct or indirect sale, lease, transfer, conveyance or other disposition, in one or a series of related transactions (including any merger or consolidation or whether by operation of law or otherwise), of all or substantially all of the properties or assets of the Company and its subsidiaries, to a third party purchaser (or group of affiliated third party purchasers) or (ii) the consummation of any transaction (including any merger or consolidation or whether by operation of law or otherwise), the result of which is that a third party purchaser (or group of affiliated third party purchasers) becomes the beneficial owner, directly or indirectly, of more than fifty percent (50%) of the then outstanding Shares or of the surviving entity of any such merger or consolidation.

(b) "**Claim**" means:

(i) any threatened, pending or completed action, suit, claim, demand, arbitration, inquiry, hearing, proceeding or alternative dispute resolution mechanism, or

any actual, threatened or completed proceeding, including any and all appeals, in each case, whether brought by or in the right of the Company or otherwise, whether civil, criminal, administrative, arbitrative, investigative or other, whether formal or informal, and whether made pursuant to federal, state, local, foreign or other law, and whether or not commenced prior to the date of this Agreement, in which Indemnitee was, is or will be involved as a party or otherwise, by reason of or relating to either (a) any action or alleged action taken by Indemnitee (or failure or alleged failure to act) or of any action or alleged action (or failure or alleged failure to act) on Indemnitee's part, while acting in his or her Corporate Status or (b) the fact that Indemnitee is or was serving at the request of the Company or any subsidiary of the Company as director, officer, employee, partner, member, manager, trustee, fiduciary or agent of another Enterprise, in each case, whether or not serving in such capacity at the time any Loss or Expense is paid or incurred for which indemnification or advancement of Expenses can be provided under this Agreement, except one initiated by Indemnitee to enforce his or her rights under this Agreement; or

(ii) any inquiry, hearing or investigation that the Indemnitee determines might lead to the institution of any such action, suit, proceeding or alternative dispute resolution mechanism.

(c) "**Controlled Entity**" means any corporation, limited liability company, partnership, joint venture, trust or other Enterprise, whether or not for profit, that is, directly or indirectly, controlled by the Company. For purposes of this definition, the term "control" means the possession, directly or indirectly, of the power to direct, or cause the direction of, the management or policies of an Enterprise, whether through the ownership of voting securities, through other voting rights, by contract or otherwise.

(d) "**Corporate Status**" means the status of a Person who is or was a director, officer, employee, partner, member, manager, trustee, fiduciary or agent of the Company or of any other Enterprise which such Person is or was serving at the request of the Company or any subsidiary of the Company. In addition to any service at the actual request of the Company, Indemnitee will be deemed, for purposes of this Agreement, to be serving or to have served at the request of the Company or any subsidiary of the Company as a director, officer, employee, partner, member, manager, trustee, fiduciary or agent of another Enterprise if Indemnitee is or was serving as a director, officer, employee, partner, member, manager, fiduciary, trustee or agent of such Enterprise and (i) such Enterprise is or at the time of such service was a Controlled Entity, (ii) such Enterprise is or at the time of such service was an employee benefit plan (or related trust) sponsored or maintained by the Company or a Controlled Entity or (iii) the Company or a Controlled Entity, directly or indirectly, caused Indemnitee to be nominated, elected, appointed, designated, employed, engaged or selected to serve in such capacity.

(e) "**Disinterested Director**" means a director of the Company who is not and was not a party to the Claim in respect of which indemnification is sought by Indemnitee. Under no circumstances will James Dondero be considered a Disinterested Director.

(f) "**Enterprise**" means the Company or any subsidiary of the Company or any other corporation, partnership, limited liability company, joint venture, employee benefit

plan, trust or other entity or other enterprise of which Indemnitee is or was serving at the request of the Company or any subsidiary of the Company in a Corporate Status.

(g) "**Expenses**" means any and all expenses, fees, including attorneys', witnesses' and experts' fees, disbursements and retainers, court costs, transcript costs, travel expenses, duplicating, printing and binding costs, telephone charges, postage, fax transmission charges, secretarial services, delivery services fees, and all other fees, costs, disbursements and expenses paid or incurred in connection with investigating, defending, prosecuting, being a witness in or participating in (including on appeal), or preparing to defend, prosecute, be a witness or participate in, any Claim. Expenses also shall include (i) Expenses paid or incurred in connection with any appeal resulting from any Claim, including, without limitation, the premium, security for, and other costs relating to any cost bond, supersedeas bond, or other appeal bond or its equivalent, and (ii) for purposes of Section 4 only, Expenses incurred by Indemnitee in connection with the interpretation, enforcement or defense of Indemnitee's rights under this Agreement, by litigation or otherwise. Expenses, however, shall not include amounts paid in settlement by Indemnitee or the amount of judgments or fines against Indemnitee.

(h) "**Exchange Act**" means the Securities Exchange Act of 1934, as amended, or any successor statute thereto, and the rules and regulations of the United States Securities and Exchange Commission promulgated thereunder.

(i) "**Expense Advance**" means any payment of Expenses advanced to Indemnitee by the Company pursuant to Section 4 or Section 5 hereof.

(j) "**Indemnifiable Event**" means any event or occurrence, whether occurring before, on or after the date of this Agreement, related to the fact that Indemnitee is or was a manager, director, officer, employee or agent of the Company or any subsidiary of the Company, or is or was serving at the request of the Company or any subsidiary of the Company as a manager, director, officer, employee, member, manager, trustee or agent of any other Enterprise or by reason of an action or inaction by Indemnitee in any such capacity (whether or not serving in such capacity at the time any Loss is incurred for which indemnification can be provided under this Agreement).

(k) "**Independent Counsel**" means a law firm, or a member of a law firm, that is experienced in matters of corporation law and neither presently performs, nor in the past three (3) years has performed, services for any of: (i) James Dondero, (ii) the Company or Indemnitee (other than in connection with matters concerning Indemnitee under this Agreement or of other indemnitees under similar agreements), or (iii) any other party to the Claim giving rise to a claim for indemnification hereunder. Notwithstanding the foregoing, the term "Independent Counsel" shall not include any Person who, under the applicable standards of professional conduct then prevailing, would have a conflict of interest in representing either the Company or Indemnitee in an action to determine Indemnitee's rights under this Agreement.

(l) "**Losses**" means any and all Expenses, damages, losses, liabilities, judgments, fines (including excise taxes and penalties assessed with respect to employee

benefit plans and ERISA excise taxes), penalties (whether civil, criminal or other), amounts paid or payable in settlement, including any interest, assessments, any federal, state, local or foreign taxes imposed as a result of the actual or deemed receipt of any payments under this Agreement and all other charges paid or payable in connection with investigating, defending, being a witness in or participating in (including on appeal), or preparing to defend, be a witness or participate in, any Claim.

(m) "**Person**" means any individual, corporation, firm, partnership, joint venture, limited liability company, estate, trust, business association, organization, governmental entity or other entity and includes the meaning set forth in Sections 13(d) and 14(d) of the Exchange Act.

(n) "**Shares**" means an ownership interest of a member in the Company, including each of the common shares of the Company or any other class or series of Shares designated by the Board.

(o) References to "**serving at the request of the Company**" include any service as a director, manager, officer, employee, representative or agent of the Company which imposes duties on, or involves services by, such director, manager, officer, employee or agent, including but not limited to any employee benefit plan, its participants or beneficiaries; and a Person who acted in good faith and in a manner he or she reasonably believed to be in and not opposed to the best interests of the Company in Indemnitee's capacity as a director, manager, officer, employee, representative or agent of the Company, including but not limited to acting in the best interest of participants and beneficiaries of an employee benefit plan will be deemed to have acted in a manner "**not opposed to the best interests of the Company**" as referred to under applicable law or in this Agreement.

2. Indemnification.

(a) Subject to Section 9 and Section 10 of this Agreement, the Company shall indemnify and hold Indemnitee harmless, to the fullest extent permitted by the laws of the State of Delaware in effect on the date hereof, or as such laws may from time to time hereafter be amended to increase the scope of such permitted indemnification, against any and all Losses and Expenses if Indemnitee was or is or becomes a party to or participant in, or is threatened to be made a party to or participant in, any Claim by reason of or arising in part out of an Indemnifiable Event, including, without limitation, Claims brought by or in the right of the Company, Claims brought by third parties, and Claims in which the Indemnitee is solely a witness.

(b) For the avoidance of doubt, the indemnification rights and obligations contained herein shall also extend to any Claim in which the Indemnitee was or is a party to, was or is threatened to be made a party to or was or is otherwise involved in any capacity in by reason of Indemnitee's Corporate Status as a fiduciary capacity with respect to an employee benefit plan. In connection therewith, if the Indemnitee has acted in good faith and in a manner which appeared to be consistent with the best interests of the participants and beneficiaries of an employee benefit plan and not opposed thereto, the Indemnitee shall be deemed to have acted in a manner not opposed to the best interests of the Company.

3. Contribution.

(a) Whether or not the indemnification provided in Section 2 is available, if, for any reason, Indemnitee shall elect or be required to pay all or any portion of any judgment or settlement in any Claim in which the Company is jointly liable with Indemnitee (or would be if joined in such Claim), the Company shall contribute to the amount of Losses paid or payable by Indemnitee in proportion to the relative benefits received by the Company and all officers, directors, managers or employees of the Company, other than Indemnitee, who are jointly liable with Indemnitee (or would be if joined in such Claim), on the one hand, and Indemnitee, on the other hand, from the transaction or events from which such Claim arose; provided, however, that the proportion determined on the basis of relative benefit may, to the extent necessary to conform to law, be further adjusted by reference to the relative fault of the Company and all officers, directors, managers or employees of the Company other than Indemnitee who are jointly liable with Indemnitee (or would be if joined in such Claim), on the one hand, and Indemnitee, on the other hand, in connection with the transaction or events that resulted in such Losses, as well as any other equitable considerations which applicable law may require to be considered. The relative fault of the Company and all officers, directors, managers or employees of the Company, other than Indemnitee, who are jointly liable with Indemnitee (or would be if joined in such Claim), on the one hand, and Indemnitee, on the other hand, shall be determined by reference to, among other things, the degree to which their actions were motivated by intent to gain personal profit or advantage, the degree to which their liability is primary or secondary and the degree to which their conduct is active or passive.

(b) The Company hereby agrees to fully indemnify and hold Indemnitee harmless from any claims of contribution which may be brought by officers, directors, managers or employees of the Company, other than Indemnitee, who may be jointly liable with Indemnitee.

(c) To the fullest extent permissible under applicable law, if the indemnification provided for in this Agreement is unavailable to Indemnitee for any reason whatsoever, the Company, in lieu of indemnifying Indemnitee, shall contribute to the amount incurred by Indemnitee, whether for judgments, fines, penalties, excise taxes, amounts paid or to be paid in settlement and/or for Expenses, in connection with any Claim relating to an Indemnifiable Event under this Agreement, in such proportion as is deemed fair and reasonable in light of all of the circumstances of such Claim in order to reflect (i) the relative benefits received by the Company and Indemnitee as a result of the event(s) and/or transaction(s) giving cause to such Claim; and/or (ii) the relative fault of the Company (and its directors, managers, officers, employees and agents) and Indemnitee in connection with such event(s) and/or transaction(s).

4. Advancement of Expenses. The Company shall, if requested by Indemnitee, advance, to the fullest extent permitted by law, to Indemnitee (an "**Expense Advance**") any and all Expenses actually and reasonably paid or incurred (even if unpaid) by Indemnitee in connection with any Claim arising out of an Indemnifiable Event (whether prior to or after its final disposition). Indemnitee's right to such advancement is not subject to the satisfaction of any standard of conduct. Without limiting the generality or effect of

the foregoing, within thirty (30) business days after any request by Indemnitee, the Company shall, in accordance with such request, (a) pay such Expenses on behalf of Indemnitee, (b) advance to Indemnitee funds in an amount sufficient to pay such Expenses, or (c) reimburse Indemnitee for such Expenses. In connection with any request for Expense Advances, Indemnitee shall not be required to provide any documentation or information to the extent that the provision thereof would undermine or otherwise jeopardize attorney-client privilege. Execution and delivery to the Company of this Agreement by Indemnitee constitutes an undertaking by the Indemnitee to repay any amounts paid, advanced or reimbursed by the Company pursuant to this Section 4, the final sentence of Section 9(b), or Section 11(b) in respect of Expenses relating to, arising out of or resulting from any Claim in respect of which it shall be determined, pursuant to Section 9, following the final disposition of such Claim, that Indemnitee is not entitled to indemnification hereunder. No other form of undertaking shall be required other than the execution of this Agreement. Each Expense Advance will be unsecured and interest free and will be made by the Company without regard to Indemnitee's ability to repay the Expense Advance.

5. Indemnification for Expenses in Enforcing Rights. To the fullest extent allowable under applicable law, the Company shall also indemnify against, and, if requested by Indemnitee, shall advance to Indemnitee subject to and in accordance with Section 4, any Expenses actually and reasonably paid or incurred (even if unpaid) by Indemnitee in connection with any action or proceeding by Indemnitee for (a) indemnification or reimbursement or advance payment of Expenses by the Company under any provision of this Agreement, or under any other agreement or provision of the Bylaws now or hereafter in effect relating to Claims relating to Indemnifiable Events, and/or (b) recovery under any D&O Insurance maintained by the Company, regardless of whether Indemnitee ultimately is determined to be entitled to such indemnification or insurance recovery, as the case may be. Indemnitee shall be required to reimburse the Company in the event that a final judicial determination is made that such action brought by Indemnitee was frivolous or not made in good faith.

6. Partial Indemnity. If Indemnitee is entitled under any provision of this Agreement to indemnification by the Company for a portion of any Losses in respect of a Claim related to an Indemnifiable Event but not for the total amount thereof, the Company shall nevertheless indemnify Indemnitee for the portion thereof to which Indemnitee is entitled.

7. Notification and Defense of Claims.

(a) Notification of Claims. Indemnitee shall notify the Company in writing as soon as reasonably practicable of any Claim which could relate to an Indemnifiable Event or for which Indemnitee could seek Expense Advances, including a brief description (based upon information then available to Indemnitee) of the nature of, and the facts underlying, such Claim, to the extent then known. The failure by Indemnitee to timely notify the Company hereunder shall not relieve the Company from any liability hereunder except to the extent the Company's ability to participate in the defense of such claim was materially and adversely affected by such failure. If at the time of the receipt of such notice, the Company has D&O Insurance or any other insurance in effect under which coverage for Claims related to Indemnifiable Events is potentially available, the Company shall give

prompt written notice to the applicable insurers in accordance with the procedures, provisions, and terms set forth in the applicable policies. The Company shall provide to Indemnitee a copy of such notice delivered to the applicable insurers, and copies of all subsequent correspondence between the Company and such insurers regarding the Claim, in each case substantially concurrently with the delivery or receipt thereof by the Company.

(b) Defense of Claims. The Company shall be entitled to participate in the defense of any Claim relating to an Indemnifiable Event at its own expense and, except as otherwise provided below, to the extent the Company so wishes, it may assume the defense thereof with counsel reasonably satisfactory to Indemnitee. After notice from the Company to Indemnitee of its election to assume the defense of any such Claim, the Company shall not be liable to Indemnitee under this Agreement or otherwise for any Expenses subsequently directly incurred by Indemnitee in connection with Indemnitee's defense of such Claim other than reasonable costs of investigation or as otherwise provided below. Indemnitee shall have the right to employ its own legal counsel in such Claim, but all Expenses related to such counsel incurred after notice from the Company of its assumption of the defense shall be at Indemnitee's own expense; provided, however, that if (i) Indemnitee's employment of its own legal counsel has been authorized by the Company, (ii) Indemnitee has reasonably determined that there may be a conflict of interest between Indemnitee and the Company in the defense of such Claim, (iii) after a Change in Control, Indemnitee's employment of its own counsel has been approved by the Independent Counsel or (iv) the Company shall not in fact have employed counsel to assume the defense of such Claim, then Indemnitee shall be entitled to retain its own separate counsel (but not more than one law firm plus, if applicable, local counsel in respect of any such Claim) and all Expenses related to such separate counsel shall be borne by the Company.

8. Procedure upon Application for Indemnification. In order to obtain indemnification pursuant to this Agreement, Indemnitee shall submit to the Company a written request therefor, including in such request such documentation and information as is reasonably available to Indemnitee and is reasonably necessary to determine whether and to what extent Indemnitee is entitled to indemnification following the final disposition of the Claim, provided that documentation and information need not be so provided to the extent that the provision thereof would undermine or otherwise jeopardize attorney-client privilege. Indemnification shall be made insofar as the Company determines Indemnitee is entitled to indemnification in accordance with Section 9 below.

9. Determination of Right to Indemnification.

(a) Mandatory Indemnification; Indemnification as a Witness.

(i) To the extent that Indemnitee shall have been successful on the merits or otherwise in defense of any Claim relating to an Indemnifiable Event or any portion thereof or in defense of any issue or matter therein, including without limitation dismissal without prejudice, Indemnitee shall be indemnified against all Losses relating to such Claim in accordance with Section 2, and no Standard of Conduct Determination (as defined in Section 9(b)) shall be required.

(ii) To the extent that Indemnitee's involvement in a Claim relating to an Indemnifiable Event is to prepare to serve and serve as a witness, and not as a party, the Indemnitee shall be indemnified against all Losses incurred in connection therewith to the fullest extent allowable by law and no Standard of Conduct Determination (as defined in Section 9(b)) shall be required.

(b) Standard of Conduct. To the extent that the provisions of Section 9(a) are inapplicable to a Claim related to an Indemnifiable Event that shall have been finally disposed of, any determination of whether Indemnitee has satisfied any applicable standard of conduct under Delaware law that is a legally required condition to indemnification of Indemnitee hereunder against Losses relating to such Claim and any determination that Expense Advances must be repaid to the Company (a "**Standard of Conduct Determination**") shall be made as follows:

(i) if no Change in Control has occurred, (A) by a majority vote of the Disinterested Directors, even if less than a quorum of the Board, (B) by a committee of Disinterested Directors designated by a majority vote of the Disinterested Directors, even though less than a quorum or (C) if there are no such Disinterested Directors, by Independent Counsel in a written opinion addressed to the Board, a copy of which shall be delivered to Indemnitee; and

(ii) if a Change in Control shall have occurred, (A) if the Indemnitee so requests in writing, by a majority vote of the Disinterested Directors, even if less than a quorum of the Board or (B) otherwise, by Independent Counsel in a written opinion addressed to the Board, a copy of which shall be delivered to Indemnitee.

Subject to Section 4, the Company shall indemnify and hold Indemnitee harmless against and, if requested by Indemnitee, shall reimburse Indemnitee for, or advance to Indemnitee, within thirty (30) business days of such request, any and all Expenses incurred by Indemnitee in cooperating with the Person or Persons making such Standard of Conduct Determination.

(c) Making the Standard of Conduct Determination. The Company shall use its reasonable best efforts to cause any Standard of Conduct Determination required under Section 9(b) to be made as promptly as practicable. If the Person or Persons designated to make the Standard of Conduct Determination under Section 9(b) shall not have made a determination within ninety (90) days after the later of (A) receipt by the Company of a written request from Indemnitee for indemnification pursuant to Section 8 (the date of such receipt being the "**Notification Date**") and (B) the selection of an Independent Counsel, if such determination is to be made by Independent Counsel, then Indemnitee shall be deemed to have satisfied the applicable standard of conduct; provided that such 90-day period may be extended for a reasonable time, not to exceed an additional thirty (30) days, if the Person or Persons making such determination in good faith requires such additional time to obtain or evaluate information relating thereto. Notwithstanding anything in this Agreement to the contrary, no determination as to entitlement of Indemnitee to indemnification under this Agreement shall be required to be made prior to the final disposition of any Claim.

(d) Payment of Indemnification. If, in regard to any Losses:

(i) Indemnitee shall be entitled to indemnification pursuant to Section 9(a);

(ii) no Standard of Conduct Determination is legally required as a condition to indemnification of Indemnitee hereunder; or

(iii) Indemnitee has been determined or deemed pursuant to Section 9(b) or Section 9(c) to have satisfied the Standard of Conduct Determination,

then the Company shall pay to Indemnitee, within thirty (30) business days after the later of (A) the Notification Date or (B) the earliest date on which the applicable criterion specified in clause (i), (ii) or (iii) is satisfied, an amount equal to such Losses.

(e) Selection of Independent Counsel for Standard of Conduct Determination. If a Standard of Conduct Determination is to be made by Independent Counsel pursuant to Section 9(b)(i), the Independent Counsel shall be selected by the Board and the Company shall give written notice to Indemnitee advising him of the identity of the Independent Counsel so selected. If a Standard of Conduct Determination is to be made by Independent Counsel pursuant to Section 9(b)(ii), the Independent Counsel shall be selected by Indemnitee, and Indemnitee shall give written notice to the Company advising it of the identity of the Independent Counsel so selected. In either case, Indemnitee or the Company, as applicable, may, within thirty (3) business days after receiving written notice of selection from the other, deliver to the other a written objection to such selection; provided, however, that such objection may be asserted only on the ground that the Independent Counsel so selected does not satisfy the criteria set forth in the definition of "Independent Counsel" in Section 1(k), and the objection shall set forth with particularity the factual basis of such assertion. Absent a proper and timely objection, the Person or firm so selected shall act as Independent Counsel. If such written objection is properly and timely made and substantiated, (i) the Independent Counsel so selected may not serve as Independent Counsel unless and until such objection is withdrawn or a court has determined that such objection is without merit; and (ii) the non-objecting party may, at its option, select an alternative Independent Counsel and give written notice to the other party advising such other party of the identity of the alternative Independent Counsel so selected, in which case the provisions of the two immediately preceding sentences, the introductory clause of this sentence and numbered clause (i) of this sentence shall apply to such subsequent selection and notice. If applicable, the provisions of clause (ii) of the immediately preceding sentence shall apply to successive alternative selections. If no Independent Counsel that is permitted under the foregoing provisions of this Section 9(e) to make the Standard of Conduct Determination shall have been selected within twenty (20) days after the Company gives its initial notice pursuant to the first sentence of this Section 9(e) or Indemnitee gives its initial notice pursuant to the second sentence of this Section 9(e), as the case may be, either the Company or Indemnitee may petition the Court of Chancery of the State of Delaware ("**Delaware Court**") to resolve any objection which shall have been made by the Company or Indemnitee to the other's selection of Independent Counsel and/or to appoint as Independent Counsel a Person to be selected by the Court or such other Person as the Court

shall designate, and the Person or firm with respect to whom all objections are so resolved or the Person or firm so appointed will act as Independent Counsel. In all events, the Company shall pay all of the reasonable fees and expenses of the Independent Counsel incurred in connection with the Independent Counsel's determination pursuant to Section 9(b).

(f) Presumptions and Defenses.

(i) Indemnitee's Entitlement to Indemnification. In making any Standard of Conduct Determination, the Person or Persons making such determination shall presume that Indemnitee has satisfied the applicable standard of conduct and is entitled to indemnification, and the Company shall have the burden of proof to overcome that presumption and establish that Indemnitee is not so entitled. Any Standard of Conduct Determination that is adverse to Indemnitee may be challenged by the Indemnitee in the Delaware Court. No determination by the Company (including by its Board or any Independent Counsel) that Indemnitee has not satisfied any applicable standard of conduct may be used as a defense to enforcement by Indemnitee of Indemnitee's rights of indemnification or reimbursement or advance of payment of Expenses by the Company hereunder or create a presumption that Indemnitee has not met any applicable standard of conduct.

(ii) Reliance as a Safe Harbor. For purposes of this Agreement, and without creating any presumption as to a lack of good faith if the following circumstances do not exist, Indemnitee shall be deemed to have acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the Company if Indemnitee's actions or omissions to act are taken in good faith reliance upon the records of the Company, including its financial statements, or upon information, opinions, reports or statements furnished to Indemnitee by the officers or employees of the Company or any of its subsidiaries in the course of their duties, or by committees of the Board or by any other Person (including legal counsel, accountants and financial advisors) as to matters Indemnitee reasonably believes are within such other Person's professional or expert competence and who has been selected with reasonable care by or on behalf of the Company. In addition, the knowledge and/or actions, or failures to act, of any director, manager, officer, agent or employee of the Company (other than Indemnitee) shall not be imputed to Indemnitee for purposes of determining the right to indemnity hereunder.

(iii) Defense to Indemnification and Burden of Proof. It shall be a defense to any action brought by Indemnitee against the Company to enforce this Agreement (other than an action brought to enforce a claim for Losses incurred in defending against a Claim related to an Indemnifiable Event in advance of its final disposition) that it is not permissible under applicable law for the Company to indemnify Indemnitee for the amount claimed. In connection with any such action or any related Standard of Conduct Determination, the burden of proving such a defense or that the Indemnitee did not satisfy the applicable standard of conduct shall be on the Company.

10. Exclusions from Indemnification. Notwithstanding anything in this Agreement to the contrary, the Company shall not be obligated to:

(a) indemnify or advance funds to Indemnitee for Losses with respect to proceedings initiated by Indemnitee, including any proceedings against the Company or its managers, officers, employees or other indemnitees and not by way of defense, except:

(i) proceedings referenced in Section 4 above (unless a court of competent jurisdiction determines that each of the material assertions made by Indemnitee in such proceeding was not made in good faith or was frivolous); or

(ii) where the Company has joined in or the Board has consented to the initiation of such proceedings.

(b) indemnify Indemnitee if a final decision by a court of competent jurisdiction determines that such indemnification is prohibited by applicable law.

(c) indemnify Indemnitee for the disgorgement of profits arising from the purchase or sale by Indemnitee of securities of the Company in violation of Section 16(b) of the Exchange Act, or any similar successor statute.

11. Remedies of Indemnitee.

(a) In the event that (i) a determination is made pursuant to Section 9 that Indemnitee is not entitled to indemnification under this Agreement, (ii) an Expense Advance is not timely made pursuant to Section 4, (iii) no determination of entitlement to indemnification is made pursuant to Section 9 within 90 days after receipt by the Company of the request for indemnification, or (iv) payment of indemnification is not made pursuant Section 9(d), Indemnitee shall be entitled to an adjudication in a Delaware Court, or in any other court of competent jurisdiction, of Indemnitee's entitlement to such indemnification. Indemnitee shall commence such proceeding seeking an adjudication within 180 days following the date on which Indemnitee first has the right to commence such proceeding pursuant to this Section 11(a). The Company shall not oppose Indemnitee's right to seek any such adjudication.

(b) In the event that Indemnitee, pursuant to this Section 11, seeks a judicial adjudication or arbitration of his or her rights under, or to recover damages for breach of, this Agreement, any other agreement for indemnification, payment of Expenses in advance or contribution hereunder or to recover under any director, manager, and officer liability insurance policies or any other insurance policies maintained by the Company, the Company will, to the fullest extent permitted by law and subject to Section 4, indemnify and hold harmless Indemnitee against any and all Expenses which are paid or incurred by Indemnitee in connection with such judicial adjudication or arbitration, regardless of whether Indemnitee ultimately is determined to be entitled to such indemnification, payment of Expenses in advance or contribution or insurance recovery. In addition, if requested by Indemnitee, subject to Section 4 the Company will (within thirty (30) days after receipt by the Company of the written request therefor), pay as an Expense Advance such Expenses, to the fullest extent permitted by law.

(c) In the event that a determination shall have been made pursuant to Section 9 that Indemnitee is not entitled to indemnification, any judicial proceeding commenced

pursuant to this Section 11 shall be conducted in all respects as a de novo trial on the merits, and Indemnitee shall not be prejudiced by reason of the adverse determination under Section 9.

(d) If a determination shall have been made pursuant to Section 9 that Indemnitee is entitled to indemnification, the Company shall be bound by such determination in any judicial proceeding commenced pursuant to this Section 11, absent (i) a misstatement by Indemnitee of a material fact, or an omission of a material fact necessary to make Indemnitee's misstatement not materially misleading in connection with the application for indemnification, or (ii) a prohibition of such indemnification under applicable law.

12. Settlement of Claims. The Company shall not be liable to Indemnitee under this Agreement for any amounts paid in settlement of any threatened or pending Claim related to an Indemnifiable Event effected without the Company's prior written consent, which shall not be unreasonably withheld; provided, however, that if a Change in Control has occurred, the Company shall be liable for indemnification of the Indemnitee for amounts paid in settlement if an Independent Counsel (which, for purposes of this Section 12, shall be selected by the Company with the prior consent of the Indemnitee, such consent not to be unreasonably withheld or delayed) has approved the settlement. The Company shall not settle any Claim related to an Indemnifiable Event in any manner that would impose any Losses on the Indemnitee without the Indemnitee's prior written consent.

13. Duration. All agreements and obligations of the Company contained herein shall continue during the period that Indemnitee is a manager of the Company (or is serving at the request of the Company as a director, manager, officer, employee, member, trustee or agent of another Enterprise) and shall continue thereafter (i) so long as Indemnitee may be subject to any possible Claim relating to an Indemnifiable Event (including any rights of appeal thereto) and (ii) throughout the pendency of any proceeding (including any rights of appeal thereto) commenced by Indemnitee to enforce or interpret his or her rights under this Agreement, even if, in either case, he or she may have ceased to serve in such capacity at the time of any such Claim or proceeding.

14. Other Indemnitors. The Company hereby acknowledges that Indemnitee may have certain rights to indemnification, advancement of Expenses and/or insurance provided by certain private equity funds, hedge funds or other investment vehicles or management companies and/or certain of their affiliates and by personal policies (collectively, the "**Other Indemnitors**"). The Company hereby agrees (i) that it is the indemnitor of first resort (i.e., its obligations to Indemnitee are primary and any obligation of the Other Indemnitors to advance Expenses or to provide indemnification for the same Expenses or liabilities incurred by Indemnitee are secondary), (ii) that it shall be required to advance the full amount of Expenses incurred by Indemnitee and shall be liable for the full amount of all Expenses, judgments, penalties, fines and amounts paid in settlement to the extent legally permitted and as required by the terms of this Agreement and the Bylaws (or any other agreement between the Company and Indemnitee), without regard to any rights Indemnitee may have against the Other Indemnitors, and, (iii) that it irrevocably waives, relinquishes and releases the Other Indemnitors from any and all claims against the Other

Indemnitors for contribution, subrogation or any other recovery of any kind in respect thereof. The Company further agrees that no advancement or payment by the Other Indemnitors on behalf of Indemnitee with respect to any claim for which Indemnitee has sought indemnification from the Company shall affect the foregoing and the Other Indemnitors shall have a right of contribution and/or be subrogated to the extent of such advancement or payment to all of the rights of recovery of Indemnitee against the Company. The Company and Indemnitee agree that the Other Indemnitors are express third party beneficiaries of the terms of this Section 14.

15. Non-Exclusivity. The rights of Indemnitee hereunder will be in addition to any other rights Indemnitee may have under the Bylaws, the General Corporation Law of the State of Delaware (as may be amended from time to time, the "**DGCL**"), any other contract, in law or in equity, and under the laws of any state, territory, or jurisdiction, or otherwise (collectively, "**Other Indemnity Provisions**"). The Company will not adopt any amendment to its Bylaws the effect of which would be to deny, diminish, encumber or limit Indemnitee's right to indemnification under this Agreement or any Other Indemnity Provision.

16. Liability Insurance. For the duration of Indemnitee's service as a director of the Company, and thereafter for so long as Indemnitee shall be subject to any pending Claim relating to an Indemnifiable Event, the Company shall use best efforts to continue to maintain in effect policies of D&O Insurance providing coverage that is at least substantially comparable in scope and amount to that provided by similarly situated companies. In all policies of D&O Insurance maintained by the Company, Indemnitee shall be named as an insured in such a manner as to provide Indemnitee the same rights and benefits as are provided to the most favorably insured of the Company's directors. Upon request, the Company will provide to Indemnitee copies of all D&O Insurance applications, binders, policies, declarations, endorsements and other related materials.

17. No Duplication of Payments. The Company shall not be liable under this Agreement to make any payment to Indemnitee in respect of any Losses to the extent Indemnitee has otherwise received payment under any insurance policy, any Other Indemnity Provisions or otherwise of the amounts otherwise indemnifiable by the Company hereunder.

18. Subrogation. In the event of payment to Indemnitee under this Agreement, the Company shall be subrogated to the extent of such payment to all of the rights of recovery of Indemnitee. Indemnitee shall execute all papers required and shall do everything that may be necessary to secure such rights, including the execution of such documents necessary to enable the Company effectively to bring suit to enforce such rights.

19. Indemnitee Consent. The Company will not, without the prior written consent of Indemnitee, consent to the entry of any judgment against Indemnitee or enter into any settlement or compromise which (a) includes an admission of fault of Indemnitee, any non-monetary remedy imposed on Indemnitee or a Loss for which Indemnitee is not wholly indemnified hereunder or (b) with respect to any Claim with respect to which Indemnitee may be or is made a party or a participant or may be or is otherwise entitled to seek

indemnification hereunder, does not include, as an unconditional term thereof, the full release of Indemnitee from all liability in respect of such Claim, which release will be in form and substance reasonably satisfactory to Indemnitee. Neither the Company nor Indemnitee will unreasonably withhold its consent to any proposed settlement; provided, however, Indemnitee may withhold consent to any settlement that does not provide a full and unconditional release of Indemnitee from all liability in respect of such Claim.

20. Amendments. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing by both of the parties hereto. No waiver of any of the provisions of this Agreement shall be binding unless in the form of a writing signed by the party against whom enforcement of the waiver is sought, and no such waiver shall operate as a waiver of any other provisions hereof (whether or not similar), nor shall such waiver constitute a continuing waiver. Except as specifically provided herein, no failure to exercise or any delay in exercising any right or remedy hereunder shall constitute a waiver thereof.

21. Binding Effect. This Agreement shall be binding upon and inure to the benefit of and be enforceable by the parties hereto and their respective successors (including any direct or indirect successor by purchase, merger, consolidation or otherwise to all or substantially all of the business and/or assets of the Company), assigns, spouses, heirs and personal and legal representatives. The Company shall require and cause any successor (whether direct or indirect by purchase, merger, consolidation or otherwise) to all, substantially all or a substantial part of the business and/or assets of the Company, by written agreement in form and substance satisfactory to Indemnitee, expressly to assume and agree to perform this Agreement in the same manner and to the same extent that the Company would be required to perform if no such succession had taken place.

22. Severability. Each provision of this Agreement shall be considered severable and if for any reason any provision which is not essential to the effectuation of the basic purposes of this Agreement is determined by a court of competent jurisdiction to be invalid, unenforceable or contrary to the DGCL or existing or future applicable law, such invalidity, unenforceability or illegality shall not impair the operation of or affect those provisions of this Agreement which are valid, enforceable and legal. In that case, this Agreement shall be construed so as to limit any term or provision so as to make it valid, enforceable and legal within the requirements of any applicable law, and in the event such term or provision cannot be so limited, this Agreement shall be construed to omit such invalid, unenforceable or illegal provisions.

23. Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given if delivered by hand, against receipt, or mailed, by postage prepaid, certified or registered mail:

(a) if to Indemnitee, to the address set forth on the signature page hereto.

(b) if to the Company, to:

Strand Advisors, Inc.
Attention: Isaac Leventon

Address: 300 Crescent Court, Suite 700
Dallas, Texas 75201
Email: ileventon@highlandcapital.com

Notice of change of address shall be effective only when given in accordance with this Section 23. All notices complying with this Section 23 shall be deemed to have been received on the date of hand delivery or on the third business day after mailing.

24. Governing Law. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF DELAWARE (OTHER THAN ITS RULES OF CONFLICTS OF LAW TO THE EXTENT THAT THE APPLICATION OF THE LAWS OF ANOTHER JURISDICTION WOULD BE REQUIRED THEREBY).

25. Jurisdiction. The parties hereby agree that any suit, action or proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby, whether in contract, tort or otherwise, shall be brought in the United States District Court for the District of Delaware or in the Court of Chancery of the State of Delaware (or, if such court lacks subject matter jurisdiction, in the Superior Court of the State of Delaware), so long as one of such courts shall have subject-matter jurisdiction over such suit, action or proceeding, and that any case of action arising out of this Agreement shall be deemed to have arisen from a transaction of business in the State of Delaware. Each of the parties hereby irrevocably consents to the jurisdiction of such courts (and of the appropriate appellate courts therefrom) in any such suit, action or proceeding and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of the venue of any such suit, action or proceeding in any such court or that any such suit, action or proceeding which is brought in any such court has been brought in an inconvenient forum.

26. Enforcement.

(a) Without limiting Section 15, this Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, oral, written and implied, between the parties hereto with respect to the subject matter hereof.

(b) The Company shall not seek from a court, or agree to, a "bar order" which would have the effect of prohibiting or limiting the Indemnitee's rights to receive advancement of Expenses under this Agreement other than in accordance with this Agreement.

27. Headings and Captions. All headings and captions contained in this Agreement and the table of contents hereto are inserted for convenience only and shall not be deemed a part of this Agreement.

28. Counterparts. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which, when taken together, shall constitute one and the

same agreement. Facsimile counterpart signatures to this Agreement shall be binding and enforceable.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

STRAND ADVISORS, INC.

By: _____
Name:
Title:

INDEMNITEE:

_____

Name: [_____]
Address: _____
_____
_____

Email:

December ___, 2019

Attn: Independent Directors
Highland Capital Management, LP
300 Crescent Court, Ste. 700
Dallas, TX 75201

Re: Development Specialists, Inc. ("DSI")
Retention and Letter of Engagement

Dear Members of the Board:

Please accept this letter as our firm's formal written agreement (the "Agreement") to provide restructuring support services to Highland Capital Management, L.P. (the "Company"). This Agreement replaces and supersedes in all respects the letter agreement between DSI and the Company, dated October 7, 2019, as amended and revised by the letter agreement dated October 29, 2019. However, all fees and expenses incurred by DSI prior to the date hereof in accordance with such prior letter agreements will be paid by the Company, subject to allowance of such fees and expenses by the U.S. Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court"). The Agreement will become effective upon execution by duly authorized representatives of the respective parties and approval of the Bankruptcy Court.

Section 1 – Scope of Work

DSI will provide the following services (the "Services") to the Company:

1. Bradley D. Sharp will act as the Company's Chief Restructuring Officer ("CRO") with other DSI personnel to assist Mr. Sharp in carrying out those duties and responsibilities.
2. Subject to the terms of this Agreement, as CRO, Mr. Sharp will assume control of the Company's restructuring and direct the Company with respect to its bankruptcy filed on October 16, 2019 (the "Chapter 11 Case"), which Chapter 11 Case has now been transferred to the Bankruptcy Court.
3. Subject to the terms of this Agreement, Mr. Sharp will report to the Independent Directors and, if appointed, the Chief Executive Officer of the Company ("CEO") and will comply with the Company's corporate governance requirements.
4. As directed by the Independent Directors and/or CEO, the CRO will be responsible for the implementation and prosecution of the Chapter 11 Case, including negotiations with creditors, reconciliation of claims, and confirmation of a plan or plans of reorganization.
5. Provide other personnel of DSI ("Additional Personnel") to provide restructuring support services as requested or required to the Company, which may include but are not limited to:

a. assisting the Company in the preparation of financial disclosures required by the Bankruptcy Code, including the Schedules of Assets and Liabilities, the Statements of Financial Affairs and Monthly Operating Reports;
b. advising and assisting the Company, the Company's legal counsel, and other professionals in responding to third party requests;
c. attending meetings and assisting in communications with parties in interest and their professionals, including the Official Committee of Unsecured Creditors appointed in the Chapter 11 Case;
d. providing litigation advisory services with respect to accounting matters, along with expert witness testimony on case related issues; and
e. rendering such other general business consulting services or other assistance as the Company may deem necessary and which are consistent with the role of a financial advisor and not duplicative of services provided by other professionals in this case.

DSI's ability to adequately perform the Services is dependent upon the Company timely providing reliable, accurate, and complete necessary information. The Company agrees that CRO will have (i) access to and the ability to communicate with any employee of the Company or any affiliate of the Company and (ii) access to any information, including documents, relating to the Company or any Company affiliate, including, but not limited to, information concerning collections and disbursements. The Company acknowledges that DSI or CRO are not responsible for independently verifying the veracity, completeness, or accuracy of any information supplied to us by or on behalf of the Company.

DSI will submit its evaluations and analyses pursuant to this Agreement in periodic oral and written reports. Such reports are intended to and shall constitute privileged and confidential information, and shall constitute the Company's property.

Although we do not predict or warrant the outcome of any particular matter or issue, and our fees are not dependent upon such outcomes, we will perform the Services with reasonable care and in a diligent and competent manner.

Section 2 – Rates, Invoicing and Retainer

DSI will be compensated at a rate of $100,000 per month, plus expenses (capped at $10,000 per month), for the services of Bradley D. Sharp as CRO and such DSI personnel (including Fred Caruso) as are required to fulfill Mr. Sharp's responsibilities as CRO; provided that if any single expense exceeds $1,000, DSI will provide reasonable documentation and will obtain the Company's prior written approval.

A number of DSI's personnel have experience in providing restructuring support services and may be utilized as Additional Personnel in this representation. Although others of our staff may

also be involved, we have listed below certain of the DSI personnel (along with their corresponding billing rates) who would likely constitute the Additional Personnel. The individuals are:

R. Brian Calvert	$640.00/hr.
Thomas P. Jeremiassen	$575.00/hr.
Eric J. Held	$495.00/hr.
Nicholas R. Troszak	$485.00/hr.
Spencer G. Ferrero	$350.00/hr.
Tom Frey	$325.00/hr.

The above rates are adjusted as of January 1 of each year to reflect advancing experience, capabilities, and seniority of our professionals as well as general economic factors.

We acknowledge receipt of a retainer of $250,000 from the Company. The purpose of the retainer is to secure a portion of our fees and expenses and to retain our status as a non-creditor should such be required for DSI to continue to provide the Services. As such, should a need arise to increase this retainer due to the level of Services DSI is providing or projected to provide, we will send the Company a supplement to this Agreement requesting the necessary increases and discuss with the Company the amount and timing of providing such increase to the retainer.

This retainer will be applied to our final invoice. If the retainer exceeds the amount of our final invoice, we will refund the difference to the Company at that time. In the event that periodic invoices are not paid timely, we will apply the retainer to the amounts owing on such invoices and, if applicable, any related late charges, and we will stop work until the retainer is replenished to the full amount required. If the retainer is not replenished within ten (10) days after the application of the retainer to unpaid balances, we reserve the right to terminate this Agreement in accordance with the provisions of Section 3 of this Agreement.

DSI also will be entitled to reimbursement for its reasonable costs and expenses. Such costs and expenses may include, among others, charges for messenger services, photocopying, travel expenses, long distance telephone charges, postage and other charges customarily invoiced by consulting firms. Airfare for international flights will be charged at the business class fare; provided that if any single expense exceeds $1,000, DSI will provide reasonable documentation and will obtain the Company's prior written approval.

This Agreement shall be presented to the Bankruptcy Court for approval and continuation, pursuant to Bankruptcy Code Section 363 and DSI's then-prospective obligations shall be contingent upon such approval.

Section 3 – Termination

Either the Company or DSI may terminate this Agreement for any reason with ten (10) business days' written notice. Notwithstanding anything to the contrary contained herein, the Company shall be obligated, in accordance with any orders of or procedures established by the Court, to pay and/or reimburse DSI all fees and expenses accrued under this Agreement as of the effective date of the termination.

Section 4 – Relationship of the Parties, Confidentiality

DSI will provide the Services to and for the Company, with select members of DSI assigned to specific roles for the benefit of the Company. These members will remain as DSI employees during the pendency of this case. Specifically, the parties intend that an independent contractor relationship will be created by this Agreement. Employees of DSI are not to be considered employees of the Company and are not entitled to any of the benefits that the Company provides for the Company's employees.

The Company acknowledges that all advice (written or oral) given by DSI to the Company in connection with DSI's engagement is intended solely for the benefit and use of the Company in considering the transaction to which it relates, and that no third party is entitled to rely on any such advice or communication. DSI will in no way be deemed to be providing services for any person not a party to this Agreement.

DSI agrees that all information not publicly available that is received by DSI from the Company in connection with this Agreement or that is developed pursuant to this Agreement, will be treated as confidential and will not be disclosed by DSI, except as required by Court order, or other legal process, or as may be authorized by the Company. DSI shall not be required to defend any action to obtain an order requiring disclosure of such information, but shall instead give prompt notice of any such action to the Company so that it may seek appropriate remedies, including a protective order. The Company shall reimburse DSI for all costs and fees (including reasonable attorney's fees) incurred by DSI relating to responding to (whether by objecting to or complying with) any subpoenas or requests for production of information or documents.

Section 5 – Indemnity

The Company shall name Bradley D. Sharp as its Chief Restructuring Officer and shall indemnify him on the same terms as provided to the Company's other officers and directors under the Company partnership agreement or other governing document and applicable state law. Mr. Sharp shall be included as an insured under any insurance policies or coverage available to officers and directors of the Company.

The Company shall additionally indemnify those persons, and only those persons, serving as executive officers on the same terms as provided to the Company's other officers and directors under the Company's partnership agreement or other governing document and applicable state law, along with insurance coverage under the Company's D&O policies. Any such indemnity shall survive the expiration or termination by either party of this Agreement. Except as provided in this Section and in Section 4, there shall be no indemnification of DSI, its affiliates or the Additional Personnel.

Each and every one of the personnel employed by DSI who works on this particular project, as well as DSI officers, directors, employees and agents (the "DSI Parties") shall not be liable to the Company, or any party asserting claims on behalf of the Company, except for direct damages found in a final determination (not subject to further appeal) by a court of competent jurisdiction to be the direct result of the bad faith, self-dealing or intentional misconduct or gross negligence of DSI.

Section 6 – Conflicts

DSI has made diligent inquiries to determine whether it or any of its professionals have any connections with the Company, its creditors, or other parties in interest in the Chapter 11 Case. Based on that review, the review of DSI's conflict files and responses to inquiries from DSI's professional staff, neither DSI nor its professionals have any known conflicts with the parties in this case. DSI will separately provide its connections to parties in this case and/or their professionals.

Section 7 – No Audit

The Company acknowledges that it is hiring DSI to assist and advise the Company in business planning and operations. DSI's engagement shall not constitute an audit, review or compilation, or any other type of financial statement reporting engagement that is subject to the rules of AICPA or other such state and national professional bodies.

Section 8 – Non-Solicitation

The Company agrees not to solicit, recruit or hire any employees or agents of DSI for a period of one year subsequent to the completion and/or termination of this Agreement; provided that the Company shall not be prohibited from (x) making general advertisements for employment not specifically directed at employees of DSI or (y) employees of DSI responding to unsolicited requests for employment.

Section 9 – Survival

The provisions of this Agreement relating to indemnification, the non-solicitation or hiring of DSI employees, and all other provisions necessary to the enforcement of the intent of this Agreement will survive the termination or expiration of this Agreement.

Section 10 – Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware without regard to conflicts of law principles.

Section 11 – Entire Agreement, Amendment

This Agreement contains the entire understanding of the parties relating to the subject matter of this Agreement and supersedes and is intended to nullify any other agreements, understandings or representations relating to the subject of this Agreement. This Agreement may not be amended or modified except in a writing signed by the parties.

If you are in agreement with the foregoing terms and conditions please indicate your acceptance by signing an original copy of this Agreement on the signature lines below, then returning one fully-executed Agreement to DSI's office. The Agreement will become effective upon execution by duly authorized representatives of the respective parties.

Very truly yours,

Bradley Sharp
Development Specialists, Inc.

AGREED AND ACKNOWLEDGED:

Highland Capital Management, L.P.
By: Strand Advisors, Inc., its general partner

_____
By: _____, Independent Director
Date: _____

A. Definitions

a. Electronically stored information" or "ESI" shall include all electronic files, documents, data, and information covered under the Federal Rules of Civil Procedure.

B. Preservation of ESI - Generally

a. Debtor acknowledges that they should take reasonable and proportional steps to preserve discoverable information in the party's possession, custody or control. This includes notifying employees possessing relevant information of their obligation to preserve such data.

C. Preservation of ESI – Specific Forms

a. For email, Debtor uses Outlook Email on an Exchange server. Veritas Enterprise Vault is used to archive emails. Journaling is and has been in active use since 2007, and all inbound, outbound, and in-system email .communications have been preserved and are not at risk of deletion due to normal document retention practices. Out of an abundance of caution, a copy of the latest email back-up, which was performed two months ago, shall be copied and stored at a secured location.
b. The file server used by Debtor was backed up approximately one week ago. A copy of this backup shall be created and stored on a portable hard drive at a secured location.
c. The Sharepoint server used by Debtor was backed up approximately one week ago. A copy of this backup shall be created in a format that maintains all potentially relevant information and stored at a secured location.
d. The Oracle E-Business Suite (EBS) server used by Debtor was backed up one week ago. A copy of this backup shall be created in a format and stored at a secured location.
e. The Advent Geneva accounting system used by Debtor was backed up approximately one week ago. Upon reasonable notice, the Committee may submit search criteria to Debtor to run searches in Advent Geneva. Subject to Debtor's rights to assert objections as provided by Part G herein, Debtor will provide the data resulting from such agreed searches pursuant to Part F herein..
f. The Siepe Database (data warehouse) used by Debtor was backed up approximately one week ago. A copy of this backup shall be created in a format and stored at a secured location.
g. For the Box account used by Debtor, to the extent routine data retention practices may result in file deletion, they shall be suspended pending further discussion with the Committee concerning the relevance of such data. Users of the Box account who have the ability to delete files shall be notified of the obligation to suspend deletion of any data stored in Box.
h. Bloomberg data is archived for five years. Debtor shall work with Bloomberg client services to preserve a copy of all such archived material, which shall be stored at a secured location, or otherwise extend the backup window in which Bloomberg preserves the data by reasonable time to be agreed by the parties.

i. Files may be saved locally on laptops/work computers used by employees of Debtor. This practice is discouraged, but may result in the creation of relevant ESI on local systems in a manner that will not be replicated elsewhere. Debtor shall therefore cease the deletion of data (*i.e.*, wiping) of any employee-assigned computer hard drives, such as for departing employees. Debtor shall furthermore instruct current employees not to delete files stored locally on their assigned computers.

D. Not Reasonably Accessible Documents

a. Absent an order from the Court upon a showing of good cause, a Party from whom ESI has been requested shall not be required to search for responsive ESI from sources that are not reasonably accessible without undue burden or cost. The following types of data stores are presumed to be inaccessible and are not subject to discovery, and need not be collected or preserved, absent a particularized need for the data as established by the facts and legal issues of the case:
   i. Deleted, slack, fragmented, or other data only accessible by forensics;
   ii. Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system; and
   iii. On-line access data such as temporary internet files, history, cache, cookies, and the like.

b. To conduct collections in a focused and efficient manner, the Parties also agree to exclude the following file types from collection: Standard system file extensions including, but not limited to, BIN, CAB, CHK, CLASS, COD, COM, DLL DRV, EXE, INF, INI, JAVA, LIB, LOG, SYS and TMP and other file extensions and directories that likely do not contain user generated content such as files identified by hash value when compared to the National Software Reference Library reference data set (RDS Hash), a sub-project of the National Institute of Standards and Technology ("NIST"), of known traceable system and application files. This process is commonly referred to as "De-NISTing."

E. Collection and Search Methodology

a. Searches for emails in Debtor's custody shall be conducted by DSI on Debtor's Veritas Enterprise Vault storage using an unrestricted account at the earliest opportunity, but in no event later than [date]. DSI shall use an add-on component called Discovery Assistant, which enables searches based on email properties, such as senders, recipients, and dates. Discovery Assistant also permits text searching of email contents and the contents of electronic file attachments, although not pictures of text (*e.g.*, scanned PDFs). Debtor did not employ employee message or file encryption that would prevent reasonable operation of the Discovery Assistant search capabilities.

b. The results of email searches shall be produced to the Committee pursuant to Part F below, subject to completion of any review for privilege or other purposes contemplated by this Agreement.

c. A snapshot copy of Debtor databases (Oracle, Siepe) shall be created in a format to be specified later by agreement with the Committee per Part (C)(d), (f), above.

Prior to any production of responsive data from such a structured database Debtor will first identify the database type and version number, provide the vendor-originated database dictionary, if any, (identifying all tables in the database, their fields, the meaning of those fields, and any interrelation among fields) and any user manuals, or any other documentation describing the structure and/or content of the database, and a list of all reports that can be generated from the database. The list of reports shall be provided in native Excel (.xis or .xlsx) format.

d. The Geneva system is highly proprietary and shall not be collected, but the Committee will be given reasonable access to that system per Part C(e), above.
e. Debtor and Committee will meet and confer to discuss the scope of any necessary searches on the Box account.
f. Debtor file server contents, where requested by the Committee, shall be produced pursuant to Part F below.
g. Debtor shall propose a format for producing Sharepoint data. The Committee agrees that it is not necessary to reproduce the interface used by Debtor in the ordinary course of business for Sharepoint.

F. Format of Documents Produced

a. Non-database ESI shall be produced as black and white Group 4 TIFF files, with a resolution of 300 DPI. Page size shall be 8.5 x 11 inches unless, in the reasonable judgment of the Producing Party, a particular item requires a different page size, and original document orientation shall be maintained (i.e., portrait to portrait and landscape to landscape). A Requesting Party may, in good faith and reasonable judgment, request a color copy of a production document if it is necessary to convey the relevant and responsive information. Such color copies may be produced as single page JPG (JPEG) image files. The Requesting Party will bear the costs for color images.
b. The files shall be accompanied by a metadata load file, in a single standard format to be requested by the Receiving Party prior to any production (e.g., Opticon, Summation DII, or the like) showing the Bates number of each page, the appropriate unitization of the documents, and the entire family range. The Parties agree to meet and confer regarding the requested standard format prior to production.
c. The files shall be accompanied by a .DAT text file including the delimited fields identified in the Metadata List (below). No Party will have any obligation to manually generate information to provide the fields identified in the Metadata List.
d. The Producing Party reserves the right to make hard copy documents available for inspection and copying pursuant to Federal Rule of Civil Procedure 34.
e. In the event that a Party identifies hard copy documents for production, hard copy paper documents shall be scanned and will include, to the extent feasible, the following fields in the .DAT text file: PRODBEG, PRODEND, PAGECOUNT, FULLTEXT, and CUSTODIAN. The Parties agree to share equally in the cost of scanning hard copy documents.
f. For any documents that were scanned from hard copy paper documents, the Parties will produce images of hard copy documents unitized to the extent the

original documents appeared to be units in physical form, with attachments following parents, and with information that identifies the holder (or container) structure, to the extent such structure exists and it is reasonable to do so. The Producing Party is not required to OCR (Optical Character Recognition) hard copy documents. If the Receiving Party requests that hard copy documents be OCR'ed, the Receiving Party shall bear the cost of such request, unless the Parties agree to split the cost so that each has an OCR'ed copy of the documents.

g. For ESI that the Producing Party produces in TIFF or JPEG format, the Producing Party shall electronically "burn" a legible, unique Bates number onto each page. The Bates number shall, to the extent reasonably possible: (1) identify the Producing Party; (2) maintain a constant length of nine numeric digits (including 0-padding) across the entire production; (3) contain only alphanumeric characters, no special characters or embedded spaces; and (4) be sequential within a given document. If the Bates number conceals, interferes with, or otherwise obscures any information from the source document, the Producing Party, at the request of the Receiving Party, shall produce a copy that is not obscured.

h. For ESI that the Producing Party produces in TIFF format, if the Producing Party is producing the ESI subject to a claim that it is protected from disclosure under any confidentiality order entered in this matter, the Producing Party shall electronically "burn" the appropriate confidentiality designation onto each page of the document. If the designation conceals, interferes with, or otherwise obscures any information from the source document, the Producing Party, at the request of the Receiving Party, shall produce a copy that is not obscured.

i. The Parties agree to produce e-mail families intact absent a privilege or work product claim, so long as each document contains responsive information; for all documents that contain a responsive, non-privileged attachment, the following fields will be produced (if available) as part of the metadata load file to indicate the parent child or parent/sibling relationship:

    i. Production Bates begin
    ii. Production Bates end
    iii. Production Bates begin attachment
    iv. Production Bates end attachment

    Notwithstanding the aforementioned, all parties acknowledge that Debtor's. Veritas Enterprise Vault system does not have the ability to search for the family members of responsive documents, and that Debtor does not have an obligation to manually search for non-responsive family members of otherwise responsive documents.

j. Unless otherwise agreed, all dynamic date and time fields, where such fields are processed to contain a value, and all metadata pertaining to dates and times, will be standardized to Universal Coordinated Time (UTC) or Universal Coordinated Time + 1 (UTC+1) **[TBD]**. The Parties understand and acknowledge that such standardization affects only dynamic fields and metadata values and does not affect, among other things, dates and times that are hard-coded text within a file. Dates and times that are hard-coded text within a file (for example, in an email thread, dates and times of earlier messages that were converted to body text when subsequently replied to or forwarded; and in any file type, dates and times that are

typed as such by users) will be produced as part of the document text in accordance with the provisions herein.

k. Exceptions to the Production Format

l. Excel spreadsheets shall be produced in native application format, unless redactions are required. The Producing Party will make reasonable efforts to provide a TIFF image of a slip sheet with the Bates number of documents produced natively in its production. The corresponding native file shall be named by using the same Bates number identified on the placeholder TIFF image. Any Excel spreadsheet that requires redaction will be produced in TIFF format only. Certain types of databases are dynamic in nature and may contain information that is irrelevant. These files are sometimes large and would, if rendered to TIFF images completely, produce thousands of pages that would have little utility to a reviewer without the associated database.

m. To the extent information from a structured data repository, such as a database, is requested, responsive information will be produced via a report or export of such data to an appropriate program that is agreeable to the requesting Party. The Parties agree to meet and confer before such data is exported.

G. Production Format Shall Not Alter Authenticity, Admissibility, or Privilege Status

a. No Party shall object that ESI produced pursuant to this Protocol is not authentic by virtue of the ESI having been converted to TIFF. The Parties otherwise reserve all rights regarding their ability to object to the authenticity of documents.

b. Nothing in this Protocol shall be construed to affect in any way the rights of any Party to make any objection as to the production, discoverability, admissibility, or confidentiality of documents and ESI.

c. Nothing in this Protocol shall constitute a waiver by any Party of any claim or privilege or other protection from discovery.

d. Nothing in this Protocol shall be interpreted to in any way limit a Producing Parties right and ability to review documents for responsiveness prior to production.

e. Nothing in the Protocol shall require disclosure of irrelevant information or relevant information protected by the attorney-client privilege, work-product doctrine, or any other applicable privilege or immunity.

Metadata List

File Name	Field Description	Sample Values
BegBates	Bates number for the first page of the document	ABC-0000001
EndBates	Bates number for the last page of the document	ABC-0000002
BegAttach	Bates number for the first page of parent document	ABC-0000001
EndAttach	Bates number for the last page of last attachment	ABC-0000005
Pages	Number of printed pages of the document	2

Global Custodian	Custodian name produced in format: Lastname, Firstname.	Smith, Jane; Taylor, Michael
Confidentiality	Indicates if the document has been designated as "Confidential" or "Highly Confidential" pursuant to the applicable Protective Order	Confidential; Highly Confidential
Redacted	Descriptor for documents that have been redacted: "Yes" for redacted documents; "No" for non-redacted documents	Yes
Email Subject	Subject line of Email or	Text of the subject line
Document Subject	Subject value of documents	Text of the subject line
Date Sent	Date email sent	mm/dd/yyyy
Time Sent	Time email sent	hh:mm:ss AM
Date Last Modified	Date document was last modified	mm/dd/yyyy
Time Last Modified	Time document was last modified	hh:mm:ss AM
Date Created	Date document was first created	mm/dd/yyyy
To	All SMTP address of email recipients, separated by a semi-colon	Larry.murphy@email.com
From	All SMTP address of email author	Bart.cole@email.com
CC	All SMTP address of email "CC" recipients, separated by a semi-colon	Jim.James@gmail.com; bjones@yahoo.com
BCC	All SMTP address of email "BCC" recipients, separated by a semi-colon	mjones@gmail.com
Attach	The file name(s) of the documents attached to emails or embedded in files. Multiple files should be delimited by a semicolon	Filename.doc; filename2.doc
Title	The Title property of a file.	Title
Author	The Author property of a file	John Doe
MessageID	The email message ID	
FILENAME	The original name of the file excluding the path	C:\My Documents\letter.doc
DocType	Email, letter, memo, invoice, etc., if available	
Extension	The file extension	.doc

FileType	The actual file type of the document (Word, Excel, etc.) regardless of the file extension	
HashValue	MD5 Hash value of original file	
FilePath	The directory structure of the original file.	C:\My Documents\ letter.doc
PathToNative	The relative path to a produced native document	C:\VOL001\BATES000000001.xls
PathToText	The relative path to the accompanying text file	C:\VOL001\BATES000000001.txt
Volume	The production number or reference from the production	
Other Custodian	To the extent global deduplication is used, the field indicates the other custodians who also were in possession of the document at the time of collection	

I. **Definitions**

A. "Court" means the United States Bankruptcy Court for the Northern District of Texas.

B. "NAV" means (A) with respect to an entity that is not a CLO, the value of such entity's assets less the value of its liabilities calculated as of the month end prior to any Transaction; and (B) with respect to a CLO, the CLO's gross assets less expenses calculated as of the quarter end prior to any Transaction.

C. "Non-Discretionary Account" means an account that is managed by the Debtor pursuant to the terms of an agreement providing, among other things, that the ultimate investment discretion does not rest with the Debtor but with the entity whose assets are being managed through the account.

D. "Related Entity" means collectively (A)(i) any non-publicly traded third party in which Mr. Dondero, Mr. Okada, or Mr. Grant Scott, or Mr. John Honis (with respect to Messrs. Okada, Scott and Honis, only to the extent known by the Debtor) has any direct or indirect economic or ownership interest, including as a beneficiary of a trust; (ii) any entity controlled directly or indirectly by Mr. Dondero, Mr. Okada, Mr. Grant Scott, or Mr. John Honis (with respect to Messrs. Okada, Scott and Honis, only to the extent known by the Debtor); (iii) MGM Holdings, Inc.; (iv) any publicly traded company with respect to which the Debtor or any Related Entity has filed a Form 13D or Form 13G; (v) any relative (as defined in Section 101 of the Bankruptcy Code) of Mr. Dondero or Mr. Okada each solely to the extent reasonably knowable by the Debtor; (vi) the Hunter Mountain Investment Trust and Dugaboy Investment Trust; (vii) any entity or person that is an insider of the Debtor under Section 101(31) the Bankruptcy Code, including any "non-statutory" insider; and (viii) to the extent not included in (A)(i)-(vii), any entity included in the listing of related entities in **Schedule B** hereto (the "Related Entities Listing"); and (B) the following Transactions, (x) any intercompany Transactions with certain affiliates referred to in paragraphs 16.a through 16.e of the Debtor's cash management motion [Del. Docket No. 7]; and (y) any Transactions with Charitable DAF Fund, L.P. (provided, however, that additional parties may be added to this subclause (y) with the mutual consent of the Debtor and the Committee, such consent not to be unreasonably withheld).

E. "Stage 1" means the time period from the date of execution of a term sheet incorporating the protocols contained below the ("Term Sheet") by all applicable parties until approval of the Term Sheet by the Court.

F. "Stage 2" means the date from the appointment of a Board of Independent Directors at Strand Advisors, Inc. until 45 days after such appointment, such appointment being effective upon Court approval.

G. "Stage 3" means any date after Stage 2 while there is a Board of Independent Directors at Strand Advisors, Inc.

H. "Transaction" means (i) any purchase, sale, or exchange of assets, (ii) any lending or borrowing of money, including the direct payment of any obligations of another entity, (iii) the satisfaction of any capital call or other contractual

requirement to pay money, including the satisfaction of any redemption requests, (iv) funding of affiliates and (v) the creation of any lien or encumbrance.

I. "Ordinary Course Transaction" means any transaction with any third party which is not a Related Entity and that would otherwise constitute an "ordinary course transaction" under section 363(c) of the Bankruptcy Code.

J. "Notice" means notification or communication in a written format and shall include supporting documents necessary to evaluate the propriety of the proposed transaction.

II. Transactions involving the (i) assets held directly on the Debtor's balance sheet or the balance sheet of the Debtor's wholly-owned subsidiaries, including Jefferies Prime Account, and (ii) the Highland Select Equity Fund, L.P., Highland Multi Strategy Credit Fund, L.P., and Highland Restoration Capital Partners

A. **Covered Entities**: N/A (See entities above).

B. **Operating Requirements**

1. Ordinary Course Transactions do not require Court approval (All Stages).

   a) Stage 1 and Stage 2: ordinary course determined by the CRO.

   b) Stage 3: ordinary course determined by the Debtor.

2. Related Entity Transactions

   a) Stage 1 and Stage 2: Transactions with Related Entities require prior approval of CRO and five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

   b) Stage 3:

      (1) Transactions with Related Entities greater than $1,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

      (2) Transactions with Related Entities greater than $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require Court approval, which the Committee agrees may be sought on an expedited basis.

3. Third Party Transactions (All Stages)

   a) Except as set forth in (b) and (c) below, Transactions in excess of $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require three business days advance notice to Committee and if the Committee objects, the burden is on the

Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) The Debtor may satisfy any redemption requests from entities that are not Related Entities without advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable. Redemption requests payable to Related Entities will be held in escrow and will not prevent the winding up or liquidation of any fund or entity.

c) The Debtor may satisfy margin calls and short covers without providing the Committee advance notice if the exigencies do not allow advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable.

C. **Weekly Reporting**: The Debtor will provide the Committee with weekly reports showing all Transactions under this category.

III. Transactions involving entities the Debtor manages and in which the Debtor holds a direct or indirect interest (other than the entities discussed in Section I above)

A. **Covered Entities**: See **Schedule A** hereto. **Schedule A** includes or will include all entities the Debtor manages and in which the Debtor holds a direct or indirect interest (other than the entities discussed in Section I above).[1]

B. **Operating Requirements**

1. Ordinary Course Transactions do not require Court approval (All Stages).

a) Stage 1 and Stage 2: ordinary course determined by the CRO.

b) Stage 3: ordinary course determined by the Debtor.

2. Related Entity Transactions

a) Stage 1 and Stage 2: Transactions with Related Entities require prior approval of CRO and five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) Stage 3:

(1) Transactions with Related Entities greater than $1,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

[1] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

(2) Transactions with Related Entities greater than $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require Court approval, which the Committee agrees may be sought on an expedited basis.

3. Third Party Transactions (All Stages)

a) Except as set forth in (b) and (c) below, Transactions in excess of $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require three business days advance notice to Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) The Debtor may satisfy any redemption requests from entities that are not Related Entities without advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable. The Debtor will provide the Committee with five business days advance notice of any redemption requests made by and payable to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

c) The Debtor may satisfy margin calls and short covers without providing the Committee advance notice if the exigencies do not allow advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable.

C. **Weekly Reporting**: The Debtor will provide the Committee with weekly reports showing all Transactions under this category.

IV. Transactions involving entities that the Debtor manages but in which the Debtor does not hold a direct or indirect interest

A. **Covered Entities**: See **Schedule A** hereto. **Schedule A** includes or will include all entities that the Debtor manages but in which the Debtor does not hold a direct or indirect interest.[2]

B. **Operating Requirements**

1. Ordinary Course Transactions do not require Court approval (All Stages).

a) Stage 1 and Stage 2: ordinary course determined by the CRO.

b) Stage 3: ordinary course determined by the Debtor.

2. Related Entity Transactions

[2] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

a) Stage 1 and Stage 2: Transactions with Related Entities require prior approval of CRO and five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) Stage 3:

(1) Transactions with Related Entities greater than $1,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

(2) Transactions with Related Entities greater than $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require Court approval, which the Committee agrees may be sought on an expedited basis.

3. Third Party Transactions (All Stages):

a) Except as set forth in (b) and (c) below, any Transaction that decreases the NAV of an entity managed by the Debtor in excess of the greater of (i) 10% of NAV or (ii) $3,000,000 requires five business days advance notice to Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) The Debtor may satisfy any redemption requests from entities that are not Related Entities without advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable. The Debtor will provide the Committee with five business days advance notice of any redemption requests made by and payable to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

c) The Debtor may take such steps as may be reasonably necessary to winddown any managed entity and make distributions as may be required in connection with such winddown to any required parties. The Debtor will provide the Committee with five business days advance notice of any distributions to be made to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

C. **Weekly Reporting**: The Debtor will provide the Committee with weekly reports showing all Transactions under this category.

V. Transactions involving entities that the Debtor does not manage but in which the Debtor holds a direct or indirect interest

A. Covered Entities: See **Schedule A** hereto. **Schedule A** includes or will include all entities that the Debtor does not manage but in which the Debtor holds a direct or indirect interest.[3]

B. Ordinary Course Transactions (All Stages): N/A

C. Operating Requirements: N/A

D. Weekly Reporting: Debtor will provide weekly reports of all cross-held asset Transactions, i.e. Transactions in which the Debtor or a Related Entity also holds a direct or indirect interest.

VI. Transactions involving entities that the Debtor does not manage and in which the Debtor does not hold a direct or indirect interest

A. Covered Entities: See **Schedule A** hereto. **Schedule A** includes or will include all entities that the Debtor does not manage and in which the Debtor does not hold a direct or indirect interest.[4]

B. Ordinary Course Transactions (All Stages): N/A

C. Operating Requirements: N/A

D. Weekly Reporting: Debtor will provide weekly reports of all cross-held asset Transactions, i.e. Transactions in which the Debtor or a Related Entity also holds a direct or indirect interest.

VII. Transactions involving Non-Discretionary Accounts

A. Covered Entities: See **Schedule A** hereto. **Schedule A** includes or will include all non-discretionary accounts.[5]

B. Ordinary Course Transactions (All Stages): N/A

C. Operating Requirements: N/A

D. Weekly Reporting: Debtor will provide weekly reports of all cross-held asset Transactions, i.e. Transactions in which the Debtor or a Related Entity also holds a direct or indirect interest.

[3] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

[4] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

[5] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

VIII. Additional Reporting Requirements – All Stages (to the extent applicable)

A. DSI will provide detailed lists and descriptions of internal financial and operational controls being applied on a daily basis for a full understanding by the Committee and its professional advisors three (3) business days in advance of the hearing on the approval of the Term Sheet and details of proposed amendments to said financial and operational controls no later than seven (7) days prior to their implementation.

B. The Debtor will continue to provide weekly budget to actuals reports referencing their 13-week cash flow budget, such reports to be inclusive of all Transactions with Related Entities.

IX. **Shared Services**

A. The Debtor shall not modify any shared services agreement without approval of the CRO and Independent Directors and seven business days' advance notice to counsel for the Committee.

B. The Debtor may otherwise continue satisfying its obligations under the shared services agreements.

X. Representations and Warranties

A. The Debtor represents that the Related Entities Listing included as **Schedule B** attached hereto lists all known persons and entities other than natural persons included in the definitions of Related Entities covered by Section I.D parts A(i)-(vii) above at the time of the execution of the Term Sheet.

B. The Debtor represents that the list included as **Schedule C** attached hereto lists all known natural persons included in the definitions of Related Entities covered by Section I.D parts A(i)-(vii) above at the time of the execution of the Term Sheet.

C. The Debtor represents that, if at any time the Debtor becomes aware of any person or entity, including natural persons, meeting the definition of Related Entities covered by Section I.D parts A(1)-(vii) above that is not included in the Related Entities Listing or Schedule C, the Debtor shall update the Related Entities Listing or Schedule C, as appropriate, to include such entity or person and shall give notice to the Committee thereof.

Schedule A[6]

Entities the Debtor manages and in which the Debtor holds a direct or indirect interest

1. Highland CLO Funding, Ltd. (0.63% Ownership Interest)
2. Dynamic Income Fund (0.26% Ownership Interest)

Entities that the Debtor manages but in which the Debtor does not hold a direct or indirect interest

1. Highland Prometheus Master Fund L.P.
2. NexAnnuity Life Insurance Company
3. PensionDanmark
4. Highland Argentina Regional Opportunity Fund
5. Longhorn A
6. Longhorn B
7. Collateralized Loan Obligations
   a) Rockwall II CDO Ltd.
   b) Grayson CLO Ltd.
   c) Eastland CLO Ltd.
   d) Westchester CLO, Ltd.
   e) Brentwood CLO Ltd.
   f) Greenbriar CLO Ltd.
   g) Highland Park CDO Ltd.
   h) Liberty CLO Ltd.
   i) Gleneagles CLO Ltd.
   j) Stratford CLO Ltd.
   k) Jasper CLO Ltd.
   l) Rockwall DCO Ltd.
   m) Red River CLO Ltd.
   n) Hi V CLO Ltd.
   o) Valhalla CLO Ltd.
   p) Aberdeen CLO Ltd.
   q) South Fork CLO Ltd.
   r) Legacy CLO Ltd.
   s) Pam Capital
   t) Pamco Cayman

Entities that the Debtor does not manage but in which the Debtor holds a direct or indirect interest

1. Highland Opportunistic Credit Fund
2. Highland Healthcare Opportunities Fund f/k/a Highland Long/Short Healthcare Fund
3. NexPoint Real Estate Strategies Fund
4. Highland Merger Arbitrage Fund
5. NexPoint Strategic Opportunities Fund
6. Highland Small Cap Equity Fund
7. Highland Global Allocation Fund

[6] NTD: Schedule A is work in process and may be supplemented or amended.

8. Highland Socially Responsible Equity Fund
9. Highland Income Fund
10. Stonebridge-Highland Healthcare Private Equity Fund ("Korean Fund")
11. SE Multifamily, LLC

Entities that the Debtor does not manage and in which the Debtor does not hold a direct or indirect interest

1. The Dugaboy Investment Trust
2. NexPoint Capital LLC
3. NexPoint Capital, Inc.
4. Highland IBoxx Senior Loan ETF
5. Highland Long/Short Equity Fund
6. Highland Energy MLP Fund
7. Highland Fixed Income Fund
8. Highland Total Return Fund
9. NexPoint Advisors, L.P.
10. Highland Capital Management Services, Inc.
11. Highland Capital Management Fund Advisors L.P.
12. ACIS CLO Management LLC
13. Governance RE Ltd
14. PCMG Trading Partners XXIII LP
15. NexPoint Real Estate Partners, LLC f/k/a HCRE Partners LLC
16. NexPoint Real Estate Advisors II LP
17. NexPoint Healthcare Opportunities Fund
18. NexPoint Securities
19. Highland Diversified Credit Fund
20. BB Votorantim Highland Infrastructure LLC
21. ACIS CLO 2017 Ltd.

Transactions involving Non-Discretionary Accounts

1. NexBank SSB Account
2. Charitable DAF Fund LP

Schedule B

Related Entities Listing (other than natural persons)

Schedule C

1. James Dondero
2. Mark Okada
3. Grant Scott
4. John Honis
5. Nancy Dondero
6. Pamela Okada
7. Thomas Surgent
8. Scott Ellington
9. Frank Waterhouse
10. Lee (Trey) Parker

November 2019

James P. Seery, Jr.

New York, NY

James P. Seery, Jr. is a high yield and distressed investing professional who was most recently a Senior Managing Director and co-Head of Credit at Guggenheim Securities LLC, where he is responsible for helping direct the development of a leveraged finance and credit distribution business. Prior to joining Guggenheim, Mr. Seery was the President and a senior investing partner of River Birch Capital, LLC, a $1.3bn global credit fund manager. In that role, he developed and led many of the firm's most profitable credit investments. Mr. Seery is a licensed attorney and was formerly a partner and co-Head of the Sidley Austin LLP New York Corporate Reorganization and Bankruptcy Group, and he also recently served as a Commissioner on The American Bankruptcy Institute's Commission to Study the Reform of Chapter 11.

Before his joining Sidley Austin, Mr. Seery was a Managing Director and the Global Head of Lehman Brothers' Fixed Income Loan business. In that position, he was responsible for managing the Lehman Brothers' Fixed Income investment grade and high yield loan businesses, including underwriting commitments, distribution, hedging, trading and sales (including CLO manager relationships), portfolio management, and restructuring. Mr. Seery was also a member of the Lehman Brothers' Fixed Income Operating Committee and Global Credit Products Operating Committee as well as the High Yield Commitment and New Business Committees. From 2000 to 2004, Mr. Seery ran Lehman Brothers' restructuring and workout businesses with responsibility for management of distressed corporate debt investments, and in 2008 he was a key member of the small team that successfully sold Lehman to Barclays.

Mr. Seery was selected as one of the Top Restructuring Lawyers in the U.S. Under 40 by *Turnarounds and Workouts* in 1999. Mr. Seery graduated in 1990 from New York Law School, *magna cum laude*, where he was an editor of the Law Review and Colgate University in 1984. He was a member of the Board of Directors of the Loan Syndications and Trading Association from 2006 to 2008 and a member of the INSOL International Lenders Group from 2016-2017.

JAMES P. SEERY, JR.

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Experience

Guggenheim Securities LLC, New York, New York Aug. 2017-Nov. 2019
Senior Managing Director, Co-Head Credit

- Responsible for developing leveraged finance and credit portfolio advisory businesses
- Management of teams of leveraged finance bankers and trading and sales professionals

River Birch Capital, LLC, New York, New York April 2012-July 2017
President, River Birch Capital, LLC

- President and senior investing partner at New York based $1.3bn global long-short credit fund focused on corporate credit from investment grade to distressed
- Responsible for originating, executing and managing stressed and distressed credit investments with a team of 6 investing partners and 5 analysts and traders
- Led finance and operations team with CFO/CCO; firm grew from approx. $200mm in 2012 to $1.3bn in 2017

Sidley Austin LLP, New York, New York May 2009-April 2012
Co-head New York Corporate and Reorganization Group

- Built and managed a creditor focused restructuring group as part of an international company side practice in a nearly 2000 attorney firm
- Represented banks, corporations, hedge funds, and structured investment vehicles in a variety of restructuring, financing and litigation matters

Lehman Brothers, New York, New York April 1999-May 2009
Global Head Fixed Income Loans

- Managing Director responsible for managing the global fixed income loan business, including investment grade and high yield commitments, global distribution, hedging, trading and sales, CLO origination, portfolio management, and restructuring; managed underwritten loan commitments and teams of credit sales and trading professionals as well as structuring, portfolio management and work-out specialists
- Member Fixed Income Operating Committee, Global Credit Products Operating Committee, and High Yield Commitment and New Business Committees
- Responsible for originating, structuring and managing proprietary distressed debt investments, rescue financings, and restructurings 1999-2004
- Key member of team that negotiated and completed the sale of Lehman Brothers to Barclays Sept. 2008; remained at Barclays through April 2009

Phillips Nizer, Garden City, New York May 1995-April 1999

- Senior Associate in corporate reorganization group of boutique New York City law firm

Cadwalader, Wickersham & Taft, New York, New York May 1989-May 1995

- Associate in corporate reorganization group of New York City based international law firm

Education

New York Law School, New York, New York, J.D., *magna cum laude*, Editor Law Review 1990
Colgate University, Hamilton, New York, B.A. History 1984

Experience

Director, River Birch International, Ltd. Board	2015-2017
Director, Camphill Foundation Board	2017-2019
Member, INSOL International Lenders Group Board	2016-2017
Commissioner, ABI Commission to Study Reform of Ch. 11	2012-2015
Director, Loan Syndications and Trading Association	2006-2008

Selected River Birch Sample Investments

Cash America International *5.75% Senior Unsecured Notes due 2018 and Litigation Claim – Developed and led execution of successful note purchase and make-whole litigation strategy based on company's improper spin of payday lending business; U.S. District Court published decision in note holders' favor led to settlement*

Chesapeake Energy Corp *6.775% Senior Notes due 2019 Litigation Claims – Developed and led execution of successful note purchase and make-whole litigation strategy based on company's improper call of notes; ultimately prevailed in $450mm judgment discussed in published Second Circuit and U.S. District Court decisions*

Caesars Entertainment Resort Properties *8% 1st Lien Notes due 2020; 11% 2d Lien Notes due 2021 – Developed and led (with senior investment analyst partner) execution of successful bankruptcy investment strategy focused on lower beta part of the capital structure of bankrupt casino operator; investment designed for high return with significant downside protection*

Intelsat Jackson Holdings *9.5% Senior Secured Notes due 2022 – Developed and led (with senior investment analyst partner) execution of successful new issue stressed secured note investment strategy; responsible for structuring and tightening covenant package and increasing size of offering after determining that potential litigation threat was low risk; responsible for recommending ICF 12.5% note investment in the low 80s in February 2018*

Motors Liquidation Company *GUC Trust Publicly Traded Units – Developed and led successful investment strategy in publicly traded bankruptcy liquidation units (GM); took the opposite side of sell-side analyst recommendations and engineered a successful settlement in high return/low downside position*

Hypo Alpe Adria Bank (Hetar) *Senior Guaranteed Notes – Developed and led (with senior investment analyst partner) execution of successful investment strategy in insolvent Austrian bank with notes guaranteed by an Austrian State*

Presidio Inc. *10.25% Senior Notes due 2023 – Developed and led execution of successful investment strategy to purchase newly developed mezzanine part of the capital structure on struggling new issue deal; ultimately sponsor purchased the mezzanine but aggressive structuring and bidding for the mezzanine tranche led to outsized allocation of new notes*

Nortel Networks Ltd. *6.875% Senior Notes due 2023 – Developed and led (with senior investment analyst partner) execution of bankruptcy liquidation strategy based on litigation and ultimate leverage of Canadian liquidating estate*

Selected Speaking Engagements

American Law Institute/ NYU Law – Credit Markets and Corporate Reorganization, New York City, April 2017
Moderator, *Auctions and Asset Sales In and Out of Bankruptcy*

University of Texas Law/American Bankruptcy Institute -- Emerging Valuation Issues in Bankruptcy, Las Vegas, March 2017
Panelist, *Determining Valuation and the Fulcrum Security*
Panelist, *Distressed Investments Strategies*

NYU Law – Claim Priority Roundtable, New York City, September 2016
Panelist, *Allocating Value in and Out of Bankruptcy*

University of Texas Law/ABI – Emerging Valuation Issues in Bankruptcy, Las Vegas, March 2016
Panelist, *ABI Commission Report Proposed Amendments and Their Impact on Valuation*

The M&A Advisor – Distressed Investing Summit, Palm Beach, January 2016
Panelist, *Using Options to Bridge Value Gaps*

NYU Law – Seligman Bankruptcy and Business Reorganization Workshop, New York City, September 2015
Panelist, *Valuation Approaches and Methodologies*

Skadden Arps/Colgate University – Law and Finance Summit, New York City, November 2014
Presenter, *Recent Developments in Bankruptcy and Distressed Debt*

Dubel & Associates, L.L.C.

John S. Dubel
Board of Directors Experience

- **Purdue Pharma Inc. – July 2019 to Present -** Independent Board Member and Chair of the Special Committee of Directors

  In addition to being a member of the Board of Directors of Purdue Pharma Inc., I am the Chair of the Special Committee of Independent Directors charged with overseeing the investigation of relationships between Purdue and Purdue owners, the Sackler family.

- **WMC Mortgage, LLC – Indirect Subsidiary GE – July 2018 to December 2019 -** Independent Board Member and Chair of the Special Independent Committee of Directors

  WMC's chapter 11 plan was recently confirmed and WMC will emerge from Chapter 11 in early December 2019. I am the Chair of the Special Independent Committee of Independent Directors for this indirect subsidiary of GE. The Special Committee was tasked with reviewing the relationship between the insolvent WMC and GE and resolving its insolvency issues through a court supervised chapter 11 proceeding. I was the lead person responsible for negotiations with the parent concerning the level of support that the parent was required to provide and worked with our creditors to negotiate a resolution amongst all parties.

- **Werner Co.** – January 2013 to Present – Sole Independent Director

  Werner is a global leader in access equipment, secure storage, light duty construction and fall protection products with operations across all geographies. A consortium of private equity investors bought the assets out of a bankruptcy proceeding in 2007. I was asked to serve on the Board as the sole Independent Director by the largest shareholder. Werner more than doubled the size of its business, diversified its product offering and substantially improved its EBITDA prior to its sale in July 2017. As an independent director, working with one other director, we lead the effort in the sale process that achieved an additional $180 million increase in the sale price of the company for its distressed investors. I am currently the lead director responsible for the resolution of post-sale purchase price adjustments.

- **Old PSG f/k/a Performance Sports Group** – August 2017 to December 2017

  Asked to serve on the Board, by the Official Equity Committee, after the sale of Performance Sports Group's assets. My role was to oversee the plan of reorganization process to drive to a smooth confirmation.

- **FXI Holdings** – September 2010 to October 2017 – Independent Director

  FXI is a leading producer of engineered polyurethane foam solutions serving the largest customers in the largest markets. It has the broadest customer and consumer reach of any North American foam producer. FXI's assets where purchased during a bankruptcy proceeding in 2009. I was asked to serve on the board of directors by one of the two private equity firms that owned FXI. Shortly after joining the Board, I was asked to Chair a Special Committee of the Board to manage certain litigation and government investigations related to alleged anti-trust infractions. FXI was the subject of over 50 different class action and individual litigations alleging damages in excess of $3 billion. Over a period of several years, FXI was able to settle all of its litigation for a minor fraction of the alleged damages and all investigations by the government were dropped. During this time, the company's performance improved in a consistent manner with EBITDA more than doubling. Once these litigations were settled, the company was marketed and ultimately sold in October 2017.

- **ResCap Liquidating Trust** – December 2013 to March 2017 – Chairman of the Board - December 2013 to late 2015

  After the ResCap chapter 11 plan was confirmed, I served on the Board of the ResCap Liquidating Trust, as FGIC's representative, to guide the wind down of the remaining assets and prosecute claims in excess of $4 billion against institutions that caused harm to ResCap. During this time, I also served as Liquidating Trustee while we brought on board a new in-house lawyer to prosecute these claims and transitioned this individual into the permanent Liquidating Trustee role.

- **FGIC Corporation and FGIC** - December 2008 to April 2014 – Chairman of the Board during various parts of that time frame – while serving as CEO

- **Barneys New York** – February 2012 to May 2012 – Sole Independent Director

  After Barneys' 2007 sale to Istithmar World, the Government of Dubai's private investment fund, Barneys was impacted by the recession in the late 2000's. I was brought in to serve as the sole independent director during the out of court restructuring process which resulted in a consensual change of control for Barneys to its distressed investor creditors.

- **The Leslie Fay Companies** – April 1993 to May 1996 – while serving as the EVP of Restructuring and CFO

- Mr. Dubel has also served as a member and chairperson of various ad hoc and official creditor committees.

Dubel & Associates, L.L.C.

John S. Dubel
Key Management Experience

- **Noble Environmental Power –** Restructuring Advisor to the Company - 2018

  Noble was the owner of two utility scale wind power plants in upstate New York which were in default on their debt instruments. Working closely with Noble's investment bankers we were able to complete a sale of these plants while keeping the companies out of chapter 11 and returning net sale proceeds to its shareholders.

- **SunEdison, Inc.** – Chief Executive Officer and Chief Restructuring Officer – 2016-2017

  SunEdison was the largest global renewable energy development company prior to its filing for chapter 11 in April 2016. SunEdison had over $10 billion of liabilities and 4,500 employees spread across operations in over 50 countries on 6 continents. A decline in energy prices along with loss of faith in management by investors and numerous litigations filed against the company caused the closing of the capital markets for SunEdison which led to its filing for chapter 11. I was brought in as a requirement of the DIP agreement. SunEdison's assets were sold in a manner to preserve the greatest value for its creditors. I am currently assisting the wind down SunEdison entity as requested.

- **Financial Guaranty Insurance Company** – Chairman and Chief Executive Officer – 2008-2014

  FGIC was the third largest monoline bond insurer, insuring in excess of $300 billion of public finance instruments, RMBS securitizations and CDS contracts with over $4 billion of capital. After the collapse of the residential mortgage market in the 2007/08 timeframe, FGIC lost its AAA ratings and experienced tremendous losses on its insurance contracts. This led to an insolvency proceeding under NY State insurance law with an innovative resolution through a pre-arranged rehabilitation plan. This enabled it to continue to pay its policy holders in a timely manner.

- **Residential Capital** – Co-Chairman of the Official Creditors Committee – 2012-2013

  ResCap, a wholly owned subsidiary of Ally Financial, was one of the largest mortgage originators in the US. FGIC was its 2nd largest creditor and after its chapter 11 filing in May of 2012, I was appointed as the Co-Chair of ResCap's Official Unsecured Creditors Committee. As the lead negotiator for the UCC, the UCC was able to negotiate an increase in the contribution to the plan of reorganization by the parent, Ally, from approximately $650 million to $2.1 billion. This contribution settled all of the litigation between Ally and Rescap and enabled ResCap to emerge from chapter 11.

- **Anchor Glass Container Corporation** – Chief Restructuring Officer – 2005-2006

  Anchor Glass was the 3rd largest manufacturer of glass containers in the US, with Anheuser Busch and Snapple as its largest customers, where it provided "just in time" deliveries to enable its customers plants to operate 24/7. Its third trip through chapter 11 resulted from poor contract pricing and high legacy costs. I worked closely with the CEO to renegotiate these contracts and reduce the cost structure which enabled it to emerge from chapter 11 as a viable business which continues to operate today.

- **RCN Corporation** – President and Chief Operating Officer - 2004

  RCN was a Bundled 3-product cable provider offering integrated voice, video and data products in the US Northeast, Midwest and West Coast markets with over $1.7 billion of debt incurred during its build out period. Working with the Lead Director, a pre-arranged chapter 11 plan was negotiated with all of its creditor constituencies to enable it to emerge as a profitable business in its markets where it continues to operate today.

- **Cable & Wireless America** – Chief Executive Officer – 2003-2004

  C&W America was a premier hosting business with 14% share of the US market and world class a Tier 1 IP Network. When its British parent company experienced financial difficulties, they attempted to abandon C&W America which caused stress for its major customers, including Yahoo, Google and others. A plan was put in place, though a chapter 11 process, to dramatically reduce its daily cash burn and sell the entity while maintaining its customer base.

- **Acterna Corporation** – Chief Restructuring Officer - 2003

  Acterna was a multi-national manufacturer of telecommunications and cable equipment with revenues of approximately $1.7 billion and debt of $1 billion prior to the industry down turn. I worked closely with the CEO to stabilize the operations and avoid a fire sale of the business. A quick turn through chapter 11 enabled it to emerge as a viable business, where upon the CEO was able to regrow the business and position it for a successful sale to an industry player 18 months later.

- **WorldCom, Inc.** – Chief Financial Officer – 2002, Advisor – 2003

  WorldCom was one of the largest telecommunication companies with assets of over $107 billion and operations across the globe. It filed for chapter 11 during 2002 due to a massive fraud which covered up the significant operational deficiencies and losses it was experiencing. I was brought in as a condition of the DIP agreement and worked closely with the CEO and other members of the senior management to stabilize the company, restructure the operations to reduce opex, provide stability to the international operations and assist with the plan of reorganization negotiations and confirmation.

- **CellNet Data Systems, Inc.** – Chief Restructuring Officer – 1999-2001

  CellNet was a startup technology company that provided smart grid and smart metering and billing solutions for the utility industry. After burning through in excess of $600 million of initial funding it was not able to access the capital markets to continue to build out its platform and realize the cost synergies across contracts that would make it profitable. Working closely with the new CEO, we reduced the cost structure and sold the company to one of its meter suppliers enabling it to continue to operate in a successful manner.

- **Barneys New York** – Chief Financial Officer – 1996-1999

  Barneys was, at this time, a family owned high end retail store chain operating with over 30 stores and international affiliations in Asia. After an uncontrolled growth plan and management that did not understand its cost structure, it filed for chapter 11. I was brought in a the request of the DIP lender to oversee the family's management, to control its costs, close unprofitable locations, renegotiate store leases and work out a consensual chapter 11 plan that included its largest creditors providing financing through a rights offering to enable Barneys to successfully emerge from chapter 11 as a profitable retailer.

- **The Leslie Fay Companies** – EVP Restructuring and Chief Financial Officer – 1993-1995

  Leslie Fay was one of the larger designer and manufacturer of ladies dresses, sportwear and suits in the US. A public company, it was the victim of fraud by its financial management team to hide the true cost of operations and manufacturing of its products. This led to a chapter 11 filing. I worked closely with the CEO and President to stabilize its financial management team, reduce costs and position it for an emergence from chapter 11.

- **Robert Maxwell Group** – Head of US Private Companies – 1991-1993

  Robert Maxwell was a British entrepreneur who invested heavily in the publishing space. After financial improprieties were uncovered and his subsequent suicide, I was appointed by the UK Administrators to run all of his US operations, which included over 40 private companies. I worked closely with the UK administers to realize value through sales of these US operations and turn those proceeds over to the UK Administrators.

Mr. Dubel is a past board member and officer of the Association of Insolvency and Reorganization Advisors, a Certified Insolvency and Reorganization Advisor and is a member of the Turnaround Management Association and the American Bankruptcy Institute. Mr. Dubel received a Bachelor in Business Administration degree from the College of William and Mary.

Dubel & Associates, LLC

Selected Case Studies

SunEdison, Inc.

John Dubel – Chief Executive Officer and Chief Restructuring Officer

Situation

- SunEdison (SUNE) was the largest global renewable energy development company prior to its filing for chapter 11 in April 2016. SUNE had over $10 billion of liabilities and 4,500 employees spread across operations in over 50 countries on 6 continents
- Continued downward pressure on energy prices caused renewable energy projects to experience stress. Lack of proper integration of acquisitions and overpayment on other acquisitions caused a liquidity crisis. Public spin-offs of profitable yieldco assets cut off cash flow that was needed to run the operations.
- Senior management control of the Yieldcos enabled borrowings from the Yieldcos which could not be repaid

Actions Taken

- Hired initially as CRO with a clear mandate to take on CEO responsibilities
- An immediate assessment of the opportunity to maintain a going concern was initiated.
- Programs were put in place to plug the employee exodus that SUNE was experiencing
- In consultation with our lenders made the determination that an orderly sale of assets was the best path to optimum value realization
- Maintained an open line of communication with the DIP, 1L and 2 L lenders to build back trust in the company
- Engaged with the Board of the Yieldcos, TERP and GLBL, to work towards a resolution of the disputes between the Yieldcos and SUNE

Results

- Took on CEO role after a short transition with the former CEO
- Reorganization of key personnel functions including the hiring of a new CFO and Controller provided stability in the Finance functions for the company to operate within the limits of the DIP agreement.
- Executed a global marketing process which resulted in over 60 asset sales with approximately $1.5 billion of gross proceeds
- Executed a plan which resulted in the transition of administrative and operational functions from SUNE to the Yieldcos which helped stabilize the value of our ownership stake in these entities

SunEdison, Inc. (continued)

John Dubel – Chief Executive Officer and Chief Restructuring Officer

Situation

- Class and individual litigation against SUNE and the Yieldcos related to these control issues ensued.
- Shortly after a Feb 2016 2L financing the company has exhausted those funds and was out of available funds to operate the business.
- Additional litigation commenced related to cancelled acquisitions.
- During this timeframe, the creditors lost faith in the CEO and CFO.
- SUNE filed for chapter 11 in late April 2016 funded by a DIP provided by the 1L and 2L creditors.

Actions Taken

- Engaged with the Board and management of the Yieldcos, TERP and GLBL, to start to work towards a resolution of the disputes between the Yieldcos and SUNE
- Put in place a path to seek resolution of all of the Class Action and individual shareholder litigations by seeking a mediation in the District Court and Bankruptcy Court litigation related to both SUNE and the Yieldcos
- Commenced negotiations to settle the various litigations amongst SUNE's creditor groups and between SUNE and its Yieldcos
- Worked closely with Chief Judge Morris, the mediator appointed in the case, to craft a resolution to all intercreditor disputes

Results

- Drove a plan, through a directed litigation strategy, to force a resolution of the over $3 billion of claims brought against SUNE by the Yieldcos which resulted in a cooperative sale of the Yieldcos netting SUNE approximately $825 million
- A replacement DIP agreement was put in place to eliminate certain concerned creditors and align the interests of the DIP lenders and the prepetition secured creditors.
- Settlements of the vast majority of class and individual shareholders were negotiated
- A mediated resolution amongst SUNE's creditor resulted in a successful chapter plan of reorg funded by a rights offering led by SUNE's 2L creditors

Financial Guaranty Insurance Company

John Dubel – Chief Executive Officer and member of the Board of Directors

Situation

- FGIC was the third largest monoline bond insurer, insuring in excess of $300 billion of public finance instruments, RMBS securitizations and CDS contracts
- At the start of 2008, FGIC was at risk of losing its AAA ratings
- The residential real estate meltdown caused FGIC to face billions of dollars of claims from CDS and RMBS contracts it had insured
- In addition, several of FGIC's largest public finance deals were on the cusp of defaulting
- In late 2009, FGIC's statuatory capital went negative and was subject to immediate takeover by the NYS Department of Financial Services

Actions Taken

- Raised capital surplus by $830 million through reinsurance agreements and preferred stock
- Negotiated settlements of CDS contracts
- Managed the workout of multiple public finance insurance contracts
- Managed affirmative litigation actions to recover from parties that harmed FGIC's insurance contracts
- Developed an innovative restructuring plan to allow FGIC to file a pre-arranged rehabilitation plan in NYS Court
- Positioned the company to be able to operate in the post rehabilitation environment to pay claims to policyholders in a timely manner

Results

- Planned and executed an orderly Rehabilitation Plan process which resulted in an innovative and precedent setting proceeding for FGIC's policyholders
- Managed down the overall exposure from $312 billion to under $30 billion
- Settled parent/subsidiary issues without litigation
- Recovered in excess of $1.25 billion for policyholders from parties that harmed FGIC's contracts
- All of these results were accomplished while maintaining an independent view towards protecting all policyholders interests

RCN Corporation – Integrated Triple Play Service Provider

John Dubel – President and Chief Operating Officer

Situation

- Bundled 3-product cable provider offering integrated voice, video and data products in the US Northeast, Midwest and West Coast markets
- Revenues of approximately $500 million
- Over 1 million connections
- $1.7 BN of debt in default
- Secured creditors pushing the Company to a forced liquidation
- Lack of confidence in management's business plan and ability to rationalize the business
- Company lacked adequate liquidity to maintain operations

Actions Taken

- Hired as President and CRO to lead RCN during this crisis.
- Implemented reorganization of operating costs achieving positive EBITDA and cash flow
- Actions included:
  - Rationalized customer base
  - Segmented Customer Service activity and automated where possible
  - Consolidated Network Operations to drive efficiency
  - Reduced IT functions
  - Reduced customer service call volume through web-based solutions
  - Simplified product offering
  - Generated Tech Operations savings

Results

- Streamlined operations and reduced breakeven costs achieving positive cash flow and EBITDA
- Reduced annualized SG&A costs by 20%
- Reduced headcount by 25%
- Improved Customer Service quality
- Company emerged with over $125 million of cash in hand
- Instituted rigorous cost reduction procedures within the company
- Positioned the company for future positive growth

Cable & Wireless America – Successfully Positioned the Company for a Sale

John Dubel – Chief Executive Officer

Situation

- Premier hosting business with 14% share of the US market by revenue and World Class Tier 1 IP Network
- Parent company's announcement of intention to exit the US market created uncertainty for customers, suppliers, and employees
- Daily cash burn estimated at $2M
- Need to stabilize standalone operations and facilitate a sale transaction

Actions Taken

- Negotiated terms of separation from parent company and obtained ongoing funding commitment
- Stabilized skittish customer base
- Took control of cash management and forecasting process
- Implemented cost cutting strategy to achieve cash flow breakeven within 9 months
- Managed extensive due diligence process by multiple bidders

Results

- Reduced daily cash burn to $0.7M
- Planned and executed orderly Chapter 11 filing with the support of a "stalking horse" bidder to facilitate a 363 sale
- Active auction process resulted in total bid consideration of $167.5M, a threefold increase over the stalking horse bid value

Acterna – Reduced Costs, Drove a Successful Turnaround

John Dubel – Chief Restructuring Officer

Situation

- Leading Telecom Network equipment supplier with worldwide operations that was facing a severe liquidity crisis
- Test equipment market was crippled by the drought of capital spending from Telecom Network companies
- Debt levels were not sustainable in then current market conditions

Actions Taken

- Assumed role of CRO to lead company through Chapter 11
- Restructured $1.0 BN of debt
- Preserved non-domestic assets across 30 countries necessary to a successful reorganization.
- Focused sales activity on core markets
- Worked with management to reduce SG&A costs
- Rationalized headcount through centralization of manufacturing activity
- Managed the subsidiary divestiture program
- Integrated worldwide cash control procedures improving liquidity

Results

- Acterna emerged from Chapter 11 with 80% less debt and a reduction of 85% of interest costs in less than 6 months
- Improved international cash liquidity sufficiently for non-US operations to become self funding
- Cash at emergence was over $60 million
- Reduced operating cash costs so the company was self funding and the DIP was never used to operate the company
- 18 months after C-11, Acterna announced a sale to JDS Uniphase, for a three fold increase in value.

WorldCom – Stabilized Operations and Finance Function

John Dubel – Chief Financial Officer

Situation

- A massive fraud which masked operational, financial and reporting issues crippled the company's credibility
- WorldCom suffered from excess debt with declining value of assets, financial fraud issues, contentious relationship with creditors, and a substantial cash burn
- Significant negative cash flow from international operations
- WorldCom filed for bankruptcy in July of 2002, becoming the largest bankruptcy filing in history at the time

Actions Taken

- Assumed role Chief Financial Officer until a permanent management team could be put in place then worked as financial advisor for pendency of Chapter 11 case
- Put turnaround teams, operational restructuring plans, and cash management plans in place
- Led the international restructuring efforts
- Assisted in negotiations with creditors
- Implemented an achievable 2003 business plan, facilitated several cost reduction initiatives, and managed the 13-week cash flow forecast
- Reduced capital spending

Results

- Achieved $2 BN of operational savings
- Increased cash flow by more than $100M in international operations and avoided bankruptcy in many jurisdictions
- Worked with all stakeholders to reach consensus on a plan of reorganization
- Successfully restructured the balance sheet

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 (the "Debtor"); the Court having reviewed the Motion, and finding that (a) the Court has

[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.

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.

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) entering into the Governing Documents and compensating the Independent Directors for their services either directly or by reimbursing Strand for any costs incurred in connection with the appointment and compensation of the Debtor; (ii) implementing the Document Production Protocol; and (ii) implementing the Protocols.

3. Subject to the Protocols and the Term Sheet, the Debtor is authorized to continue operations in the ordinary course of its business.

4. Notwithstanding any stay under applicable Bankruptcy Rules, this Order shall be effective immediately upon entry.

5. 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

Appendix Exhibit 17

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
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[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

Appendix Exhibit 18

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COUNSEL FOR ACIS CAPITAL MANAGEMENT, L.P AND ACIS CAPITAL MANAGEMENT GP, LLC

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.,	§	
	§	
	§	
DEBTOR.	§	**Chapter 11**

ACIS CAPITAL MANAGEMNT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC'S OBJECTION TO THE FIRST MONTHLY APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES OF FOLEY GARDERE, FOLEY & LARDNER LLP AS SPECIAL TEXAS COUNSEL FOR THE PERIOD FROM OCTOBER 16, 2019 THROUGH NOVEMBER 30, 2019

Acis Capital Management, L.P. ("Acis LP") and Acis Capital Management GP, LLC ("Acis GP," together with Acis LP, "Acis") file this *Objection* (the "Objection") to the *First Monthly Application for Compensation and Reimbursement of Expenses of Foley Gardere, Foley & Lardner LLP As Special Texas Counsel for the Period from October 16, 2019 through November 30, 2019* [Docket No. 270] (the "Fee Application ").

I. OBJECTION

1. Acis filed a *Limited Objection to the Debtor's: (I) Application for An Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel, Nunc Pro Tunc to the Petition Date; and (II) Application for An Order Authorizing The Retention of Lynn Pinker Cox, & Hurst LLP as Special Texas Counsel, Nunc Pro Tunc to the Petition Date* [Docket No. 120] (the "Acis Foley Employment Objection") to the *Debtor's Application for An Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel, Nunc Pro Tunc to the Petition Date* [Docket No. 68] (the "Foley Employment Application") filed by Highland Capital Management, L.P. (the "Debtor"). The Official Committee of Unsecured Creditors of the Debtor (the "UCC") also filed a *Limited Objection to the Debtor's Application for An Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel and Lynn Pinker Cox, & Hurst LLP as Special Texas Counsel, Nunc Pro Tunc to the Petition Date* [Docket No. 124] (the "UCC Foley Employment Objection"). Acis expressly incorporates the arguments and authorities set forth in the Acis Foley Employment Objection and the UCC Foley Employment Objection into this Objection.

2. This Court should deny the Fee Application of Foley Gardere, Foley & Lardner LLP ("Foley"), as this Court has not authorized the Debtor to employ Foley. The Foley Employment Application, the Acis Foley Employment Objection, and the UCC Foley Employment Objection are set for hearing on January 21, 2020. As acknowledged by footnote two of the Fee Application, this Court has not authorized the Debtor to employ Foley. It is axiomatic that Sections 327, 330, and 331 of the Bankruptcy Code require a professional to be employed pursuant to the applicable statutory section *before* compensation may be awarded. *See Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) ("330(a)(1) does not authorize

compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327"); *see also In re Aladdin Petroleum Co.*, 85 B.R. 738, 740 (Bankr. W.D. Tex. 1988) (this Court concludes that [the Professional's] services were those of a professional person, that Court permission was therefore a prerequisite to his retention, and thus without such permission, he is not entitled to compensation"); *In re Palacios*, No. 14-70076, 2016 Bankr. LEXIS 249, at *42 (Bankr. S.D. Tex. Jan. 27, 2016) ("the Code clearly sets an order of employment as a prerequisite for compensation to be awarded").

3. Court authorized employment is a prerequisite to compensation even on an interim basis. The plain language of Section 331 states "…any professional person ***employed under section 327*** or 1103 of this title may apply to the court…for such compensation for services rendered…as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement." 11 U.S.C. § 331. Section 331 of the Bankruptcy Code clearly states that employment under Sections 327 or 1103 is a prerequisite for interim compensation. Section 330 requires the same. *See* 11 U.S.C. § 330(a).

4. This Court has not authorized the Debtor to employ Foley. Therefore, Acis objects to the interim allowance and payment of Foley's fees and expenses, as requested by the Fee Application.

5. Additionally, as set forth in the Acis Foley Employment Objection and the UCC Foley Employment Objection, Acis objects to the extent the Fee Application requests the allowance and payment of fees and expenses for work performed by Foley on behalf of non-debtor entities. As more fully set forth in the Acis Foley Employment Objection, Acis continues to be concerned about fees and expenses incurred by Neutra, Ltd. ("Neutra"), a non-debtor and

an affiliate of James Dondero. A significant portion of the fees and expenses included on the Fee Application appear to relate to Neutra's appeal of Acis's involuntary orders for relief, which is currently pending in the United States Court of Appeals for the Fifth Circuit under Case Number 19-10846 (the "Neutra Appeal"). The Debtor is not party to the Neutra Appeal. Given that this work was performed for a non-debtor and not likely to benefit the estate, even if Foley is permitted to be retained by the Debtor, the fees and expenses related to the Neutra Appeal should not be awarded, even on an interim basis.

II. PRAYER

Acis respectfully requests that this Court deny the Fee Application. Acis also requests such other and further relief to which it may show itself to be justly entitled.

DATED: January 13, 2020.

Respectfully submitted,

By: */s/ Rakhee V. Patel*

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COUNSEL FOR ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, notice of this document will be electronically mailed to the parties that are registered or otherwise entitled to receive electronic notices in this case pursuant to the Electronic Filing Procedures in this District. I further certify that on January 13, 2020, this documents will be sent by e-mail and first class mail to the parties listed below.

/s/ Annmarie Chiarello
One of Counsel

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Appendix Exhibit 19

The following constitutes the ruling of the court and has the force and effect therein described.

Signed February 4, 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. 271, 362, 364**

ORDER DENYING UNITED STATES TRUSTEE'S MOTION FOR AN ORDER DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE

Upon the *United States Trustee's Motion for an Order Directing the Appointment of a Chapter 11 Trustee* [Docket No. 271] (the "Motion"), filed by the United States Trustee for Region 6 (the "UST") on December 23, 2019; and this Court having considered the objections to the Motion [Docket Nos. 362 and 364] filed by Highland Capital Management, L.P., the debtor and

[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.

debtor in possession herein (the "Debtor") and the Official Committee of Unsecured Creditors, respectively; 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 no cause exists under 11 U.S.C. § 1104(a)(1) for the appointment of a chapter 11 trustee in this case and that the relief requested in the Motion is not in the best interests of the Debtor's estate or parties in interest for purposes of 11 U.S.C. § 1104(a)(1); and this Court having read the findings of fact and conclusions of law into the record in accordance with Fed. R. Bankr. P. 7052(a); and after due deliberation and sufficient cause appearing therefor, it is **HEREBY ORDERED THAT:**

1. The Motion is **DENIED**.

2. Notwithstanding any stay under applicable rules, this Order shall be effective immediately upon entry.

3. The Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order.

END OF ORDER

Appendix Exhibit 20

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ATTORNEYS JOSHUA N. TERRY AND JENNIFER G. TERRY

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

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

MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO ALLOW PURSUIT OF STATE COURT ACTION AGAINST NON-DEBTORS

PURSUANT TO LOCAL BANKRUPTCY RULE 4001-l(b), A RESPONSE IS REQUIRED TO THIS MOTION, OR THE ALLEGATIONS IN THE MOTION MAY BE DEEMED ADMITTED, AND AN ORDER GRANTING THE RELIEF SOUGHT MAY BE ENTERED BY DEFAULT.

ANY RESPONSE SHALL BE IN WRITING AND FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT EARLE CABEL FEDERAL BUILDING, 1100 COMMERCE ST., RM. 1254, DALLAS, TX 75242 BEFORE CLOSE OF BUSINESS ON MARCH 2, 2020, WHICH IS AT LEAST 14 DAYS FROM THE DATE OF SERVICE HEREOF. A COPY SHALL BE SERVED UPON COUNSEL FOR THE MOVING PARTY AND ANY TRUSTEE OR EXAMINER APPOINTED IN THE CASE. ANY RESPONSE SHALL INCLUDE A DETAILED AND COMPREHENSIVE STATEMENT AS TO HOW THE MOVANT CAN BE "ADEQUATELY PROTECTED" IF THE STAY IS TO BE CONTINUED.

Creditors Joshua N. Terry and Jennifer G. Terry (the "Terrys") file this Motion for Relief from the Automatic Stay to Allow Pursuit of State Court Action Against Non-Debtors (the "Motion") pursuant to 11 U.S.C. § 362(d), and show the Court as follows:

SUMMARY OF MOTION

1. Out of an abundance of caution, the Terrys request stay relief to pursue their state court claims against non-debtors James Dondero ("Dondero") and Thomas Surgent ("Surgent"). In state court litigation, Surgent and Dondero, along with the Debtor Highland Capital Management, L.P. (the "Debtor"), agreed to pay the Terrys $425,000.00 to resolve claims associated with the theft of monies from the Terrys' retirement accounts. Surgent and Dondero are jointly and severally liable with the Debtor for that amount. In state court, the Terrys wish to sever their claims from those against the Debtor and recoup their retirement savings from Surgent and Dondero. The Terrys have been deprived of their stolen retirement savings for more than three years, and it is about time they get back what was stolen from them in 2016.

JURISDICTION

2. This Court has jurisdiction over the Motion by virtue of 11 U.S.C. §§103, 361, 362, 363 and 28 U.S.C. §§1334(b), 157(b).

RELEVANT FACTS

3. As this Court knows, an arbitration panel of three well-respected former state court jurists issued a scathing arbitration award involving actions of the Debtor's former affiliates and present employees, including Dondero and Surgent. A true and correct copy of the arbitration award is attached hereto as **Exhibit 1**. The arbitration panel found that approximately $350,000.00 in the Terrys' retirement accounts were *converted* and that their claims for conversion and damages "should be stated against those parties or others, elsewhere." Ex. 1 at p. 16.

4. The Terrys did as the arbitration panel advised and brought those claims in state court for the conversion of their retirement accounts against the orchestrators of the scheme:

Highland, Dondero and Surgent. The state court suit is in the 162nd District Court of Dallas County, Texas, Case No. DC-16-11396 (the "State Court Litigation").

5. On October 2, 2019, the parties to the State Court Litigation settled, as reflected in the agreement attached hereto as **Exhibit 2,** which is a legally-enforceable agreement pursuant to Texas Rule of Civil Procedure 11 (the "Rule 11"). The Rule 11 provides, among other things, that "Defendants shall pay Plaintiffs $425,000" and **"[t]he parties will mutually, fully, and comprehensively release each other with usual and customary releases (we do not intend to settle this matter if it is Defendants' intent to use one of their thousands of entities, funds, or affiliates to sue, directly or indirectly, Mr. or Mrs. Terry)**; however, the releases shall not release Highland CLO Funding Ltd.'s claims in Guernsey nor any claims of Acis Capital Management, LP or Acis Capital Management GP, LLC." Ex. 2 (emphasis added).

6. On October 16, 2019, Debtor filed this bankruptcy case.

7. On October 21, 2019, Debtor filed a Suggestion of Bankruptcy in the State Court Litigation.

8. Attached hereto as **Exhibit 3** is a declaration of Joshua N. Terry setting out the aforementioned facts.

ARGUMENT & AUTHORITY

9. "Cause" exists for relief from the automatic stay permitting the Terrys to:

(a) File and pursue to order a motion to sever claims against Dondero and Surgent from those against Debtor, such that the State Court Litigation will have two separate causes with separate defendants, one with the Debtor and one with Dondero and Surgent;

(b) Pursue their claims against Surgent and Dondero in the severed action.

10. Other than severing the claims against Dondero and Surgent from those against the Debtor, the latter of which will remain stayed by the automatic stay, the requested relief will not affect the Debtor.

11. "[W]hile the stay protects the debtor who has filed a bankruptcy petition, litigation can proceed against other co-defendants." *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985). The Terrys request the Court grant them stay relief to sever and pursue their state law claims against the Debtor's co-defendants, Dondero and Surgent.

WHEREFORE, PREMISES CONSIDERED, the Terrys respectfully request that upon hearing of the Motion, the Court grants the Terrys the following stay relief to:

(a) File and pursue to order a motion to sever claims against Dondero and Surgent from those as against Debtor, such that the State Court Litigation will have two separate causes with separate defendants, one with the Debtor and one with Dondero and Surgent;

(b) Pursue their claims against Surgent and Dondero in the severed action.

The Terrys also request the Court grant such other and further relief to which they are entitled.

Dated: February 14, 2020

Respectfully Submitted,

/s/ Brian P. Shaw

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ATTORNEYS FOR JOSHUA N. TERRY AND JENNIFER G. TERRY

CERTIFICATE OF CONFERENCE

I hereby certify that I personally conferred with John Morris, counsel for the Debtor. Despite counsel for the Debtor and the Terrys' efforts to resolve this matter, a resolution has not yet been reached, therefore this matter is presented to the Court. Counsel for the Debtor and the Terrys will continue to engage in an effort to resolve the matters raised by this Motion.

/s/ Brian P. Shaw
Brian P. Shaw

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on February 14, 2020, through the Court's ECF noticing system upon those parties who have requested and agreed to electronic notification.

/s/ Brian P. Shaw
Brian P. Shaw

Appendix Exhibit 21

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COUNSEL FOR ACIS CAPITAL MANAGEMENT, L.P AND ACIS CAPITAL MANAGEMENT GP, LLC

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.,	§	
	§	
	§	
DEBTOR.	§	**Chapter 11**

ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC'S OBJECTION TO THE SECOND MONTHLY APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES OF FOLEY GARDERE, FOLEY & LARDNER LLP AS SPECIAL TEXAS COUNSEL FOR THE PERIOD FROM DECEMBER 1, 2019 THROUGH DECEMBER 31, 2019

Acis Capital Management, L.P. ("Acis LP") and Acis Capital Management GP, LLC ("Acis GP," together with Acis LP, "Acis") file this *Objection* (the "Second Objection") to the *Second Monthly Application for Compensation and Reimbursement of Expenses of Foley Gardere, Foley & Lardner LLP As Special Texas Counsel for the Period from December 1, 2019 through December 31, 2019* [Docket No. 394] (the "Second Fee Application ").

I. OBJECTION

1. Acis filed a *Limited Objection to the Debtor's: (I) Application for An Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel, Nunc Pro Tunc to the Petition Date; and (II) Application for An Order Authorizing The Retention of Lynn Pinker Cox, & Hurst LLP as Special Texas Counsel, Nunc Pro Tunc to the Petition Date* [Docket No. 120] (the "Acis Foley Employment Objection") to the *Debtor's Application for An Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel, Nunc Pro Tunc to the Petition Date* [Docket No. 68] (the "Foley Employment Application") filed by Highland Capital Management, L.P. (the "Debtor"). The Official Committee of Unsecured Creditors of the Debtor (the "UCC") also filed a *Limited Objection to the Debtor's Application for An Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel and Lynn Pinker Cox, & Hurst LLP as Special Texas Counsel, Nunc Pro Tunc to the Petition Date* [Docket No. 124] (the "UCC Foley Employment Objection"). Acis expressly incorporates the arguments and authorities set forth in the Acis Foley Employment Objection and the UCC Foley Employment Objection into this Second Objection.

2. Acis filed its *Objection to the First Monthly Application for Compensation and Reimbursement of Expenses of Foley Gardere, Foley & Lardner LLP As Special Texas Counsel for the Period from October 16, 2019 through November 30, 2019* [Docket No. 353] (the "First Objection"), objecting to the *First Monthly Application for Compensation and Reimbursement of Expenses of Foley Gardere, Foley & Lardner LLP As Special Texas Counsel for the Period from*

October 16, 2019 through November 30, 2019 [Docket No. 270] (the "First Fee Application"). Acis expressly incorporates the arguments and authorities set forth in the First Objection.

3. This Court should deny the Second Fee Application of Foley Gardere, Foley & Lardner LLP ("Foley"), as this Court has not authorized the Debtor to employ Foley. The Foley Employment Application, the Acis Foley Employment Objection, and the UCC Foley Employment Objection are set for hearing on February 19, 2020. As acknowledged by footnote two of the Second Fee Application, this Court has not authorized the Debtor to employ Foley. It is axiomatic that Sections 327, 330, and 331 of the Bankruptcy Code require a professional to be employed pursuant to the applicable statutory section *before* compensation may be awarded. *See Lamie v. United States Tr.*, 540 U.S. 526, 538 (2004) ("330(a)(1) does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327"); *see also In re Aladdin Petroleum Co.*, 85 B.R. 738, 740 (Bankr. W.D. Tex. 1988) (this Court concludes that [the Professional's] services were those of a professional person, that Court permission was therefore a prerequisite to his retention, and thus without such permission, he is not entitled to compensation"); *In re Palacios*, No. 14-70076, 2016 Bankr. LEXIS 249, at *42 (Bankr. S.D. Tex. Jan. 27, 2016) ("the Code clearly sets an order of employment as a prerequisite for compensation to be awarded").

4. Court-authorized employment is a prerequisite to compensation even on an interim basis. The plain language of Section 331 states "…any professional person ***employed under section 327*** or 1103 of this title may apply to the court…for such compensation for services rendered…as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement."

11 U.S.C. § 331. Section 331 of the Bankruptcy Code clearly states that employment under Sections 327 or 1103 is a prerequisite for interim compensation. Section 330 requires the same. *See* 11 U.S.C. § 330(a).

5. This Court has not authorized the Debtor to employ Foley. Therefore, Acis objects to the interim allowance and payment of Foley's fees and expenses, as requested by the Second Fee Application.

6. Additionally, as set forth in the Acis Foley Employment Objection and the UCC Foley Employment Objection, Acis objects to the extent the Second Fee Application requests the allowance and payment of fees and expenses for work performed by Foley on behalf of non-debtor entities. As more fully set forth in the Acis Foley Employment Objection, Acis continues to be concerned about fees and expenses incurred by Neutra, Ltd. ("Neutra"), a non-debtor and an affiliate of James Dondero. A significant portion of the fees and expenses included on the Fee Application appear to relate to the Debtor's and Neutra's appeal of Acis's plan of reorganization, which is currently pending in the United States Court of Appeals for the Fifth Circuit under Case Number 19-10847 (the "Confirmation Appeal"). Foley represents both Neutra and the Debtor in the Confirmation Appeal. It appears that the Debtor has been billed 100-percent of the legal fees related to the Confirmation Appeal. Given that this work was performed, in part, for a non-debtor and not likely to benefit the estate, even if Foley is permitted to be retained by the Debtor, the fees and expenses related to the Confirmation Appeal should not be awarded.

7. The Foley Employment Application seeks to be employed as special counsel under Section 327(e). The Foley Employment Application does not seek to employ Foley as *general* bankruptcy counsel. The Second Fee Application, although heavily redacted, appears to

demonstrate that Foley is acting, in part, as general bankruptcy counsel. For example, on December 4, 2019, Holly O'Neil "provide information to Highland to assist with Schedules and SOFAs (.3)." *See* Second Fee Application p. 19. Additionally, the Second Fee Application states it "Foley addressed issues and multiple objections to the Foley and Lynn Pinker retention applications and assisted with responses to the objections." *See* Second Fee Application p. 10. Given that Foley has not sought to be employed as general bankruptcy counsel, it is not clear how under the proposed Foley Employment Application, Foley will be entitled to bill the estate for work related to a *different* law firm's employment matters.

II. PRAYER

Acis respectfully requests that this Court deny the Second Fee Application. Acis also requests such other and further relief to which it may show itself to be justly entitled.

DATED: February 14, 2020.

Respectfully submitted,

By: */s/ Rakhee V. Patel*

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CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2020, notice of this document will be electronically mailed to the parties that are registered or otherwise entitled to receive electronic notices in this case pursuant to the Electronic Filing Procedures in this District. I further certify that on February 14, 2020, this document will be sent by e-mail and first class mail to the parties listed below.

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Appendix Exhibit 22

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.	**Docket Ref. No. 474**

OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE MOTION OF THE DEBTOR FOR ENTRY OF AN ORDER AUTHORIZING, BUT NOT DIRECTING, THE DEBTOR TO CAUSE DISTRIBUTIONS TO CERTAIN "RELATED ENTITIES"

The official committee of unsecured creditors (the "Committee") of Highland Capital Management, L.P. (the "Debtor"), hereby submits this objection (this "Objection") to the *Motion of the Debtor for Entry of an Order Authorizing, But Not Directing, the Debtor to Cause Distributions to Certain "Related Entities"* [Docket No.474] (the "Distribution Motion").[2] In support of this Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. The Committee's objection focuses on a very limited portion of the transaction currently proposed by the Debtor – namely, proposed distributions of approximately $8.6 million (the "Proposed Insider Distributions") to several insiders who not only owe money to the Debtor but also may be the target of avoidance and other litigation brought by the Committee on behalf

[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] All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Distribution Motion.

of the Debtor's estate - Mark Okada and two entities owned and/or controlled by James Dondero and/or Mark Okada (such entities, together with Messrs. Dondero and Okada, the "Insider Parties"). As this Court is aware, Messrs. Dondero and Okada owned and controlled the Debtor for most of the past 30 years. During that time, the Debtor repeatedly breached fiduciary duties and contractual obligations, leading to hundreds of millions of dollars in judgments against the Debtor and certain affiliates. The Committee is currently investigating a variety of significant potential estate claims against the Insider Parties. For example, certain of the interests held by the Insider Parties, which form the basis for a portion of the Proposed Insider Distributions, were once owned by the Debtor – the Committee is investigating, among other things, the propriety of the transfers of these interests from the Debtor to the Insider Parties. In addition, Messrs. Dondero and Okada currently owe the Debtor over $10.6 million in demand notes and another Insider Party owes the Debtor nearly $7.5 million in notes receivable, some of which also are demand notes. In light of these and other potential claims, which are only now the subject of review by a party other than the Debtor, the Committee believes the Proposed Insider Distributions to the Insider Parties should be reserved in segregated accounts pending resolution of the issues under investigation by the Committee and repayment of all amounts owed to the Debtor by the Insider Parties.

2. This Court's order granting the relief requested by the Committee would shield the Debtor from any purported legal risks associated with withholding the Proposed Insider Distributions. Similarly, the Debtor and Independent Board would not breach their fiduciary duties by complying with this Court's order to withhold the Proposed Insider Distributions.[3]

[3] Even absent court order, the Committee is highly skeptical of the legal merit of any such legal claims by Messrs. Dondero and Okada and related damages for any alleged breach of contract and/or fiduciary duty by the Debtor.

3. Temporarily withholding and segregating the proposed distributions would greatly facilitate the Debtor's interests while causing little harm to the Insider Parties. It would facilitate repayment of over $18 million in notes payable to the Debtor by the Insider Parties. Moreover, delay in the distribution will allow the Committee an adequate opportunity to investigate potential estate claims against the Insider Parties, including claims arising from the very transactions pursuant to which the Debtor transferred certain of the interests at issue to such parties.

4. While the Debtor and Independent Board have taken the position that they cannot affirmatively seek this relief, clearly both should be supportive of this outcome which preserves claims of the Debtor's estate and a ready source of recovery for the outstanding demand notes. Moreover, the Proposed Insider Distributions will be temporarily placed in segregated, interest bearing accounts, compensating the Insider Parties for any material injury from the mere passage of time. To the extent Messrs. Dondero and Okada believe they would incur additional harm of which the Committee is not aware, they – not the Debtor – should bring those concerns directly to this Court.

OBJECTION

5. Through the Distribution Motion, the Debtor seeks authority to make redemption payments and other distributions to investors in certain funds managed by the Debtor. Specifically, as part of the Debtor's plan to distribute (i) approximately $123.25 million to investors of RCP, (ii) $21.8 million to investors of AROF in connection with the wind up of such fund, and (iii) $34.8 million to investors in Dynamic in connection with the wind up of such fund – the Debtor seeks authority for some of the foregoing distributions to be made to the Insider Parties. Of the almost $180 million in distributions, the Committee only objects to the distribution of a total of $8.6 million to be distributed to three Insider Parties. Specifically, the Committee objects to the request

to make distributions to Mark Okada, Highland Capital Management Services, Inc. ("HCM Services," owned by James Dondero, and Mark Okada), and CLO Holdco Ltd. ("CLOH").[4] To be clear, the Committee does not object to the Debtor's orderly liquidation of Dynamic or AROF, or to the distributions from AROF, Dynamic, and RCP to any third-party, non-affiliated investors. However, in light of the significant amounts of money owed to the Debtor by Mr. Okada, Mr. Dondero and HCM Services, the Committee's ongoing investigation of the Debtor's insiders and related entities (including with respect to the propriety of how the Insider Parties obtained the interests which form the basis of the Proposed Insider Distributions (such interests, the "Insider Interests")), and the well-documented fraudulent and improper activities engaged in by the Debtor's insiders, the Committee requests that the Court order the Debtor to hold the Proposed Insider Distributions in a reserve for a limited period of time.

I. The Proposed Insider Distributions Should Be Reserved Pending the Repayment of Insiders Parties' Obligations Owed to the Debtor and the Committee Investigation

6. Through the Distribution Motion, the Debtor seeks to make the following Proposed Insider Distributions:

Investor	Distribution Amount	Fund
CLO HoldCo, Ltd.	$872,000	AROF
CLO HoldCo, Ltd.	$1,521,000	Dynamic
Mark Okada	$4,185,000	Dynamic
Highland Capital Management Services, Inc.	$2,085,000	RCP
Total	**$8,663,000**	

These Proposed Insider Distributions are a small portion of the $180 million to be distributed from Dynamic, AROF and RCP.

[4] The Distribution Motion also seeks authority to make distributions to Highland Dynamic Income Fund GP, LLC. The Committee does not object to such distribution.

The Insider Parties Owe the Debtor Money

7. It is undisputed that James Dondero, Mark Okada, and HCM Services owe the Debtor significant amounts of money. The Debtor's schedule of assets and liabilities [Docket No. 247] discloses that, as of the Petition Date, the Debtor holds notes receivable from (i) James Dondero, in the principle amount of $9,334,012 (the "Dondero Note")[5]; (ii) HCM Services in the aggregate principle amount of $7,482,480.88 (the "HCM Services Notes"), and (iii) Mark Okada, in the principle amount of $1,336,287.84 (the "Okada Note", and with the Dondero Note and the HCM Services Notes, the "Notes"). The Dondero Note, the Okada Note, and four of the five HCM Services Notes are demand notes, payable upon the request of the Debtor. These Notes should be repaid before the Debtor makes any distributions to these insiders.

The Insider Parties Have Engaged in a Pattern of Fraudulent Activities to the Detriment of Creditors

8. Further, as this Court is well-aware, the Debtor has a documented history of engaging in misconduct, breaches of fiduciary duty and fraudulent transactions in multiple settings, which ultimately led to the commencement of this bankruptcy case. At all relevant times, Mr. Dondero and Mr. Okada, as co-founders and executive officers, managed and controlled the Debtor and were ultimately responsible for the Debtor's pattern of misconduct, breaches of fiduciary duty and fraudulent activities.

9. As examples of the extensive misconduct, in 2014, the Securities and Exchange Commission ("SEC") determined (i) that the Debtor knowingly engaged in multiple transactions with its client advisory accounts without disclosing that the Debtor was acting as principal, or obtaining client consent, before the trades were completed, and (ii) that the debtor failed to

[5] The Dondero Note is in addition to $18.3 million owed to the Debtor under a demand note made by The Dugaboy Investment Trust, of which Mr. Dondero is a beneficiary.

maintain sufficient documentation with respect to certain transactions. *See* SEC Order ¶¶ 6-7, *In the Matter of Highland Capital Mgmt., L.P.*, File No. 3-16169 [Docket No. 130. Ex. A]. As established in the Redeemer Committee litigation, the Debtor, under the control of Mr. Dondero and Mr. Okada, was found to have covertly and improperly taken $32.3 million in cash out of the a fund for which the Debtor acted as investment manager (the "Crusader Fund"), and was found to have made decisions with the "willful intent" to benefit itself and not the parties to whom the Debtor owed fiduciary duties. An arbitration panel unanimously found that the Debtor, Mr. Dondero, and Highland's in-house lawyers violated their fiduciary duties to the Crusader Fund, engaged in willful misconduct, self-dealing, and secrecy, and made multiple misrepresentations to the Crusader Fund's investors as well as the Debtor's auditors.

10. In the Acis Capital Management bankruptcy case, this Court found that there was a "legitimate prospect" that the Debtor "would continue dismantling [Acis], to the detriment of [Acis] creditors." *In re Acis Capital Mgmt., L.P.*, 584 B.R. 115, 147, 149 (Bankr. N.D. Tex. 2018). Following an arbitration award against Acis, Mr. Dondero and other members of the Debtor's management transferred tens of millions of dollars in assets out of Acis into newly-formed Cayman Islands-based Highland affiliates. *Id.* at 127-130. This Court ultimately concluded that the "record contain[ed] substantial evidence of both intentional and constructive fraudulent transfers," and "[t]he numerous prepetition transfers that occurred around the time of and after the Terry Arbitration Award appear[ed] more likely than not to have been made to deprive the Debtor-Acis of value and with the actual intent to hinder, delay, or defraud the Debtors' creditors." *See In re Acis Capital Mgmt., L.P.*, No. 18-30264, 2019 WL 417149, at *11 (Bankr. N.D. Tex. Jan. 31, 2019), *aff'd* 604 B.R. 484 (N.D. Tex. 2019). In both the Acis bankruptcy case and the Crusader Fund arbitration, the Debtor's management were found to have manufactured dishonest and

illegitimate defenses and provided unreliable and incredible testimony regarding the Debtor's actions.

11. Each of the Insider Parties are closely affiliated with Mr. Dondero and/or the fraudulent actions that led the Debtor to bankruptcy:

- *Mark Okada*: Mr. Okada is the co-founder of the Debtor, and was the Chief Investment Officer until shortly before the commencement of this chapter 11 case. As Chief Investment Officer, Mr. Okada was responsible for overseeing the Debtor's investment activities across all investment platforms. Mr. Okada was an executive officer of the Debtor (i) when the Debtor was found by the SEC to have engaged in wrongful transactions without disclosing important information to clients, (ii) when the Debtor stripped Acis of its assets – CLO portfolio management contracts – and transferred to them a newly formed Cayman entity, and (iii) when the Debtor engaged in misconduct and breached fiduciary duties with respect to the Crusader Fund. Mr. Okada was the beneficial owner of 25% of Acis Capital Management, L.P. when Mr. Dondero and the Debtor transferred assets away from Acis, and this Court found that Mr. Dondero and Mr. Okada were the individuals making decisions for Highland CLO Funding Ltd. ("HCLOF Guernsey") in connection with the events leading to the Acis bankruptcy litigation.[6]

- *HCM Services* – As the Debtor disclosed, HCM Services is owned 75% by Mr. Dondero and 25% by Mr. Okada. HCM Services appears to have received its interests in RCP from the Debtor, but the circumstances of such transaction have yet to be fully investigated by the Committee. HCM Services owes the Debtor $7,482,481, of which $900,000 is payable on demand. The Committee understands that Mr. Dondero remains in complete control of HCM Services.

- *CLOH* – CLOH is an entity owned by Charitable DAF Fund, LP (the "DAF"), which was seeded with contributions from the Debtor; the consideration for such contributions has yet to be fully investigated by the Committee. The DAF is managed and advised by the Debtor, and its trustee is a long-time friend of Mr. Dondero.[7] The trustee for the DAF has also served as trustee for The Get Good Trust, The Dugaboy Investment Trust, and the SLHC Trust, of which Mr. Dondero

[6] *In re Acis Capital Management, L.P.*, 2019 WL 417149, at *7, *9 (Bankr. N.D. Tex. January 31, 2019) (observing (i) that Mr. Okada owed 25% of Acis until the day after Mr. Terry obtained his arbitration judgement against Acis, at which point Mr. Okada conveyed his interests in Acis to Neutra, Ltd. for no consideration, and that (ii) Mr. Dondero, Mr. Okada, and another Highland employee made decisions for HCLOF Guernsey regarding the optional redemptions of the Acis CLOs).

[7] *See In re Acis Capital Management, L.P.*, 2019 WL 417149, at *6 (Bankr. N.D. Tex. January 31, 2019) (noting that one of the three equity owners of HCLOF Guernsey was the DAF, which was "seeded with contributions from ***Highland***, is managed/advised by ***Highland***, and whose ***independent trustee is a long-time friend of Highland's chief executive officer, Mr. Dondero***" (emphasis in original)).

> is a beneficiary. The Distribution Motion discloses that the interests in Dynamic currently held by CLOH were originally held by the Debtor, and were transferred to The Get Good Nonexempt Trust, in exchange for Get Good's interest in a promissory note made by The Dugaboy Investment Trust, and then from Get Good to Mr. Dondero's Highland Dallas Foundation, Inc. and then to CLOH. The Distribution Motion does not disclose how or when CLOH obtained its interests in AROF. The Committee is investigating CLOH's relationship to and transactions with Mr. Dondero and other entities controlled by or otherwise benefitting Mr. Dondero.

The Committee is Investigating Claims Against the Insider Parties, Including Transfers the Transfers of the Insider Interest

12. Pursuant to the Term Sheet outlining the agreement between the Debtor and the Committee, the Committee has standing to pursue any and all estate claims and causes of action against Mr. Dondero, Mr. Okada, other insiders of the Debtor and the Debtor's related entities (which include the DAF and CLOH), "including any promissory notes held by any of the foregoing." [Docket No. 354] This part of the settlement with the Debtor was a critical component of the Committee's agreement to the governance structure in lieu of seeking appointment of a chapter 11 trustee. The Committee has begun its investigation and served document production requests to the Debtor. Among other claims and causes of action, the Committee is investigating potential preferential transfers, fraudulent transfers, breaches of fiduciary duties, usurpation of corporate opportunities, misappropriation of assets, and abuses of the corporate form. The Committee's investigation includes fully exploring the circumstances and transactions through which HCM Services, CLOH and Mr. Okada obtained the Insider Interests.

13. The Debtor's history of self-dealing and improper or fraudulent activities suggests that the Committee's investigation is likely to uncover similar inappropriate activities with respect to the Debtor's assets, including the Insider Interests. The Debtor's statements of financial affairs [Docket No. 248] disclosed that the Debtor made significant payments to affiliates through purported intercompany funding and affiliate loans in the 90 days prior to the filing date, along

with significant other insider transfers in the one year before the filing date (including very large expense reimbursement payments to Mr. Dondero). The Committee must have the opportunity to fully investigate the insider and affiliate transactions, including those that gave rise to the Insider Interests, that may be the subject of valuable estate causes of action before transactions distributing funds to those same insiders and affiliates can be consummated.

14. This is all the more true because the evidence is that, even during this bankruptcy case, Mr. Dondero continues to engage in secretive and potentially improper transactions. The Distribution Motion fails to highlight that the MGM Sale was negotiated by Mr. Dondero without the knowledge or approval of Debtor's counsel or the Debtor's financial advisors. Specifically, at the very same time that the Debtor's counsel and financial advisors were attempting to persuade the Committee to approve certain transactions with respect to RCP, Mr. Dondero, unbeknownst to any Debtor professional, committed the Debtor to executing the MGM Sale. The Independent Directors, the Debtor's counsel and the Debtor's CRO and financial advisors were not made aware of the MGM Sale until ***two months*** after Mr. Dondero allegedly committed to the transaction on behalf of the Debtor. While the Committee has decided not to object to the MGM Sale itself (based, in significant part, on feedback from the Independent Board regarding its concern about the alleged binding nature of Mr. Dondero's secretive agreement with MGM), the circumstances surrounding Mr. Dondero's negotiation of and entry into the transaction are alarming at best, and the Committee has not waived any rights to fully investigate that transaction and any related potential causes of action against Mr. Dondero or others.

15. In addition to its concern that some or all of the Proposed Insider Distributions may be on account of otherwise avoidable transactions, based upon the Interested Parties' long history of transferring assets and taking other actions to hinder, delay, and defraud creditors, the

Committee is also seriously concerned that the Insider Parties will swiftly place these distributions out of reach of the Debtor's estate while refusing to satisfy their obligations to the Debtor. Such actions would jeopardize the estate's ability to recover amounts owed to it and any future judgments against the Insider Parties, and would waste estate resources by forcing the Debtor to incur additional litigation costs to recover such debts and judgments.

II. The Court Has Authority to Direct the Debtor to Withhold the Proposed Insider Distributions

16. The Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). "Courts interpret Section 105 liberally." *King Louie Mining, LLC v. Comu (In re Comu)*, Nos. 09-38820-SGJ-7, 10-03269-SGJ, 2014 Bankr. LEXIS 2969, at *264 (Bankr. N.D. Tex. July 8, 2014) (citing *Momentum Mfg. Corp. v. Employee Creditors Committee (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994)). While the Supreme Court has found that section 105(a) does not give the bankruptcy court the ability to take any actions explicitly prohibited by another provision of the Bankruptcy Code, it does grant "extensive equitable powers that bankruptcy courts need in order to be able to perform their statutory duties." *Caesars Entm't Operating Co. v. BOKF, N.A. (In re Caesars Entm't Operating Co.)*, 808 F.3d 1186, 1188 (7th Cir. 2015) (citing *Law v. Siegel*, 571 U.S. 415, 420 (2014). Section 105 has been the source of authority for courts to, among other things, enjoin third parties, substantively consolidate non-debtors, and extend the automatic stay. *See e.g.*, *Celotex Corp. v. Edwards*, 514 U.S. 300, 303 (1995) (holding that an injunction issued under § 105 was an appropriate use of the court's powers); *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 769 (9th Cir. 2000) (holding that the court's power to substantively consolidate non-debtors was found in § 105); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1230

(6th Cir. 1985) (holding that a preliminary injunction issued to bar distributions from a non-debtor to third parties was an appropriate use of the court's equitable power under § 105).

17. Temporarily withholding the Proposed Insider Distributions and placing the corresponding funds in segregated accounts is well within the authority of this Court under section 105 of the Bankruptcy Code. The Insider Parties are current and former affiliates and/or insiders of the Debtor and creditors of the Debtor. The order requested by the Committee will allow full investigation of the claims and causes of action against the Insider Parties that was integral to the settlement approved by this Court in connection with approval of the Term Sheet. Furthermore, the Committee submits (and the Debtor has not asserted otherwise) that the relief sought by the Committee would not violate any explicit or implicit requirements of the Bankruptcy Code. Therefore, the Court need only consider the equitable nature of the relief that the Committee seeks, and its appropriateness in the context of furthering the goals of this bankruptcy. *See In re Caesars Entm't Operating Co.*, 808 F.3d at 1188.

18. The equitable argument for temporarily withholding the Proposed Insider Distributions and segregating such funds is straightforward. These actions merely maintain the status quo. The Committee is not requesting that the Debtor effectuate a set-off or take possession of the Proposed Insider Distribution. No party has asserted that any economic harm (much less any significant harm) will be done to the Insider Parties by holding the Proposed Insider Distributions in segregated interest bearing accounts pending further order of this Court. On the other hand, the withholding of the Proposed Insider Distributions (and the resulting leverage that creates against the Insider Parties) may be the only chance for the Debtor to receive any value for the amounts it is owed (or potentially owed) by the Insider Parties or obtaining redress for fraudulent or improper transactions involving those parties, including with respect to the Insider

Interest. As set forth above, the Insider Parties and the persons controlling them have repeatedly engaged in schemes and other behavior designed to evade creditors. It should not surprise this Court to learn that, after making demand for payment on the demand note from Mr. Okada as of February 13th at the urging of the Committee, the Debtor still has yet to receive any payment from Mr. Okada. Absent approval of the Committee's request, the Debtor's efforts to collect from the Insider Parties may be extremely cost intensive and time-consuming. It is fair and equitable for this Court to temporarily prevent money from flowing to the Insider Parties in order to facilitate the Debtor's efforts to recover amounts owed to it. Furthermore, the Committee should be given the opportunity to investigate the propriety of the Debtor's transfers of its interests in the underlying funds to the Insider Parties, including the Insider Interests. Maintaining the status quo until the Committee has investigated those transfers is fair and equitable and falls well within this Court's authority under section 105.

19. Moreover, the relief sought by the Committee would further the goals of this bankruptcy case and would allow the Debtor to fulfill its duties to creditors by maximizing the value of the estate. The Debtor contends, and the Committee does not disagree, that the Debtor has certain contractual and fiduciary duties to the investors in the funds that it manages. The Debtor asserts that those duties compelled the Debtor to file the Distribution Motion. *Distribution Motion* ¶ 7. The Debtor also has duties to its creditors, however, and the Committee, for the reasons set forth above, asserts that such duties require the Debtor to avoid making the Proposed Insider Distributions at this time. Filing the Distribution Motion should fulfill any duties the Debtor may have to the Insider Parties in respect of the Proposed Insider Distributions. An order from this Court providing that the Proposed Insider Distributions should be temporarily withheld

and segregated fully addresses any conflict of duties the Debtor otherwise may have, and would allow the Debtor to more effectively carry out its duty to maximize the value of the estate.

20. Accordingly, the Committee believes that the Court should order the Debtor to withhold and segregate the Proposed Insider Distributions until (i) the Insider Parties repay the Notes that are currently due and payable and (ii) the Committee has an opportunity to fully investigate estate causes of action against such Insider Parties. The Committee does not propose that the Debtor effectuate a setoff or take possession of the Proposed Insider Distributions; rather the Committee requests that the Court order the Debtor to segregate and hold the Proposed Insider Distributions in reserve for a limited period of time in order to avoid the significant prejudice to the estate in allowing cash distributions to be paid to Insider Parties and beneficiaries that owe the Debtor money, and then forcing the estate to spend resources recovering assets from these parties.

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WHEREFORE, the Committee respectfully requests that the Court deny the Distribution Motion and direct the Debtor to hold the Proposed Insider Distributions in segregated interest bearing accounts pending further order of the Court.

Dated: March 2, 2020
Dallas, Texas

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Appendix Exhibit 23

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Attorneys for James Dondero

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

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

NOTICE OF APPEARANCE AND REQUEST FOR SERVICE

PLEASE TAKE NOTICE that pursuant to Rules 2002 and 9010(b) of the Federal Rules of Bankruptcy Procedure and Section 1109(b) of Title 11 of the United States Code, the undersigned attorneys of Bonds Ellis Eppich Schafer Jones LLP hereby give notice of their representation of Mr. James Dondero in the above styled and numbered cause, and request that copies of all notices of meetings, hearings, motions, notices to file claims, pleadings, and other papers filed in this case be served upon undersigned counsel as follows:

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PLEASE TAKE FURTHER NOTICE that pursuant to 11 U.S.C. § 1109(b), the foregoing request includes not only the notices and papers referred to in the rules specified above, but also includes, without limitation, all orders, notices, hearing dates, applications, motions, petitions, requests, complaints, demands, replies, answers, schedule of assets and liabilities, statement of affairs, operating reports, plans of reorganization, and disclosure statements, whether formal or informal, whether written or oral, and whether transmitted or conveyed by mail, courier service, delivery, telephone, facsimile, telegraph, telex, telefax or otherwise.

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Dated: March 6, 2020

Respectfully submitted,

/s/ John Y. Bonds, III

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on March 6, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on all parties requesting such service in this case.

/s/ Bryan C. Assink
Bryan C. Assink

Appendix Exhibit 24

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COUNSEL FOR ACIS CAPITAL MANAGEMENT, L.P AND ACIS CAPITAL MANAGEMENT GP, LLC

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.,	§	
	§	
	§	
DEBTOR.	§	**Chapter 11**

ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC'S OMNIBUS LIMITED OBJECTION TO APPLICATIONS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSE OF FOLEY GARDERE, FOLEY & LARDNER LLP AS SPECIAL TEXAS COUNSEL FOR THE PERIOD FROM OCTOBER 16, 2019 THROUGH FEBRUARY 29, 2020

Acis Capital Management, L.P. ("Acis LP") and Acis Capital Management GP, LLC ("Acis GP," together with Acis LP, "Acis") file this *Omnibus Limited Objection* (the "Objection") to the (i) *Amended First Monthly Application for Compensation and Reimbursement of Expenses of Foley Gardere, Foley & Lardner LLP As Special Texas Counsel for the Period from October 16, 2019 through November 30, 2019* [Docket No. 538] (the "October/November Application"); (ii) *Amended Second Monthly Application for Compensation and Reimbursement of Expenses of Foley Gardere, Foley & Lardner LLP As Special Texas*

Counsel for the Period from December 1, 2019 through December 31, 2019 [Docket No. 539] (the "December Application"); (iii) *Third Monthly Application for Compensation and Reimbursement of Expenses of Foley Gardere, Foley & Lardner LLP As Special Texas Counsel for the Period from January 1, 2020 through January 30, 2020* [Docket No. 540] (the "January Application"); and (iv) *Fourth Monthly Application for Compensation and Reimbursement of Expenses of Foley Gardere, Foley & Lardner LLP As Special Texas Counsel for the Period from February 1, 2020 through February 29, 2020* [Docket No. 541] (the "February Application," with the October/November Application, the December Application, and the January Application, the "Fee Applications") filed by Foley Gardere, Foley & Lardner LLP ("Foley").

I. SUMMARY OF OBJECTION[1]

1. Acis objects to Foley's Fee Applications to the extent that Foley fails to allocate Foley's fees between Neutra and the Debtor related to the Debtor Appeal, as required by this Court and the Employment Order. Acis further objects to Foley's Fee Applications to the extent that they seek compensation outside the scope of Foley's employment.

II. FACTUAL BACKGROUND

2. On March 11, 2020, this Court entered the *Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLPO as Special Texas Counsel, Nunc Pro Tunc, to the Petition Date* [Docket No. 513] (the "Employment Order").

3. The Employment Order authorizes Highland Capital Management, L.P. (the "Debtor") to employ Foley "on only the following matter, unless otherwise ordered by the Court the Acis Bankruptcy and the Debtor Appeal. The Debtor shall neither directly nor indirectly pay fees or expenses related to Foley's representation of Neutra in either the Acis Bankruptcy or the

[1] Capitalized terms not defined herein have the meanings ascribed to such term later in the Objection.

Debtor Appeal. For the avoidance of doubt, Foley is only representing the Debtor and Neutra in the Acis Bankruptcy and the Debtor Appeal." Employment Order ¶ 2.

4. In the Employment Order, the Acis Bankruptcy is defined as "*In re Acis Capital Management, L.P.*, Case No. 18-30264-SGJ-11 (Bankr. N.D. Tex. 2018) & *In re Acis Capital Management GP, L.L.C.)*, Case No. 18-30265-SGJ-11 (Bankr. N.D. Tex. 2018)."

5. In the Employment Order, the Debtor Appeal is defined as "*In re Matter of Acis Management GP, LLC and Acis Capital Management, L.P. v. Highland Capital Management, L.P., et al, v. Robin Phelan, Chapter 11 Trustee*, Case No. 19-10847 (5th Cir. 2019)."

6. The Employment Order further provides that "Foley shall include in any application for compensation an allocation of its fees and expenses between the Debtor, Neutra, and any other represented party as appropriate." Employment Order ¶ 3.

III. APPLICABLE LAW

7. Foley is employed pursuant to Section 327(a) of the Bankruptcy Code.[2] As such, Foley's compensation is subject to Section 330(a) of the Bankruptcy Code, as made applicable to this interim applicable by Section 331 of the Bankruptcy Code.[3] Section 330(a) of the Bankruptcy Code provides:

> **(1)** After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332 an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 —

[2] 11 U.S.C. §§ *et seq.* (the "Bankruptcy Code").

[3] Section 331 of the Bankruptcy Code states as follows: "a trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is p**rovided under section 330 of this title.** After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement" (emphasis added").

> **(A)** **reasonable compensation for actual, necessary services** rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
>
> **(B)** reimbursement for actual, necessary expenses.
>
> **(2)** **The court may**, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, **award compensation that is less than the amount of compensation that is requested.**
>
> (3) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> **(A)** the time spent on such services;
>
> **(B)** the rates charged for such services;
>
> (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> **(D)** whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> **(E)** with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> **(F)** whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.
>
> **(4)** (A) Except as provided in subparagraph (B), the court shall not allow compensation for—
>
> **(ii)** services that were not—
>
> **(I)** reasonably likely to benefit the debtor's estate; or
>
> **(II)** necessary to the administration of the case.

11 U.S.C. § 330(a) (emphasis added).

8. The Fifth Circuit and the United States Supreme Court state that bankruptcy courts are to apply the plain language of Section 330. *See Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004) (interpreting the plain meaning of Section 330); *see also CRG Partners, LLC v.*

Neary (In re Pilgrim's Pride Corp.), 690 F.3d 650, 665 (5th Cir. 2012) ("bankruptcy courts are expected to consider under § 330(a)'s plain language"). The plain language of Section 330(a) permits this Court to award only *reasonable* compensation, at the discretion of this Court, after analyzing "all relevant factors."

9. In *Barron & Newburger, P.C. v. Tex. Skyline, Ltd. (In re Woerner)*, 783 F.3d 266 (5th Cir. 2015), the Fifth Circuit "overturn[ed] *Pro-Snax's* attorney's-fee rule and adopted the prospective, 'reasonably likely to benefit the estate' standard endorsed by [the Fifth Circuit's] sister circuits." *Woerner*, 783 F.3d at 268. Prior to *Woerner*, *Pro-Snax* allowed compensation only if the "services resulted in an identifiable, tangible, and material benefit to the bankruptcy estate." *See Andrews & Kurth, LLP v. Family Snacks (In re Pro-Snax Distributors)*, 157 F.3d 414, 426 (5th Cir. 1998). The *Pro-Snax* standard required a retrospective analysis, while the *Woerner* standard requires a prospective analysis. *See Woerner*, 783 F.3d at 273 ("a court may compensate an attorney for services that are 'reasonably likely to benefit' the estate and adjudge that reasonableness 'at the time at which the service was rendered'").

10. Under Section 330 of the Bankruptcy Code, as made applicable here by Section 331 of the Bankruptcy Code, not only must the overall *amount* of fees be reasonable, the *allocation* of such fees among clients must also be reasonable. *See In re Energy Future Holdings Corp.*, 593 B.R. 217, 259 (Bankr. D. Del. 2018) ("[t]he fee and expense approval process must be done on a debtor-by-debtor basis, and professional fees and expenses that are not incurred for the benefit of a particular debtor should not be paid out of the estate of such debtor"); *see also In re Eagle Creek Subdivision, LLC*, No. 08-04292-8-JRL, 2009 Bankr. LEXIS 5779, *6 (Bankr. E.D.N.C. Feb. 5, 2009); *In re Tropicana Entm't*, No. 08-105856(KJC), 2014 Bankr. LEXIS 5198, *14 (Bankr. Del. Dec. 30, 2014).

11. Professionals employed under Section 327 of the Bankruptcy Code may only seek compensation pursuant to Section 330 of the Bankruptcy Code for work performed under their authorized scope of employment. *See PricewaterhouseCoopers, LLP v. Litzler (In re Harbor Fin. Grp., Inc.),* Civil Action No. 3:00-CV-1283-X, 2001 U.S. Dist. LEXIS 14412, *14-*17 (N.D. Tex. Sept. 6, 2001) (affirming the bankruptcy court's disallowance of fees related to work performed outside the scope of a professional's employment); *see also John F. Ames & Co. v. Marshall (In re G.G. Moss Co.),* No. 94-2587, 1995 U.S. App. LEXIS 14699, *6 (4th Cir. June 15, 1995).

IV. LIMITED OBJECTION

A. Foley Has Not Properly Allocated Fees

12. Foley has not allocated its fees between Neutra Ltd. ("Neutra") and the Debtor with respect to the Debtor Appeal. Both Neutra and the Debtor are appellants in the Debtor appeal and Neutra and the Debtor filed joint pleadings in such appeal. While the Debtor and Neutra filed joint briefing in the Debtor appeal, Neutra is not a similarly situated creditor[4] that is simply "riding the coattails" of the Debtor. In fact, Neutra, the former equity holder of Acis, has its own issues related to the Debtor Appeal. Despite this, Neutra was not allocated any fees for Foley's work performed for it.[5] In fact, the December Fee Application states: "The amounts requested do not differ but this Amended Fee Application includes an additional breakout of time related to the Confirmation Order Appeal (defined herein) and reassignment of certain fees to the appropriate project categories." December Fee Application n. 2. Neither the January Application

[4] The Debtor is a disputed creditor in the Acis bankruptcy case and the Debtor Appeal.

[5] In the October and November Application, Foley did allocate $96,312.44 in fees to Neutra. Presumably, this was for work performed exclusively for Neutra in *Neutra, Ltd. v. Joshua N. Terry*, Case No. 19-10846, regarding the Acis involuntary orders for relief (the "Neutra Appeal"). Highland is not party to the Neutra Appeal.

nor the February Application attempt to allocate any fees to Neutra despite the fact that work was performed related to the Debtor Appeal. Therefore, Foley has failed to comply with this Court's directive "to include in any application for compensation an allocation of its fees and expenses between the Debtor, Neutra, and any other represented party as appropriate." Employment Order ¶ 3.

B. Foley Performed Work Outside The Scope Of Its Employment.

13. Although Foley was retained on "only the following matter, unless otherwise ordered by the Court the Acis Bankruptcy and the Debtor Appeal," it appears that Foley performed work outside the scope of its employment. The following time entries demonstrate[6] fees incurred by Foley for work that is not related to the Acis Bankruptcy or the Debtor Appeal:

Fee Application	**Date**	**Time Keeper**	**Time Entry**	**Time**
October/November	10/17/19	HNO	Listen to first-day hearing in Highland Capital bankruptcy case and emails with Debtor's counsel following same.	2.0
October/November	11/04/19	HNO	Brief review of Order denying expedited hearing on the Venue Transfer motion and emails regarding same (.2)	.20
December	12/6/19	HNO	Preparation for and to court for hearing on Scheduling Conference and followup regarding same (3.1).	3.1
December	12/16/19	JCH	Download Highland Capital Schedules and SOFAs (.2); email same to H. O'Neil and print for binder (.2); update time of Dec. 18, 2019 Status conference per order that was entered (.2).	.6

[6] The following are serve only as demonstrative time entries and are not intended to encompass all time entries that are outside the scope of Foley's employment. In fact, the redactions in the Fee Applications make it nearly impossible to adequately assess the work performed by Foley.

December	12/30/19	HNO	Review of myriad of incoming pleadings, including compromise motion related to agreement on governance between Debtor and UCC and emails regarding same.	1.10
December	12/20/19	JCH	Download numerous pleadings filed and circulate same (1.5); calendar upcoming hearing dates and relevant objection deadlines (.8).	2.30
December	12/31/19	HNO	Review of incoming pleadings including MOR, Notice of Hearing on the settlement with the UCC and CNOs as to UCC professionals, expedited hearing order, etc. and emails regarding same.	1.00
December	12/27/19	HNO	Review of M/Appoint Trustee filed by the UST and [REDACTED] (1.7); brief review of M/Protective Order (.3).	2.00
January	1/2/20	HNO	Review of incoming pleadings.	.40
January	1/3/20	HNO	Emails to Debtor's counsel regarding status of resolution of corporate governance issues and hearings on 1/9/2020 and emails regarding same (.6).	.60
January	1/6/20	HNOI	Brief review of incoming pleadings, primarily related to Objections to the compromise on governance, and follow up regarding [REDACTED]	.90

14. Work performed outside the scope of the Employment Order is not compensable. *See PricewaterhouseCoopers, LLP v. Litzler (In re Harbor Fin. Grp., Inc.),* Civil Action No. 3:00-CV-1283-X, 2001 U.S. Dist. LEXIS 14412, *14-*17 (N.D. Tex. Sept. 6, 2001).

C. Winstead Appeal

15. While the Employment Order states that "Although the Debtor has determined not to proceed with the Winstead Matter, Foley may seek approval of its fees and expenses incurred related thereto in subsequent fee applications" this Court has not determined that fees and expenses related to the Winstead Matter (as defined by the Employment Order) meet the *Woerner* "reasonably likely to benefit" standard. The Fee Applications contained more than *de minimus* time related to the Winstead Matter (as defined by the Employment Order). It is not clear that the fees and expenses related to the Winstead Matter (as defined by the Employment Order) provided any benefit to the estate.

V. PRAYER

Acis respectfully requests that this Court only allow Foley fees and expenses to the extent such fees actually benefited the Debtor, comply with the Employment Order, and are within the scope of employment authorized by the Employment Order. Acis also requests such other and further relief to which it may show itself to be justly entitled.

DATED: April 10, 2020.

Respectfully submitted,

By: */s/ Annmarie Chiarello*

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2020, notice of this document will be electronically mailed to the parties that are registered or otherwise entitled to receive electronic notices in this case pursuant to the Electronic Filing Procedures in this District. I further certify that on April 10, 2020, this document will be sent by e-mail and first class mail to the parties listed below.

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One of Counsel

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Appendix Exhibit 25

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COUNSEL FOR ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC

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

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

MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO ALLOW PURSUIT OF MOTION FOR ORDER TO SHOW CAUSE FOR VIOLATIONS OF THE ACIS PLAN INJUNCTION

PURSUANT TO LOCAL BANKRUPTCY RULE 4001-1(B), A RESPONSE IS REQUIRED TO THIS MOTION OR THE ALLEGATIONS IN THE MOTION MAY BE DEEMED ADMITTED AND AN ORDER GRANTING THE RELIEF SOUGHT MAY BE ENTERED BY DEFAULT.

ANY RESPONSE SHALL BE IN WRITING AND FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT EARLE CABELL FEDERAL BUILDING, 1100 COMMERCE STREET ROOM 1254, DALLAS, TEXAS 75242 BEFORE CLOSE OF BUSINESS ON MAY 1, 2020, WHICH IS AT LEAST FOURTEEN (14) DAYS FROM THE DATE OF SERVICE HEREOF. A COPY SHALL BE SERVED UPON COUNSEL FOR THE MOVING PARTY AND ANY TRUSTEE OR EXAMINER APPOINTED IN THE CASE. ANY RESPONSE SHALL INCLUDE A DETAILED AND COMPREHENSIVE STATEMENT AS TO HOW THE MOVANT CAN BE "ADEQUATELY PROTECTED" IF THE STAY IS TO BE CONTINUED.

Creditors and parties-in-interest in the above-caption bankruptcy case, Acis Capital Management, L.P. and Acis Capital Management GP, LLC (collectively "Acis"), file this Motion for Relief from the Automatic Stay to Allow Pursuit of Motion for Order to Show Cause For Violations of the Acis Plan Injunction (the "Motion") pursuant to 11 U.S.C. § 362(d) regarding Highland Capital Management, L.P. ("Highland" or the "Debtor") and parties acting in concert with the Debtor, including, Highland CLO Funding, Ltd. ("Highland Funding" and Highland are sometimes collectively referred to as the "Highlands"), William Scott ("Scott"), Heather Bestwick ("Bestwick"), J.P. Sevilla ("Sevilla"), Scott Ellington ("Ellington"), James Dondero ("Dondero," and together with the Highlands, Scott, Bestwick, Sevilla and Ellington, the "Violators"),[1] and any other agents of Highland Funding and Highland that participated in the plan injunction violations, and show as follows:

SUMMARY OF MOTION

1. After Highland filed for bankruptcy, Acis was hopeful it was a new day at Highland. Acis hoped that Highland would see that the continuation of its failed litigation strategy was not only futile, but also self-destructive, and that the Debtor would turn over a new leaf. Thus, in an attempt to foster potential reconciliation and to provide Debtor's newly-appointed independent board with room to maneuver, Acis deferred pursuing the many wrongs which were needlessly inflicted on it and its principal, from a frivolous lawsuit in Guernsey meant to undermine this Court, to litigation against non-debtor individuals for, among other things, breaches of fiduciary duties owed to Acis.

[1] Highland Funding, Scott, Bestwick, Sevilla, Ellington, and Dondero, again, as non-debtors are not protected by the automatic stay, as further described below. To the extent their individual actions on behalf of Highland are protected by the automatic stay, Acis requests relief from the automatic stay, as further described below.

2. Acis can no longer sit back.[2] The time has come for Highland and the individuals who have engaged in wrongdoing (some of whom continue as highly-compensated employees at the Debtor) to face *individual* consequences for their actions. The legal process is not a game, and the Violators will only understand that when they are subjected to personal accountability for their actions. Good cause exists to lift the automatic stay and permit Acis to pursue the matters set forth in the draft Motion for Order to Show Cause for Plan Injunction Violations attached hereto as **Exhibit 1** (the "Show Cause Motion").[3] The Court should grant the Motion – it is well-founded.

STATUTORY BASIS AND JURISDICTION

3. The basis for this Motion is 11 U.S.C. §§ 105 and 362, Federal Rule of Bankruptcy Procedure 4001, and Rule 4001-1 of the Local Rules for the United States Bankruptcy Court for the Northern District of Texas (the "Local Rules").[4] This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334(b). This matter is a core proceeding pursuant to 28 U.S.C. § 157, and venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

[2] Acis has engaged in a good-faith effort to work with the Board (as hereinafter defined) and attempt to resolve its Highland-related issues without litigation. During those efforts, Acis was sued in New York federal district court (the "DAF Lawsuit"), many claims of which arose from Acis's bankruptcy in this Court. The DAF Lawsuit harmed Acis's reputation and clouds its attempts at a successful reorganization pursuant to this Court's confirmed plan. While the DAF Lawsuit was eventually voluntarily dismissed, *without* prejudice, that happened only at the urging of the Board. The filing of the DAF Lawsuit demonstrates that the same group of individuals that led the Debtor through a failed litigation strategy, and ultimately bankruptcy, still have significant sway at the Debtor and its affiliates. Nevertheless, Acis appreciates the Board's role and the dismissal of the DAF Lawsuit.

[3] As indicated, the Show Cause Motion is merely a draft and Acis reserves the right to amend or revise it prior to filing, including the ability to make material modifications to the Show Cause Motion. Regardless, the Show Cause Motion provides the parties and the Court with ample notice of the basis for Acis's request for stay relief. Any terms not defined herein have the meanings ascribed to such terms by the Show Cause Motion.

[4] Pursuant to Local Rule 4001-1(e) Acis intends to serve its evidentiary affidavit in advance of any hearing on this Motion, in compliance with the Local Rules.

RELEVANT FACTS

4. In addition to the matters specifically set forth below, Acis relies on and incorporates herein the fact section of the Show Cause Motion outlining the Guernsey Action and related matters in the Acis bankruptcy.

5. On October 16, 2019, Debtor filed this bankruptcy case.

6. On January 9, 2020, the Court entered an order approving a settlement with the Official Committee of Unsecured Creditors, which, in turn, approved the installation of a new, independent board of directors (the "Board") for the Debtor. Dkt. No. 339 in Case No. 19-34054.

7. On January 31, 2020, after the installation of the Board, Michael Hurst, this time on behalf of the Charitable Donor Advised Fund, L.P. (the "DAF"), filed a Second Amended Complaint in the United States District Court for the Southern District of New York against U.S. Bank National Association, Moody's Investors Services, Inc., Acis Capital Management, L.P., Brigade Capital Management, LP, and Joshua N. Terry. A true and correct copy of the amended complaint is attached hereto as **Exhibit 2** (the "Amended Complaint"). This Court might recognize some or all of the parties in the Amended Complaint—as well as Mr. Hurst, who has regularly represented Highland before this Court and others—from the Acis Bankruptcy. The DAF is nominally controlled by Mr. Dondero's college roommate, Grant Scott.

8. On February 5, 2020, at the DAF's request, Judge Buchwald of the Southern District of New York dismissed the Amended Complaint. A true and correct copy of Judge Buchwald's order (a notation on Mr. Hurst's letter) is attached as **Exhibit 3**.

9. On February 6, 2020—the next day—the DAF and CLO Holdco, Ltd., a subsidiary of the DAF and also controlled by Mr. Dondero's college roommate (and, upon information and belief, Mr. Dondero), filed suit in the United States District Court of the Southern District of New York, again naming the same Acis-Bankruptcy-related parties, U.S. Bank National Association,

Moody's Investors Services, Inc., Acis Capital Management, L.P., Brigade Capital Management, LP, and Joshua N. Terry (the "Complaint"). A true and correct copy of the Complaint is attached as **Exhibit 4**.

10. On February 25, 2020, at the Board's urging, the DAF and CLO Holdco, Ltd. filed a Notice of Voluntary Dismissal Without Prejudice, a true and correct copy of which is attached as **Exhibit 5**.

11. On the other hand, the Guernsey Lawsuit (further described by the Show Cause Motion), initiated at the direction and behest of Highland as a naked collateral attack on this Court, remains pending across the Atlantic.

ARGUMENT & AUTHORITY

12. Acis does not believe that the automatic stay protects the non-Highland, non-Debtor Violators. *See In re Arrow Huss, Inc*., 51 B.R. 853, 856 (Bankr. D. Utah 1985) (collecting cases). ("it is well settled that Section 362 of the Bankruptcy Code, which stays actions against the debtor and against property of the estate, does not forbid actions against its nondebtor principals, partners, officers, employees, co-obligors, guarantors, or sureties."); *see also Wedgeworth v. Fibreboard Corp*., 706 F.2d 541, 544 (5th Cir. 1983); *Mar. Elec. Co. v. United Jersey Bank,* 959 F.2d 1194, 1205 (3d Cir. 1991) ("the automatic stay is not available to non-bankrupt co-defendants of a debtor even if they are in a similar legal or factual nexus with the debtor."). However, Acis files this Motion, with respect to the non-Highland Violators, out of an abundance of caution. *See Brown v. Chesnut (In re Chesnut),* 422 F.3d. 298, 304 (5th Cir. 2005) (providing that creditors should seek order of the court before foreclosing or seizing arguable property of the estate). To the extent this Court finds it necessary to determine if causes exists to lift the automatic stay as to non-Highland, non-Debtor Violators, cause exists for the reasons set forth below.

13. This Court has broad discretion to alter or modify the automatic stay under Section 362 of the Bankruptcy Code. The statutory predicate for granting relief from the automatic stay is Section 362(d) of the Bankruptcy Code. That section provides:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

14. Because neither the Bankruptcy Code nor the legislative history provides a specific definition of what constitutes "cause" under Section 362(d)(1), courts must determine whether relief is appropriate on a case-by-case basis. *Reitnauer v. Tex. Exotic Feline Found., Inc. (In re Reitnauer),* 152 F.3d 341, 343 n.4 (5th Cir. 1998). "Cause is an intentionally broad and flexible concept, made so in order to permit the courts to respond in equity to inherently fact-sensitive situations." *Mooney v. Gill*, 310 B.R. 543, 546-547 (N.D. Tex. 2002) (quoting *In re Sentry Park, Ltd*., 87 B.R. 427, 430 (Bankr. W.D. Tex. 1988)). Acis is entitled to stay relief under Section 362(d)(1) of the Bankruptcy Code to permit Acis to file and pursue to order, before this Court or any other court, the Show Cause Motion because the Violators have repeatedly violated this Court's orders and have effectively prevented Acis from reorganizing.

15. "The purposes of the bankruptcy stay under 11 U.S.C. § 362 are to protect the debtor's assets, provide temporary relief from creditors, and further equity of distribution among the creditors by forestalling a race to the courthouse." *Reliant Energy Servs. v. Enron Can. Corp.,* 349 F.3d 816, 825 (5th Cir. 2003). By the Show Cause Motion, Acis is not attempting to gain preferential treatment among Highland's creditors, but rather hold the Violators responsible for their post-confirmation actions against Acis.

16. The Show Cause Motion requests this Court hold the Violators responsible for their post-confirmation actions against Acis, actions that violate this Court's confirmation order. The Court should exercise its broad discretion to lift the automatic stay to allow Acis to proceed on the Show Cause Motion *before this Court*, the very Court where Debtor's Chapter 11 bankruptcy is pending. Ultimately, this Court will grant any relief granted pursuant to the Show Cause Motion. This Court can ensure that all of the various stakeholders' interests are protected vis-à-vis the Show Cause Motion.

17. The automatic stay does not permanently protect Highland from answering for *its* violations of this Court's orders.[5] None of the policy goals of the automatic stay are furthered by preventing the enforcement of this Court's *own* orders against debtors in bankruptcy like Highland. Further, allowing Highland's bankruptcy proceeding to shield the Violators from accountability for their actions in another pending bankruptcy case only emboldens and benefits the wrongdoers. If this Court does not enforce its own orders, who will? If individuals and entities believe they can flout this Court's orders with impunity, the Court's authority is, at a minimum, severely undermined and, at worst, wholly eviscerated.

18. Contempt powers are necessary to ensure that "courts [are not] impotent." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911). The Court has cause to lift the automatic stay to demonstrate exactly that.

19. There is good cause in this case for the Court to grant Acis relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1).

[5] Highland is responsible for all of the actions of Highland, its agents, and its affiliates, including Highland Funding. *In re Acis Capital Mgmt., L.P.*, 18-30264-SGJ-11, 2019 WL 417149, at *7 (Bankr. N.D. Tex. Jan. 31, 2019), aff'd, 604 B.R. 484 (N.D. Tex. 2019).

20. Acis does not believe that the automatic stay protects the non-Highland, non-Debtor Violators. *See In re Arrow Huss, Inc*., 51 B.R. 853, 856 (Bankr. D. Utah 1985) (collecting cases). ("it is well settled that Section 362 of the Bankruptcy Code, which stays actions against the debtor and against property of the estate, does not forbid actions against its nondebtor principals, partners, officers, employees, co-obligors, guarantors, or sureties."); *see also Wedgeworth v. Fibreboard Corp*., 706 F.2d 541, 544 (5th Cir. 1983); *Mar. Elec. Co. v. United Jersey Bank,* 959 F.2d 1194, 1205 (3d Cir. 1991) ("the automatic stay is not available to non-bankrupt co-defendants of a debtor even if they are in a similar legal or factual nexus with the debtor."). However, Acis files this motion, with respect to the non-Highland Violators, out of an abundance of caution. *See Brown v. Chesnut (In re Chesnut),* 422 F.3d. 298, 304 (5th Cir. 2005) (providing that creditors should seek order of the court before foreclosing or seizing arguable property of the estate). To the extent this Court finds it necessary to determine if causes exists to lift the automatic stay as to non-Highland, non-Debtor Violators, cause exists for the reasons set forth above.

WAIVER OF BANKRUPTCY RULE 4001(a)(3) STAY

21. To the extent applicable, cause exists to lift the 14-day stay of Federal Rule of Bankruptcy Procedure 4001(a)(3). Removing the 14-day stay is an appropriate remedy to immediately permit Acis to file and prosecute the Show Cause Motion.

WHEREFORE, PREMISES CONSIDERED, Acis respectfully requests that upon hearing of the Motion, the Court grant Acis stay relief permitting Acis to file and pursue to order, before this Court or any other court, the Show Cause Motion, and any other relief to which Acis is entitled.

Dated: April 17, 2020.

Respectfully submitted,

/s/ Brian P. Shaw

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COUNSEL FOR ACIS CAPITAL MANAGEMENT, L.P., AND ACIS CAPITAL MANAGEMENT GP, LLC

CERTIFICATE OF CONFERENCE

I hereby certify that I personally conferred with John Morris, counsel for the Debtor. Despite counsels' efforts, no resolution was reached and, therefore, this matter is presented to the Court. On March 18, counsel for the Debtor, John Morris, advised that Debtor opposes the relief requested by this Motion.

/s/ Brian P. Shaw
Brian P. Shaw

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on April 17, 2020, through the Court's ECF noticing system upon those parties who have requested and agreed to electronic notification.

/s/ Brian P. Shaw
Brian P. Shaw

Appendix Exhibit 26

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State Bar I.D. No. 02589100
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Attorneys for James Dondero

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

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

JAMES DONDERO'S LIMITED RESPONSE TO ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO ALLOW PURSUIT OF MOTION FOR ORDER TO SHOW CAUSE FOR VIOLATIONS OF THE ACIS PLAN INJUNCTION

COMES NOW, James Dondero ("Dondero") and files this, his Limited Response to Acis Capital Management, L.P. and Acis Capital Management GP, LLC's (collectively, the "Movants") Motion for Relief from the Automatic Stay to Allow Pursuit of Motion for Order to Show Cause for [claimed] Violations of the Acis Plan Injunction [Docket No. 593] ("Motion"), and Dondero would respectfully show as follows:

1. Dondero denies each and every allegation or insinuation in paragraphs 1 through 21 of the Motion that he has engaged in or committed any wrongdoing, bad act, or improper act. Dondero also denies each and every allegation or insinuation in paragraphs 1 through 21 of the

Motion that he has acted, or caused actions or conduct in violation of the Court's orders in the Acis Capital Management, L.P. *et al* bankruptcy cases.

2. Attached as Exhibit 1 to the Motion is an alleged draft Show Cause Motion, which the Movants incorporate in to the Motion. Dondero denies each and every allegation or insinuation in the draft Show Cause Motion that he has engaged in or committed any wrongdoing, bad act, or improper action or conduct. Dondero also denies each and every allegation or insinuation in the draft Show Cause Motion that he has acted, or caused, actions or conduct in violation of the Court's orders in the Acis Capital Management, L.P. *et al* bankruptcy cases.

3. Dondero states that the automatic stay in the above captioned chapter 11 case is not applicable to Dondero in his individual capacity, but to the extent the automatic stay is applicable, Dondero does not oppose relief from stay being granted.

4. Movants' claims and allegations in the Show Cause Motion are without merit. However, the merits of those claims and allegations, including any and all preliminary findings necessary to reach the merits of a show cause or contempt claim, should not be discussed, litigated, debated, ruled upon, or determined by this Court during or through a lift stay proceeding. Such matters should be heard, if at all, via a separate proceeding after all targeted parties are afforded sufficient due process.

WHEREFORE, PREMISES CONSIDERED James Dondero respectfully prays that the merits of any claims or allegations asserted in the Motion or Show Cause Motion regarding any alleged wrongdoing, bad act, or improper action or conduct of Dondero not be discussed, litigated, debated, ruled upon, or determined by this Court during or through a lift stay proceeding, including any and all preliminary findings necessary to reach the merits of a show cause or contempt claim; and for any further relief that James Dondero is entitled.

Dated: May 1, 2020

Respectfully submitted,

/s/ D. Michael Lynn

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Attorneys for James Dondero

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on May 1, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for Movants and on all other parties requesting such service in this case.

/s/ Bryan C. Assink
Bryan C. Assink

Appendix Exhibit 27

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COUNSEL FOR ACIS CAPITAL MANAGEMENT, L.P AND ACIS CAPITAL MANAGEMENT GP, LLC

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.,	§	
	§	
	§	
DEBTOR.	§	**Chapter 11**

ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC'S OMNIBUS LIMITED OBJECTION TO THE APPLICATION FOR COMPENSATION AND REIMBURSEMENT OF EXPENSE OF FOLEY & LARDNER LLP AS SPECIAL TEXAS COUNSEL FOR THE PERIOD FROM OCTOBER 16, 2019 THROUGH MARCH 31, 2020

Acis Capital Management, L.P. ("Acis LP") and Acis Capital Management GP, LLC ("Acis GP," together with Acis LP, "Acis") file this *Omnibus Limited Objection* (the "Objection") to the (i) *Fifth Monthly Application for Compensation and Reimbursement of Expenses of Foley & Lardner LLP As Special Texas Counsel for the Period from March 1, 2020 through March 31, 2020* [Docket No. 601] (the "March Application"); and (ii) *First Interim Application for Compensation and Reimbursement of Expenses of Foley & Lardner LLP As Special Texas Counsel for the Period from October 16, 2019 through March 31, 2020* [Docket

No. 602] (the "Interim Application," the "Fee Applications") filed by Foley Gardere, Foley & Lardner LLP ("Foley").

I. SUMMARY OF OBJECTION[1]

1. Although this Court directed Foley to allocate its fees between Neutra and the Debtor, Foley has not properly allocated its fees between Neutra and the Debtor with respect to the Debtor Appeal. Based on the time entries in the Fee Application, it is impossible to ascertain what would be a ratable allocation of fees between the Debtor and Neutra, as many of the time entries contain non-specific distributions of task such as "work on reply brief"[2] or "oral argument preparation."[3] Acis also objects to Foley's Fee Applications to the extent that Foley seeks compensation outside the scope of Foley's employment.

II. FACTUAL BACKGROUND

2. On March 11, 2020, this Court entered the *Order Authorizing the Retention and Employment of Foley Gardere, Foley & Lardner LLP as Special Texas Counsel, Nunc Pro Tunc, to the Petition Date* [Docket No. 513] (the "Employment Order").

3. The Employment Order authorizes Highland Capital Management, L.P. (the "Debtor") to employ Foley "on only the following matter, unless otherwise ordered by the Court the Acis Bankruptcy and the Debtor Appeal. The Debtor shall neither directly nor indirectly pay fees or expenses related to Foley's representation of Neutra in either the Acis Bankruptcy or the Debtor Appeal. For the avoidance of doubt, Foley is only representing the Debtor and Neutra in the Acis Bankruptcy and the Debtor Appeal." Employment Order ¶ 2.

[1] Capitalized terms not defined herein have the meanings ascribed to such term later in the Objection.

[2] This generic description was used approximately twelve (12) times in the Fee Application.

[3] This generic description was used approximately five (5) times in the Fee Application.

4. In the Employment Order and as used herein, the Acis Bankruptcy is defined as "*In re Acis Capital Management, L.P.*, Case No. 18-30264-SGJ-11 (Bankr. N.D. Tex. 2018) & *In re Acis Capital Management GP, L.L.C.)*, Case No. 18-30265-SGJ-11 (Bankr. N.D. Tex. 2018)."

5. In the Employment Order and as used herein, the Debtor Appeal is defined as "*In re Matter of Acis Management GP, LLC and Acis Capital Management, L.P. v. Highland Capital Management, L.P., et al. v. Robin Phelan, Chapter 11 Trustee*, Case No. 19-10847 (5th Cir. 2019)." The Debtor Appeal relates to the Debtor's, Neutra Ltd.'s ("Neutra"), and Highland CLO Funding, Ltd.'s ("Highland Funding") appeal of Acis's confirmation order. *See Highland Capital Management, L.P., et al. v. Robin Phelan, Chapter 11 Trustee*, Case No. 19-10847.

6. The Employment Order further provides that "Foley shall include in any application for compensation an allocation of its fees and expenses between the Debtor, Neutra, and any other represented party as appropriate." Employment Order ¶ 3.

7. Although Foley's applications requested that Foley be retained by the Debtor on a larger scope, such relief was denied. Employment Order ¶ 1.

8. Foley also represents Neutra, the only appellant, in Neutra's appeal of Acis's orders for relief, currently pending before the Fifth Circuit Court of Appeals and styled *Neutra, Ltd. v. Joshua N. Terry*, Case No. 19-10846 (the "Involuntary Appeal"). *See Neutra, Ltd. v. Joshua N. Terry*, Case No. 19-10846 (5th Cir. Oct. 30, 2019).

A. Appellate Timeline.

1. Involuntary Appeal

9. The two parties to the Involuntary Appeal are Neutra (represented by Foley), the appellant, and Joshua N. Terry (represented by Winstead and the Rogge Dunn Group), the appellee. *See generally Neutra, Ltd. v. Joshua N. Terry*, Case No. 19-10846.

10. Prior to October 16, 2019 (the "Petition Date"), Neutra filed its opening brief in the Involuntary Appeal. *See Neutra, Ltd. v. Joshua N. Terry*, Case No. 19-10846 (5th Cir. Oct. 1, 2019).

11. On October 30, 2019, the appellee filed his reply brief in the Involuntary Appeal. *See Neutra, Ltd. v. Joshua N. Terry*, Case No. 19-10846 (5th Cir. Oct. 30, 2019).

12. On November 20, 2019, Neutra filed its Reply Brief in the Involuntary Appeal. *See Neutra, Ltd. v. Joshua N. Terry*, Case No. 19-10846 (5th Cir. Nov. 20, 2019).

13. On February 14, 2020, the United States Court of Appeals for the Fifth Circuit calendared the Involuntary Appeal for oral argument on March 30, 2020. *See Neutra, Ltd. v. Joshua N. Terry*, Case No. 19-10846 (5th Cir. Feb. 14, 2020).

14. On March 9, 2020, Jeffrey S. Levinger filed a Notice of Form for Appearance on behalf of Neutra in the Involuntary Appeal (the "Notice"). The Notice states that lead counsel is Holland N. O'Neil. *See Neutra, Ltd. v. Joshua N. Terry*, Case No. 19-10846 (5th Cir. March 9, 2020).

15. On March 23, 2020, after requesting input from the parties, the United States Court of Appeals for the Fifth Circuit notified parties that oral argument in the Involuntary

Appeal will be set at a later date. *See Neutra, Ltd. v. Joshua N. Terry*, Case No. 19-10846 (5th Cir. March 23, 2020).

2. Debtor Appeal

16. The parties to the Debtor Appeal are Neutra (represented by Foley), as appellant, the Debtor (represented by Foley), as appellant, Highland Funding. (represented by King and Spalding, LLP), as appellant, and Robin Phelan, Chapter 11 Trustee (represented by Winstead and the Rogge Dunn Group). *See Highland Capital Management, L.P., et al. v. Robin Phelan, Chapter 11 Trustee*, Case No. 19-10847.

17. Prior to the Petition Date, Highland Funding (represented by King and Spalding) filed its own opening brief in the Debtor Appeal. *See Highland Capital Management, L.P., et al. v. Robin Phelan, Chapter 11 Trustee*, Case No. 19-10847 (5th Cir. Sept. 20, 2019).

18. Prior to the Petition Date, Neutra and the Debtor (represented by Foley) **jointly** filed their opening brief in the Debtor Appeal. *See Highland Capital Management, L.P., et al. v. Robin Phelan, Chapter 11 Trustee*, Case No. 19-10847 (5th Cir. Oct. 14, 2019).

19. On November 13, 2019, the appellee filed his brief in the Debtor Appeal. *See Highland Capital Management, L.P., et al. v. Robin Phelan, Chapter 11 Trustee*, Case No. 19-10847 (5th Cir. Nov. 13, 2019).

20. On December 16, 2019, Highland Funding filed its reply brief in the Debtor Appeal. *See Highland Capital Management, L.P., et al. v. Robin Phelan, Chapter 11 Trustee*, Case No. 19-10847 (5th Cir. Dec. 16, 2019).

21. On December 16, 2019, Neutra and the Debtor (both represented by Foley) filed their **joint** reply brief in the Debtor Appeal. *See Highland Capital Management, L.P., et al. v. Robin Phelan, Chapter 11 Trustee*, Case No. 19-10847 (5th Cir. Dec. 16, 2019).

22. On February 14, 2020, the United States Court of Appeals for the Fifth Circuit calendared the Involuntary Appeal for oral argument on March 30, 2020. *See Highland Capital Management, L.P., et al. v. Robin Phelan, Chapter 11 Trustee*, Case No. 19-10847 (5th Cir. Feb. 14, 2020).

23. On March 23, 2020, after requesting input from the parties, the United States Court of Appeals for the Fifth Circuit notified parties that oral argument in the Debtor Appeal will be set at a later date. *See Highland Capital Management, L.P., et al. v. Robin Phelan, Chapter 11 Trustee*, Case No. 19-10847 (5th Cir. March 23, 2020).

III. APPLICABLE LAW

24. Foley is employed pursuant to Section 327(a) of the Bankruptcy Code.[4] As such, Foley's compensation is subject to Section 330(a) of the Bankruptcy Code, as made applicable by Section 331 of the Bankruptcy Code.[5] Section 330(a) of the Bankruptcy Code provides:

> **(1)** After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 —
>
> **(A) reasonable compensation for actual, necessary services** rendered by the trustee, examiner, ombudsman, professional person, or

[4] 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code").

[5] Section 331 of the Bankruptcy Code states as follows: "a trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is p**rovided under section 330 of this title.** After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement" (emphasis added).

> attorney and by any paraprofessional person employed by any such person; and
>
> **(B)** reimbursement for actual, necessary expenses.
>
> **(2)** **The court may**, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, **award compensation that is less than the amount of compensation that is requested.**
>
> **(3)** In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—
>
> **(A)** the time spent on such services;
>
> **(B)** the rates charged for such services;
>
> **(C)** whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
>
> **(D)** whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
>
> **(E)** with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> **(F)** whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.
>
> **(4)** **(A)** Except as provided in subparagraph (B), the court shall not allow compensation for—
>
> **(ii)** services that were not—
>
> **(I)** reasonably likely to benefit the debtor's estate; or
>
> **(II)** necessary to the administration of the case.

11 U.S.C. § 330(a) (emphasis added).

25. The Fifth Circuit and the United States Supreme Court have routinely stated that bankruptcy courts are to apply the plain language of Section 330. *See Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004) (interpreting the plain meaning of Section 330); *see also CRG*

Partners, LLC v. Neary (In re Pilgrim's Pride Corp.), 690 F.3d 650, 665 (5th Cir. 2012) ("bankruptcy courts are expected to consider under § 330(a)'s plain language"). The plain language of Section 330(a) permits this Court to award only *reasonable* compensation, at the discretion of this Court, after analyzing "all relevant factors."

26. In *Barron & Newburger, P.C. v. Tex. Skyline, Ltd. (In re Woerner)*, 783 F.3d 266 (5th Cir. 2015), the Fifth Circuit "overturn[ed] *Pro-Snax's* attorney's-fee rule and adopted the prospective, 'reasonably likely to benefit the estate' standard endorsed by [the Fifth Circuit's] sister circuits." *Woerner*, 783 F.3d at 268. Prior to *Woerner*, *Pro-Snax* allowed compensation only if the "services resulted in an identifiable, tangible, and material benefit to the bankruptcy estate." *See Andrews & Kurth, LLP v. Family Snacks (In re Pro-Snax Distributors)*, 157 F.3d 414, 426 (5th Cir. 1998). The *Pro-Snax* standard required a retrospective analysis, while the *Woerner* standard requires a prospective analysis. *See Woerner*, 783 F.3d at 273 ("a court may compensate an attorney for services that are 'reasonably likely to benefit' the estate and adjudge that reasonableness 'at the time at which the service was rendered'").

27. Under Section 330 of the Bankruptcy Code, as made applicable here by Section 331 of the Bankruptcy Code, not only must the overall *amount* of fees be reasonable, the *allocation* of such fees among clients must also be reasonable. *See In re Energy Future Holdings Corp.*, 593 B.R. 217, 259 (Bankr. D. Del. 2018) ("[t]he fee and expense approval process must be done on a debtor-by-debtor basis, and professional fees and expenses that are not incurred for the benefit of a particular debtor should not be paid out of the estate of such debtor"); *see also In re Eagle Creek Subdivision, LLC*, No. 08-04292-8-JRL, 2009 Bankr.

LEXIS 5779, *6 (Bankr. E.D.N.C. Feb. 5, 2009); *In re Tropicana Entm't*, No. 08-105856(KJC), 2014 Bankr. LEXIS 5198, *14 (Bankr. Del. Dec. 30, 2014).

28. Foley, the applicant, bears initial burden of proof regarding the Fee Application. *Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Charles N. Wooten, Ltd. (In re Evangeline Refining Co.),* 890 F.2d 1312, 1326 (5th Cir. 1989). The "Court should not venture guesses nor undertake extensive investigation to justify a fee for an attorney or trustee who has not done so himself." *Id*.

29. Finally, professionals employed under Section 327 of the Bankruptcy Code may only seek compensation pursuant to Section 330 of the Bankruptcy Code for work performed under their authorized scope of employment. *See PricewaterhouseCoopers, LLP v. Litzler (In re Harbor Fin. Grp., Inc.),* Civil Action No. 3:00-CV-1283-X, 2001 U.S. Dist. LEXIS 14412, *14-*17 (N.D. Tex. Sept. 6, 2001) (affirming the bankruptcy court's disallowance of fees related to work performed outside the scope of a professional's employment); *see also John F. Ames & Co. v. Marshall (In re G.G. Moss Co.),* No. 94-2587, 1995 U.S. App. LEXIS 14699, *6 (4th Cir. June 15, 1995).

IV. LIMITED OBJECTION

A. Foley Has Not Properly Allocated Fees, As Directed By This Court.

30. At the hearing on Foley's employment application, the Court stated the following with respect to the Debtor's employment of Foley in the Debtor Appeal:

> I will say yes to that, but they need to be prepared to have their fees split. I'm not saying 50/50, I don't know what the percentage is, but they are going to be allocated between Neutra and Highland, and they should not expect to get a hundred percent of those covered by Highland at the end of the day. Okay? There's going to be a deep dive into looking at how that allocation, should work, okay?

Tr. 180:19-181:1 (Feb. 19, 2020).

31. Foley has not properly allocated its fees between Neutra and the Debtor with respect to the Debtor Appeal. During the period covered by the Fee Applications, Foley filed one reply brief on behalf of Neutra only in the Involuntary Appeal, and one reply brief on behalf of both the Debtor and Neutra in the Debtor Appeal. *See* Interim Fee Application Docket No. 602-2. It is not clear from the Fee Applications if Foley prepared for oral argument on behalf of Neutra in only the Debtor Appeal, or both the Involuntary Appeal and the Debtor Appeal. *See* Interim Fee Application Docket No. 602-2. Foley also prepared for oral argument on behalf of the Debtor in the Debtor Appeal. *See* Interim Fee Application Docket No. 602-2.

32. During the period covered by the Fee Applications, Foley states the following amounts were billed to Neutra and the Debtor, respectively:

Time Period	**Relevant Action By Appellants**	**Relevant Action By Appellee**	**Amount Billed to Neutra for Involuntary Appeal**	**Amount Billed to Neutra for Debtor Appeal**	**Amount Billed to Debtor for Debtor Appeal**
Oct. 16, 2019 -Nov. 30, 2019	Reply brief filed by Neutra in Involuntary Appeal	Appellee Brief filed in Involuntary Appeal and Appellee Brief filed in Debtor Appeal	$96,312.44 (unclear because Foley did not delineate between Involuntary Appeal and Debtor Appeal)		$18,424.00
December 2019	Joint reply brief filed by **both** Neutra and Debtor in Debtor Appeal		$0	$0	$87,369.10

January 2020			$0	$0	$4,054.50
February 2020	Oral argument calendared in **both** appeals		$10,356.50 (unclear because Foley did not delineate between Involuntary Appeal and Debtor Appeal)		$31,560.00
March 2020	Oral argument in both appeals scheduled		$12,617.00 (unclear because Foley did not delineate between Involuntary Appeal and Debtor Appeal)		$60,707.50
Total			**$119,285.94** (unclear because Foley did not delineate between Involuntary Appeal and Debtor Appeal)		**$202,115.10**

33. Foley's calculation shows that Neutra is being billed approximately **half** the amount that the Debtor is being billed, even though Foley represents Neutra in **two** appeals, including one **joint** appeal with the Debtor, whereas it represents the Debtor in only one appeal, a joint appeal with Neutra. According to the Application, the Debtor is responsible for 63% of the total fees incurred for both appeals despite the fact that the Debtor is only party to the Debtor appeal, while Neutra is responsible for 37% of fees despite the fact that it is party to both appeals. Foley's allocation of 63% of the total fees to the Debtor for both appeals appears to be unreasonable and disproportionate to the work performed.[6]

[6] Foley has stated that $321,401.04 in fees are attributable to both the Involuntary Appeal and the Debtor Appeal. Assuming, half of those fees relate to the Involuntary Appeal, Neutra should be responsible for approximately $160,700.52, related to solely the Involuntary Appeal. If the remaining fees, related to the Debtor appeal, are split equally between the Debtor and Neutra, the Debtor would be responsible for $80,350.26 (rather than the current $202,115.10) and Neutra would be responsible for the same amount of fees, related to the Debtor Appeal. Note, this is based on mere assumptions as Foley has not provided time entries that attribute time/fees to specific entity.

This Objection relates to approximately 25-percent of the total fees at issue. Further, Foley requests 100-percent of its fees and 100-percent of its expenses on an interim basis. This *Court's Guidelines of Compensation and Expense*

34. Foley's time entries do not support the allocation described above because many of the time entries are generic. It is not clear from the entries why the Debtor, rather than Neutra, is tasked with compensating Foley. Certain of Foley's time entries related to the Debtor appeal do not clearly relate to the **Debtor**, rather than Neutra, so one cannot decipher if Foley complied with the Court's directive to allocate fees between Neutra and the Debtor. For example:[7]\

Fee Application	**Date**	**Time Keeper**	**Time Entry**	**Time**
October/November	11/7/2020	HNO	Preparation for and conference call with HCLOF counsel to discuss the 5th Cir. appellate brief and follow up regarding same	.80
October/November	11/14/19	HNO	Commence review of Brief of Appellee (Trustee) in the Confirmation Order Appeal.	1.1
October/November	11/18/19	SRO	Draft motion to extend reply brief deadline in HCM appeal in Fifth Circuit.	.80

Reimbursement of Professionals provide for professionals to be paid up to 80-percent of their compensation for services rendered on an interim basis. *See Guidelines of Compensation and Expense Reimbursement of Professionals* § I.H. However, the *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals* [Docket No. 141] entered by the Delaware Bankruptcy Court contains no such requirement.

[7] These time entries are intended to be examples. In fact, most of the time entries related to the Debtor Appeal do not specifically relate to the Debtor or Neutra.

October/November	11/22/19	HNO	Review of Appellee's Brief on the Acis Confirmation Order appeal and work on issues as to Appellant's Reply Brief.	8.40
December	12/02/2019	DEG	Work on reply brief.	3.50
December	12/03/2019	DEG	Work on reply brief.	7.00
December	12/04/2019	DEG	Work on reply brief.	3.2
December	12/09/2019	DEG	Work on reply brief.	8.00
December	12/12/2019	DEG	Extensive work on the 5th Circuit Reply Brief and myriad of emails with D. Green regarding same.	7.70
December	12/13/2019	HNO	Work on 5th Circuit Brief and related issues, including emails with client regarding [REDACTED] and review of [Redacted].	8.20
December	12/15/2019	HNO	Work on Reply Brief and emails to client regarding same.	3.30
February	2/10/2020	HNO	Oral argument preparation issues.	2.10
February	2/16/2020	HNO	Address 5th Circuit oral argument preparation and mapping.	3.80
February	2/17/2020	DBG	Review briefs and discuss oral argument strategy with H. O'Neil; review Fifth Circuit order regarding oral argument.	3.10
March	3/8/2020	HNO	Review of record on appeal.	2.0

March	3/12/2020	HNO	Work on oral argument with review of record and briefing arguments.	2.40
March	3/14/2020	HNO	Review of Record on appeal and overlay with argument in the brief.	3.50

35. The narrative explanation provided by Foley, related to how time was divided between Neutra and the Debtor, does not tie back to specific time entries. *See* Interim Fee Application Docket No. 602-2. Further, Foley states "[t]hese fees related to preparation for oral argument and were divided up accordingly." *See* Interim Fee Application Docket No. 602-2. However, it is not clear how "accordingly" was determined and by whom.

36. Additionally, certain time entries are not clearly attributable to the Debtor Appeal (in which Foley is retained to represent the Debtor) rather than the Involuntary Appeal (which Foley is not retained to represent the Debtor). For example:

Fee Application	**Date**	**Time Keeper**	**Time Entry**	**Time**
October/November	11/01/19	NJOV	Analyze brief to pull case cites and prepare a notebook at the request of D. Green; coordinate with Special Delivery to hand deliver the notebook.[8]	.80
October/November	11/11/19	HNO	Address litigation and appellate matters.	1.5
October/November	11/19/19	JBB	Review Fifth Circuit reply brief and exchange e-mails discussing same.	1.1

[8] Given the date of this time entry (the day after the Appellee's brief was filed in the Involuntary Appeal and before the Appellee's brief was filed in the Debtor Appeal), this time may be attributable to Neutra, and therefore, the Debtor should not be responsible for the fees and expenses related to the same.

37. Additionally, the time related to oral argument preparations in February and March is not clearly attributable to the Debtor Appeal, rather the Involuntary Appeal, as both were set to take place on the same day.

38. Foley has "allocated" a majority of the fees incurred by both Neutra and the Debtor to the Debtor. Foley's time entries do not elucidate on what particular work was being performed and for whom. This Court stated there was going to be a "deep dive" into the allocation of fees between Neutra and the Debtor. The current explanation provided by Foley is shallow. Foley bears the burden with respect to its Fee Application and it has failed to meet this burden. Therefore, the "Court should not venture guesses nor undertake extensive investigation to justify a fee for an attorney or trustee who has not done so himself." *Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Charles N. Wooten, Ltd. (In re Evangeline Refining Co.),* 890 F.2d 1312, 1326 (5th Cir. 1989).

B. Foley May Have Performed Work Outside The Scope Of Its Employment.

39. Foley was retained on "only the following matter, unless otherwise ordered by the Court the Acis Bankruptcy and the Debtor Appeal." Employment Order ¶ 2. Foley has billed over $110,000.00 (approximately 22% of the total fees billed) to the "case administration" category (presumably for work unrelated to the Acis Bankruptcy or the Debtor appeal, which are largely included in the Adverse Proceeds/Appeal or Confirmation Order Appeal categories). Many of the time entries related to the "case administration" category and elsewhere are heavily redacted. These redactions in the Fee Applications make it nearly impossible to adequately assess the work performed by Foley. At a minimum, the unredacted invoices should be submitted

for *in camera* review. Acis objects to the Fee Applications to the extent Foley seeks to be compensated for work performed outside the scope of its employment.

V. CONCLUSION

40. Acis recognizes that it is atypical to file a lengthy and substantive objection to an interim fee application. While Foley seeks payment on an interim basis, it is important to note that Foley seeks payment of 100-percent of its fees and expenses, rather than the customary 80-percent of fees and 100-percent of expenses.[9] Additionally, the allocation issues appear to relate to a significant portion of the total fees requested by the Fee Applications. Finally, as Foley was retained by the Debtor on two discrete topics: (i) the Acis Bankruptcy (which had little activity since the Petition Date, as the adversary involving the Debtor is stayed) and (ii) the Debtor Appeal (which now has briefing completed), the vast majority of work to be performed by Foley, pursuant to the Employment Order, has already occurred. Therefore, Acis requests this Court only award Foley fees and expenses to the extent that such fees actually benefited the Debtor and comply with the Employment Order. As this Court has already determined, Neutra must pay its own way.

VI. PRAYER

Acis respectfully requests that this Court only allow Foley fees and expenses to the extent such fees actually benefited the Debtor and comply with the Employment Order. Acis also requests such other and further relief to which it may show itself to be justly entitled.

DATED: May 19, 2020.

[9] This is permitted by the *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals* [Docket No. 141].

Respectfully submitted,

By: */s/ Annmarie Chiarello*

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2020, notice of this document will be electronically mailed to the parties that are registered or otherwise entitled to receive electronic notices in this case pursuant to the Electronic Filing Procedures in this District. I further certify that on May 19, 2020, this document will be sent by e-mail and first class mail to the parties listed below.

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Appendix Exhibit 28

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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]	:	
	:	Case No. 19-34054-sgj11
Debtor.	:	

UBS'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO PROCEED WITH STATE COURT ACTION

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

PURSUANT TO LOCAL BANKRUPTCY RULE 4001-1(b), A RESPONSE IS REQUIRED TO THIS MOTION, OR THE ALLEGATIONS IN THE MOTION MAY BE DEEMED ADMITTED, AND AN ORDER GRANTING THE RELIEF SOUGHT MAY BE ENTERED BY DEFAULT.

ANY RESPONSE SHALL BE IN WRITING AND FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT EARLE CABELL FEDERAL BUILDING, 1100 COMMERCE STREET #1254, DALLAS, TEXAS 75242 BEFORE CLOSE OF BUSINESS ON JUNE 3, 2020, WHICH IS AT LEAST 14 DAYS FROM THE DATE OF SERVICE HEREOF. A COPY SHALL BE SERVED UPON COUNSEL FOR THE MOVING PARTY AND ANY TRUSTEE OR EXAMINER APPOINTED IN THE CASE. ANY RESPONSE SHALL INCLUDE A DETAILED AND COMPREHENSIVE STATEMENT AS TO HOW THE MOVANT CAN BE ADEQUATELY PROTECTED IF THE STAY IS TO BE CONTINUED.

UBS Securities LLC and UBS AG, London Branch (together, "UBS"), by and through their undersigned counsel, hereby submit this motion (the "Motion") for entry of an order, in substantially the form attached hereto as **Exhibit A**, granting relief from the automatic stay provided by Section 362 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"), to allow UBS to continue a trial in a long pending state court action (the "State Court Action") against Highland Capital Management, L.P. (the "Debtor"), amongst other parties. Additionally, this Motion seeks to preserve UBS's right to try the State Court Action before a jury—a right that UBS risks waiving by filing a proof of claim in this case.

As a threshold matter, this Court should lift the automatic stay for the simple reason that the Debtor *previously agreed* that the proper forum for resolution of the State Court Action is the Supreme Court of the State of New York (the "State Court"), where the State Court Action has been pending since February 2009. The Debtor agreed, in writing, to stipulate to lifting the automatic stay and to the continuation of the pending trial in the State Court. In reliance on that representation, UBS agreed to jointly request that the State Court keep the judgment that UBS obtained in "Phase I" of the bifurcated trial in the State Court Action under seal for a limited time, while the parties pursued settlement discussions regarding UBS's remaining claims in the State Court Action (*i.e.*, the claims to be adjudicated by a jury in "Phase II"). In further reliance on this

agreement, UBS supported the governance structure initially put forward by the Debtor and has pursued a path towards reconciliation throughout this chapter 11 proceeding. To date, the parties have been unable to reach a resolution on their own. Now, however, having already received the benefit of its bargain (a delayed release of the Phase I judgment, among other things), the Debtor—inexplicably—refuses to honor its agreement to stipulate to lifting the stay so that Phase II can proceed in State Court, as planned. UBS respectfully submits that this Court should hold the Debtor to its end of the bargain.

Furthermore, cause exists to lift the automatic stay for numerous reasons independent of the Debtor's agreement, and the Debtor cannot meet its burden to show otherwise.

First, UBS will be prejudiced absent the requested relief. If the stay is not lifted, UBS potentially would be required to litigate Phase II against the Debtor in this Court, a forum that does not have the benefit of the State Court's experience with the complex facts and lengthy procedural history of the State Court Action. On the other hand, the Debtor would not be prejudiced in any way if the stay is lifted. The Debtor represented to the State Court (in December 2019) that it could be ready and able to litigate the remainder of the State Court Action in six months' time. And in fact, litigating the State Court Action now would benefit the Debtor's estate, by eliminating the uncertainty over the amount of UBS's claim (the largest claim that has been asserted against the Debtor here) and thus expediting chapter 11 plan negotiations.

Second, questions of judicial economy favor lifting the automatic stay. The Debtor is not the only Defendant in the State Court Action. Other remaining defendants include: Highland CDO Opportunity Master Fund, L.P. ("CDO Fund") and Highland Special Opportunities Holding Company ("SOHC") (SOHC and CDO Fund together, the "Fund Counterparties," and the Fund Counterparties and the Debtor, collectively, "Highland"), as well as Highland Financial Partners, L.P., Highland Credit Opportunities CDO, L.P. (now Highland Multi Strategy Credit Fund, L.P.),

and Strand Advisors, Inc. The parties are in the middle of a trial. Because Phase II of the State Court Action still needs to be litigated against *all* remaining defendants, judicial economy is served by lifting the stay and resolving all of UBS's pending claims in one forum, at one time. This approach would benefit all parties: UBS would not need to try its case twice, the Debtor and remaining Highland entities could share the costs of one action, and the parties' witnesses would not need to travel to multiple forums to testify about the same events. To take any other approach, on the other hand, would waste judicial resources and potentially result in inconsistent rulings.

Third, cause exists to lift the stay because should the Debtor attempt to remove the State Court Action to this Court, the doctrine of either mandatory or permissive abstention should prevent this Court from hearing those claims, as set forth below. The only appropriate forum to resolve the State Court Action is the State Court. The stay should be lifted now to resolve those claims, which are crucial to the resolution of this chapter 11 case, as expeditiously as possible.

In support of the Motion, UBS respectfully represents as follows:

JURISDICTION

1. This Court has jurisdiction over the Motion under 28 U.S.C. §§ 157 and 1334. The Motion is a core matter within the meaning of 28 U.S.C. § 157(b)(2).

2. Venue of the Motion in this Court is proper pursuant to 28 U.S.C. § 1409.

3. The statutory basis for the relief requested herein is Section 362 of the Bankruptcy Code.

BACKGROUND

A. The Knox Transaction

4. The State Court Action arises out of a failed transaction that began thirteen years ago. In early 2007, UBS and Highland agreed to pursue a complex form of securitization transaction known as a "CLO Squared" (the "Knox Transaction").[2]

5. The purpose of the Knox Transaction was to acquire and securitize a series of collateralized loan obligation ("CLO") securities and credit default swap ("CDS") assets (the "Knox Assets"). To that end, the Debtor agreed to be the "Servicer" of the Knox Transaction, and as such was responsible for identifying the specific CLO and CDS assets to be securitized. UBS agreed to finance the acquisition of the CLO and CDS assets identified by Highland. UBS would then hold, or "warehouse," the assets until the securitization was completed (the "Knox Warehouse"). Under this arrangement, UBS financed the acquisition of $818 million in CLO and CDS Knox Assets.

6. The parties' first attempt at the Knox Transaction was not completed successfully and the relevant agreements expired in August 2007 without the contemplated securitization having occurred. Rather than end their relationship, Highland and UBS agreed in 2008 to restructure the agreement and once more attempt the securitization. Following negotiations, the parties executed three new written agreements: an Engagement Letter, a Cash Warehouse Agreement, and a Synthetic Warehouse Agreement (collectively, the "Warehouse Agreements," attached as **Exhibits C, D, and E**, respectively). The Engagement Letter was executed by UBS

[2] Justice Friedman's November 14, 2019 Decision and Order after the Phase I trial in the State Court Action (attached hereto as **Exhibit B**) includes a summary of the Knox Transaction and provides additional support for the Background Section of this Motion. *See infra* para. 17; Ex. B, Decision and Order at 2-5. A minimal number of exhibits are attached to this Motion for brevity, but additional documentary evidence underlying the Phase I Decision and Order is available at the request of this Court. UBS reserves the right to file additional supporting declarations or to otherwise present evidence in support of the Motion at or in advance of the hearing.

and the Debtor; the Fund Counterparties were not parties to the Engagement Letter. The Cash Warehouse and Synthetic Warehouse Agreements were executed by UBS and the Debtor, along with the Fund Counterparties.

7. As described above, UBS agreed to finance the acquisition of the CLO and CDS assets that the parties planned to securitize. In so doing, the key risk UBS faced was the possibility that the Knox Assets would lose value while the securitization was pending. To address this risk, UBS and the Debtor agreed in the Engagement Letter that the Fund Counterparties would bear this risk. *See* Ex. B, Engagement Letter § 3(c). Notably, at the time, the Debtor was the Investment Manager to the Fund Counterparties under agreements that gave the Debtor total control over those entities.

8. The Warehouse Agreements reiterated that the Fund Counterparties (as controlled by the Debtor) would bear the risk, specifying that if the Knox Assets lost value while the securitization was pending, the Fund Counterparties "will in aggregate bear 100% of the risk" for the Knox Assets—with CDO Fund bearing 51% of any losses and SOHC bearing the remaining 49%. Ex. C, Engagement Letter § 3(c); Ex. D, Cash Warehouse Agreement § 5(A) & Exhibit A thereto (defining "Allocation Percentage[s]"); Ex. E., Synthetic Warehouse Agreement § 6(C) & Exhibit A thereto (defining "Allocation Percentage[s]").

9. To further protect UBS in the event that the Knox Assets lost value, the Warehouse Agreements provided for recurring measurements of mark-to-market losses on all assets in the Knox Warehouse and required the Fund Counterparties to post collateral in the event the Knox Assets lost a set amount of value. Specifically, the parties agreed that the Fund Counterparties would post an additional $10 million in collateral for each $100 million in losses to the overall value of the Knox Assets.

10. In September and October 2008, amid the global economic recession, the value of the Knox Assets dropped by $100 million, twice. Thus, UBS twice exercised its contractual right to demand additional collateral. And twice Highland posted the required collateral. On or about November 7, 2008, UBS issued a third margin call, because the value of the Knox Assets suffered additional losses of $200 million (bringing the aggregate losses to over $400 million). This time, Highland refused to provide the additional collateral required under the Warehouse Agreements.[3]

11. Highland's default on UBS's third margin call triggered a termination event under the Warehouse Agreements. On December 5, 2008, UBS gave Highland formal notice of default and demanded the Fund Counterparties pay UBS for 100% of the losses incurred on the Knox Assets—which had, by then, grown to over $520 million. At the direction of the Debtor, however, the Fund Counterparties refused to provide such payment.

12. Indeed, the Debtor undertook a series of actions to not only prevent the Fund Counterparties from paying what was owed to UBS, but to ensure that UBS would not be able to collect any judgment arising out of this liability. Such actions include, but are not limited to, a series of fraudulent transfers of funds out of, and away from, an alter ego of SOHC, Highland Financial Partners, L.P. These internal transfers of funds and other actions—all overseen by James Dondero, the Debtor's founder and president—were designed to prevent UBS from ever collecting the millions of dollars it was owed under the Warehouse Agreements. As one internal Highland

[3] *See* Ex. B, Decision and Order at 4 ("It is undisputed that the Fund Counterparties did not meet this [third] collateral call."). Although the Warehouse Agreements specified that it was the Fund Counterparties who would post collateral, the Debtor moved assets around from other entities it controlled to make the first two collateral calls (without disclosing this practice to UBS). For the third collateral call, Highland specifically told UBS on November 11, 2008, that it could choose assets to satisfy the third collateral call from a variety of Highland-controlled entities, including from the Debtor itself, and invited UBS representatives to Dallas to diligence available assets on November 14, 2008. When UBS determined that the assets offered were insufficient and instead sought cash, Highland chose to default rather than causing the Fund Counterparties to satisfy their obligations. *See id.*

document (attached hereto as **Exhibit F**) put it, "[UBS] can see us in court for their additional collateral."

B. The State Court Action

13. On February 24, 2009, UBS filed a complaint in the State Court against the Debtor and the Fund Counterparties. As UBS learned more about Highland's conduct through discovery, UBS amended its complaint to assert additional claims and name additional Highland entities, including Highland Financial Partners, L.P., Highland Credit Strategies Master Fund, L.P., Highland Crusader Offshore Partners, L.P., Highland Credit Opportunities CDO, L.P. (now Highland Multi Strategy Credit Fund, L.P.), and Strand Advisors, Inc. As amended and stated in its Second Amended Complaint (attached hereto as **Exhibit G**) in the State Court Action, filed on May 11, 2011, UBS's claims include breach of contract claims directly against the Fund Counterparties, as well as claims for fraudulent inducement, breach of the duty of good faith and fair dealing, fraudulent conveyance, tortious interference, and declaratory judgment against the Debtor and its affiliates. The Debtor subsequently brought counterclaims against UBS for breach of contract and unjust enrichment.

14. The procedural history of the State Court Action—which now spans more than 11 years—is exceedingly complex. The suit was assigned to the Commercial Division, a division of the State Court that hears only complicated commercial claims meeting specified jurisdictional requirements. The Debtor and its affiliates and UBS filed, and the State Court ruled on, four sets of motions to dismiss—briefing for which lasted from May 2009 through August 2012. The Debtor and its affiliates then filed two sets of summary judgment motions, which led to a series of complex rulings by the State Court in 2017. The parties filed various interlocutory appeals of the State Court's rulings on the motions to dismiss and for summary judgment. Those appeals were heard by the Appellate Division for the First Judicial Department in the County of New York, with

the Appellate Division issuing five separate decisions over this suit's protracted history. Over the course of the State Court Action, two different judges have presided over the claims at the trial court level—Justice Bernard Fried and, later, Justice Marcy Friedman, who continues to preside over the action.

15. Also included in the Appellate Division's decisions was an order arising from an appeal of the State Court's ruling on UBS's motion to restrain Defendants Highland Credit Strategies Master Fund, L.P. and Highland Crusader Partners, L.P. from disposing of property received through the fraudulent transfers orchestrated by the Debtor. After UBS showed it had a likelihood of success on the merits of its fraudulent transfer claims, would suffer irreparable harm absent relief, and the balance of equities favored granting the injunctions, the Appellate Division enjoined both Highland entities from disposing of their assets. Ultimately, these injunctions resulted in partial settlements between UBS and Highland Credit Strategies Master Fund, L.P. and Highland Crusader Partners, L.P.[4]

16. By early 2018, more than nine years after UBS first filed suit, the parties were finally ready to proceed to trial. Due to a jury waiver clause in the Warehouse Agreements, however, Justice Friedman bifurcated UBS's claims into two distinct phases for trial: Phase I, consisting of a bench trial on UBS's claims against the Fund Counterparties for breach of the Cash Warehouse and Synthetic Warehouse Agreements, as well as the Debtor's counterclaims; and Phase II, consisting of a jury trial on UBS's remaining claims against all remaining Highland entities, including the Debtor. Although bifurcated into two phases, the trial in the State Court

[4] The settlement agreements are confidential. However, the Debtor discussed these agreements on the record during Phase I of the trial and thus, Justice Friedman addressed the settlement agreements in her Phase I Decision and Order. *See infra* ¶ 17; Ex. B, Decision and Order. The preliminary injunction motions (and decisions) also involved a third Defendant, Highland Crusader Holding Corporation. UBS filed a separate 2011 complaint against this entity arising from the same fraudulent conveyances orchestrated by the Debtor. Although the cases were not formally consolidated, the preliminary injunction motions were consolidated for disposition.

Action was always intended to be conducted as efficiently as possible. Phase II of the trial was intended to build upon the factual record and evidentiary rulings in Phase I, with both phases presided over by Justice Friedman as part of the same lawsuit.

17. Justice Friedman presided over a thirteen-day bench trial for Phase I from July 9 through July 27, 2018. During Phase I, the court heard from eight in-person witnesses, whose testimony spanned nearly 2,000 pages of trial transcripts, as well as fourteen additional witnesses through deposition designations. On November 14, 2019, Justice Friedman entered a Decision and Order on Phase I (attached hereto as **Exhibit B**), ruling in favor of UBS on almost every issue presented in Phase I. In particular, the court found the Fund Counterparties liable to UBS for breach of the Cash Warehouse and Synthetic Warehouse Agreements, found no liability on the part of UBS for either of the Debtor's counterclaims, and rejected almost every one of the Debtor's offset arguments with the only remaining issue (affecting approximately $70,500,000) to be determined after Phase II. An Entry of Judgment on Phase I was entered on February 10, 2020. Under that Phase I final judgment, UBS is entitled to $1,039,957,799.44, consisting of $519,374,149.00 in damages and $520,583,650.44 in pre-judgment interest as of January 22, 2020, with additional interest of $128,065 having accrued daily until the Entry of Judgment.

18. The next step in the State Court Action is Phase II of the trial, which involves a jury trial of all UBS's remaining claims against not only the Debtor, but also against other Highland affiliates. The claims to be tried in Phase II include claims for breach of the implied covenant of good faith and fair dealing, fraudulent conveyances, and alter-ego liability. If found liable, the Debtor will be responsible for the judgment awarded to UBS in Phase I (in addition to any other amounts awarded to UBS in Phase II). In addition, UBS will seek punitive damages against the

Debtor for its role in orchestrating the extended efforts to prevent UBS from collecting the amounts owed under the Warehouse Agreements.[5]

19. The evidence to be presented in Phase II includes testimony from many of the same witnesses who appeared in the State Court for Phase I of the trial. Additional documentary evidence will be presented and will build on the exhibits already entered and evidentiary rulings already made in Phase I of the State Court Action. Although Phase II will be tried in front of a new audience (the jury), Justice Friedman's extensive knowledge of previous rulings and evidence will help her decide issues of law and evidence arising in Phase II in a timely and efficient manner.

20. Currently, Phase II of the State Court Action is stayed against the Debtor by the automatic stay imposed pursuant to Section 362 of the Bankruptcy Code when the Debtor commenced this chapter 11 case. The State Court is aware that the parties are attempting to settle UBS's remaining claims in the State Court Action. If the parties are unable to resolve those claims on their own, after the Court lifts the restrictions in place due to the COVID-19 pandemic, UBS intends to request that the State Court schedule the Phase II jury trial at the Court's earliest convenience.

C. The Debtor's Agreement to Stipulate to Relief From the Automatic Stay.

21. When the State Court issued its judgment in Phase I of the State Court Action, the Debtor and UBS were engaged in settlement discussions to potentially stipulate to UBS's remaining claims in the State Court Action (*i.e.*, the claims to be adjudicated in Phase II) and facilitate a consensual restructuring of the Debtor in this chapter 11 case. In order to facilitate these discussions and in recognition of the Debtor's concern about the effect the Phase I judgment

[5] *See* Ex. B, Decision and Order at 39 ("UBS persuasively argues, in opposition, that the fraudulent conveyance causes of action seek relief in addition to compensatory damages, including imposition of a constructive trust and punitive damages.").

would have on its ongoing business relationships, the Debtor and UBS agreed to request that the State Court keep the Phase I judgment under seal for a limited time. As part of this agreement, the Debtor also agreed to stipulate to relief from the automatic stay in this chapter 11 case, if the parties were unable to come to a mutually agreeable settlement of the State Court Action. Both parties clearly and repeatedly agreed that Phase II would proceed as planned—as a jury trial in the State Court—if the parties were unable to resolve the remaining claims on their own. Emails between the Debtor, through its general counsel, Scott Ellington, and litigation counsel, Angela Somers and Jeff Gross of Reid Collins & Tsai LLP, and UBS, through its counsel, evidence this agreement (attached hereto as **Exhibit H**). Through email, the parties drafted and reached an agreed upon stipulation to relief from the automatic stay in this chapter 11 case (attached hereto as **Exhibit I**), should they need to file it. If no settlement agreement could be reached, the parties agreed they could be ready to try Phase II before the State Court in "about 6 months." *See* Ex. H, Debtor-UBS Communications. The Debtor and UBS both orally represented the terms of their agreement, including the agreement to lift the automatic stay, to the State Court on multiple occasions in December 2019 and January 2020. *See, e.g.*, Nov. 22, 2019 Letter from UBS Counsel to Justice Friedman (attached hereto as **Exhibit J**) (requesting a telephone conference to discuss, among other matters, the parties' "agreement regarding the jury trial phase of the action"). The parties' agreement formed part of the basis for the State Court's sealing of the Phase I judgment until late January 2020. *See* Ex. H, Debtor-UBS Communications ("We already had a call with the Court and they understand these to be the terms.").

22. In further reliance on the Debtor's agreement to litigate the State Court Action in State Court if no agreement could be reached, and out of a desire to bring this chapter 11 case to a consensual and value-maximizing resolution, UBS supported the governance structure (*i.e.*, independent directors) put forward by the Debtor and agreed to by the official committee of

unsecured creditors, rather than pursuing the appointment of a chapter 11 trustee. Since then, UBS has continued to encourage the Debtor to settle the State Court Action in lieu of more litigious paths forward toward the Debtor's restructuring.

23. Settlement discussions between the Debtor and UBS, while ongoing, have not progressed over the last few months and UBS requested that the Debtor proceed with Phase II of the State Court Action in the State Court by filing the previously agreed-to joint stipulation to relief with this Court. Now, however, having already received the benefit of its bargain (*i.e.*, a delayed release of the Phase I judgment and its preferred governance structure), the Debtor refuses to honor its agreement to stipulate to lifting the stay, despite knowing the State Court Action will still need to proceed as to the remaining Highland entity defendants.

D. The Bar Date Order.

24. On March 2, 2020, this Court entered the *Order (I) Establishing Bar Dates for Filing Claims and (II) Approving the Form and Manner of Notice Thereof* [Docket No. 488] (the "Bar Date Order"), setting the deadline for parties in interest to file proofs of claim for April 8, 2020 (the "Bar Date"). The Bar Date Order further provided that parties whose claims are listed as disputed, contingent, or unliquidated on the Debtor's schedules of assets and liabilities, filed December 13, 2019 [Docket No. 247], must file proofs of claim by the Bar Date in order to preserve their claims against the Debtor's estate.

25. UBS's claims are listed as disputed, contingent, or unliquidated on the Debtor's schedules of assets and liabilities. Accordingly, under the Bar Date Order, UBS had to file a proof of claim in this chapter 11 case in advance of the Bar Date, in order to preserve its claims against the Debtor's estate. However, by filing a proof of claim, UBS risks waiving its right to try Phase II of the State Court Action before a jury. *See Langenkamp v. Culp*, 498 U.S. 42 (1990) (finding that a creditor who submits a proof of claim against the bankruptcy estate has no right to a jury

trial on the issues raised in defense of such claim); *Grafinanciera S.A. v. Nordberg*, 492 U.S. 33 (1989) (same); *U.S. Bank Nat. Ass'n v. Verizon Commc'ns, Inc.*, 761 F.3d 409 (5th Cir. 2014) (same). Indeed, it is unclear whether a reservation of rights in the proof of claim itself (which would not be binding on the Court) would be sufficient to protect UBS's fundamental right to a jury trial. *See In re Legendary Field Exhibitions, LLC*, 2020 Bankr. LEXIS 91, at *12 (Bankr. W.D. Tex. Jan. 10, 2020) ("Even if a creditor attempts to couch its claim in protective language reserving the right to a jury trial, such protective language is not binding on the Court."); *Travellers Int'l AG v. Robinson*, 982 F.2d 96 (3d Cir. 1992) (filing of a proof of claim waived a creditor's right to a jury trial, notwithstanding that the proof of claim itself purported to reserve that right).

26. In an attempt to avoid the expense and inconvenience associated with motions and a hearing to lift the automatic stay while their settlement discussions progressed, the Debtor and UBS agreed to a *Joint Stipulation and Order Extending Bar Date*, filed with this Court on March 22, 2020 [Docket No. 543], which this Court entered an order approving on March 25, 2020 [Docket No. 547] (the "Bar Date Stipulation"). The Bar Date Stipulation extended the Bar Date with respect to UBS's proof of claim until the later of (i) June 22, 2020 at 5:00 p.m. Central Time or (ii) five business days after the Court enters an order on UBS's motion to lift the automatic stay, provided that UBS files such motion on or before May 20, 2020 at 5:00 p.m. Central Time.

27. Since the entry of the Bar Date Stipulation, the Debtor and UBS have had several discussions regarding UBS's State Court claims and unfortunately have not yet fully resolved the issues underlying the State Court Action. In accordance with the Bar Date Stipulation and in order to safeguard its right to a jury trial, UBS now files this Motion seeking relief from the automatic stay.

RELIEF REQUESTED

28. UBS respectfully requests that the Court grant UBS relief from the automatic stay pursuant to Section 362(d)(1) of the Bankruptcy Code to continue the State Court Action in the State Court before a jury in order to liquidate its claims against the Debtor. UBS further requests that the Court enter an Order that UBS's right to a jury trial shall not be deemed waived by UBS's filing of a proof of claim in this chapter 11 case. Alternatively, even if the Court decides that lifting the stay is not appropriate at this time, UBS respectfully requests that the Court enter the Order that UBS's right to a jury trial shall not be deemed waived by UBS's filing of a proof of claim in this chapter 11 case, or extend the Bar Date further, to preserve UBS's right to try its case before a jury at a later date.

BASIS FOR RELIEF REQUESTED

A. The Debtor Has Already Agreed to Lift the Automatic Stay.

29. It is well established that a debtor in chapter 11 and a creditor may agree to lift the automatic stay in order to allow prepetition litigation to proceed so that claims against the debtor may be liquidated efficiently. *See e.g. In re GenOn Energy, Inc.*, Case No. 17-33695 (DRJ) [Docket No. 449] (Bankr. S.D. Tex. Aug. 2, 2017) (entering agreed order between debtors and plaintiffs allowing litigation to proceed in a non-bankruptcy venue). Here, the Debtor and UBS did just that. As the evidence demonstrates, when the State Court reached its opinion after the bench trial in Phase I, UBS agreed to keep the judgment under seal and not seek immediate litigation of Phase II while engaging in settlement discussions. In return for UBS's agreement to keep the Phase I judgment under seal, among other things, the Debtor's general counsel, Scott Ellington, agreed in writing that the Debtor would agree to lift the automatic stay to allow Phase II to proceed in State Court if settlement negotiations were unsuccessful. The Debtor and UBS went so far as to agree to the form of stipulation that would be used, at the appropriate time if

settlement discussions proved unfruitful, to lift the automatic stay. *See* Ex. H, Debtor-UBS Communications; Ex. I, Agreed Upon Stipulation. And, counsel to UBS, as well as the Debtor's counsel in the State Court Action, each represented to the State Court that they had agreed to lift the automatic stay in the event a settlement could not be reached. *See* Ex. H, Debtor-UBS Communications; *see also* Ex. J, Letter to Justice Friedman; *supra* para. 21. Now, counsel to the Debtor has informed UBS that the Debtor will not, inexplicably, honor its agreement and does not intend to stipulate to the agreed-upon relief.

30. On the basis of the agreement between the Debtor and UBS, the State Court kept the Phase I judgment sealed until January 23, 2020, more than two months after the State Court reached its decision. And UBS, to its detriment, refrained from seeking immediate relief from the automatic stay in this chapter 11 case or pursuing the appointment of a chapter 11 trustee. In the time since the Phase I judgment was entered, the Debtor's assets have significantly declined in value, and the Debtor has been forced to liquidate several positions in equity securities (the value of which may have already rebounded) to meet margin calls.

31. The Debtor received the benefit of its bargain with UBS through the delayed release of the Phase I judgement and UBS's agreement to not immediately pursue litigating Phase II, and is now refusing to uphold its end of the bargain. UBS respectfully requests that this Court hold the Debtor to the deal it made and lift the automatic stay to permit the State Court Action to proceed so that UBS's claim may be liquidated.

B. Cause Exists to Lift the Automatic Stay.

32. This Court has broad discretion to grant relief from the automatic stay under Section 362 of the Bankruptcy Code. Section 362(d)(1) provides as follows:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay-

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

33. Pursuant to Section 362(g)(2), the Debtor bears the burden of proving the absence of cause for relief under Section 362(d)(1). *See* 11 U.S.C. § 362(g)(2). UBS respectfully submits that under any standard this Court applies, cause exists to lift the automatic stay, and the Debtor cannot bear its burden of showing otherwise. Although "cause" is not defined in the Bankruptcy Code, courts have interpreted the concept broadly in order to respond equitably to the specific facts of a case. *See, e.g., Mooney v. Gill,* 310 B.R. 543, 546-47 (N.D. Tex. 2002) (observing that "[c]ause is an intentionally broad and flexible concept").

34. Bankruptcy courts in the Fifth Circuit have not settled on a single test for what constitutes "cause" and have applied various tests from other jurisdictions at various points in time. *See In re Choice ATM Enterprises, Inc.,* 2015 WL 1014617, at *4 (Bankr. N.D. Tex. Mar. 4, 2015) ("Even among bankruptcy courts in this circuit, no single approach prevails."). However, the common features of all of these tests are: (1) a focus on prejudice to the parties; and (2) questions of judicial economy. *See, e.g., In re Xenon Anesthesia of Texas, PLLC,* 510 B.R. 106, 112 (Bankr. S.D. Tex. 2014) (finding that judicial economy alone can provide grounds to lift the automatic stay). Both the substantial prejudice to UBS that will result if the stay is not lifted and questions of judicial economy weigh heavily in favor of lifting the stay. And, additional cause exists to grant relief from the stay because the State Court is the only appropriate forum for the State Court Action.

i. UBS is the Only Party That Will Be Prejudiced if the Stay Is Not Lifted.

35. UBS has already suffered prejudice due to its reliance on the Debtor's previous agreement to lift the automatic stay and the consequent delay in litigating Phase II in State Court. This weighs in favor of lifting the stay. *See In re Oluyemisi Omokafe Okedokun,* 593 B.R. 469,

554 (Bankr. S.D. Tex. 2018) ("Any detrimental reliance suffered by the defendant may be considered in weighing the equities"); *In re Thrash*, 433 B.R. 585, 602 (Bankr. N.D. Tex. 2010) ("Reliance is established by showing that the defendant's actions and representations induced the plaintiff 'to act or to refrain from action.'") (*quoting Matis v. Golden*, 228 S.W.3d 301, 311 (Tex. App.-Waco 2007, no pet.)).

36. Moreover, if the stay is not lifted, UBS will continue to suffer material harm. UBS potentially would be required to litigate Phase II against the Debtor in this Court, a forum that does not have the benefit of the State Court's lengthy experience with the State Court Action and the underlying facts and procedural history.

37. On the other hand, the Debtor cannot show that it would be prejudiced in any way by the lifting of the stay. Indeed, the Debtor previously *agreed* to stipulate to lift the stay and proceed in State Court, absent a settlement. The Debtor has already spent a decade fighting the State Court Action there. To argue now that litigating further in the State Court would be prejudicial strains credulity. The Debtor has counsel in the State Court Action and both the Debtor and UBS have remained in regular communication with the State Court while Phase II has been stayed. The parties should be ready and able to litigate the remainder of the State Court Action in relatively short order. Indeed, as recently as December 2019, the Debtor represented that it could be ready to litigate the State Court Action "in six months." Ex. H, Debtor-UBS Communications.

38. In fact, litigating the State Court Action now would provide an actual benefit to the Debtor's estate. As of the filing of this Motion, this chapter 11 case has been pending for nearly seven months with no appreciable progress towards a resolution. UBS's claim against the Debtor is the largest claim that has been asserted against the Debtor in this case by over $800 million. If the Debtor is ultimately found liable in the State Court Action, UBS's claim will be significantly larger than the claims of any of the other creditors in this case. Right now, however, the uncertainty

over the amount of UBS's claim has made it difficult to estimate how much other creditors may hope to receive pursuant to a chapter 11 plan and, accordingly, has complicated plan negotiations. Reducing UBS's claim to a judgment in Phase II will provide much needed certainty and expedite the process of bringing this chapter 11 case to a close. The Debtor has not proposed any plan or serious settlement offer to resolve creditors' claims. And, the longer this chapter 11 case continues and administrative costs continue to mount without UBS being able to liquidate its claim, the more the value of the Debtor's assets available for distribution to UBS, and all creditors, declines.

39. Accordingly, UBS respectfully submits that the Debtor cannot meet its burden of showing that cause does not exist to lift the stay, because the only party prejudiced by the stay remaining in place is UBS.

ii. Judicial Economy Favors Lifting the Automatic Stay.

40. Questions of judicial economy also clearly favor the State Court as the appropriate forum for litigating Phase II, and accordingly, favor lifting the stay so the State Court Action can proceed there. Phase II involves solely New York state law causes of action, all of which relate significantly to the issues previously litigated before the State Court in Phase I. Further, the State Court Action has been pending for over a decade. During that time, as detailed above, a very complex procedural history has developed, including multiple evidentiary rulings, summary judgment rulings, and interlocutory appeals. UBS respectfully submits that the State Court's familiarity with that substantial evidentiary and procedural record is critical to a fair, expeditious trial of Phase II.

41. Phase II also involves a number of non-Debtor defendants over whom this Court's jurisdiction is uncertain. Accordingly, if the stay is not lifted, UBS may be forced to litigate its claim against the Debtor in this Court and also litigate its claims against the other defendants in the State Court, *i.e.*, try the case twice, to the inconvenience of all parties. This necessarily would

lead to a waste of judicial resources and potentially inconsistent rulings. Litigating the same claims in two courts, in two different states, would also unnecessarily raise costs for the Debtor. Lifting the stay would allow the Debtor and other Highland entities to share the costs of one trial rather than each paying for separate trials. Additionally, without relief, witnesses from both sides will be inconvenienced, by being asked to travel to both Texas and New York to say the same thing.

42. Accordingly, UBS respectfully submits that the Debtor cannot meet its burden of showing that cause does not exist to lift the stay, because considerations of judicial economy weigh in favor of litigating Phase II in the State Court.

iii. Additional Cause Exists to Lift the Automatic Stay Because the State Court is the Only Forum Where the State Court Action Can and Should be Litigated.

43. Additional cause exists to lift the automatic stay pursuant to the doctrines of permissive and mandatory abstention codified in 28 U.S.C. §§ 1334(c)(1) and (2), respectively. Abstention generally arises in the context of a debtor's removal of a litigation to the bankruptcy court, which has not yet occurred here. UBS respectfully submits that this Court should not wait for the Debtor to attempt to remove UBS's claim to federal court. Rather, UBS submits that it is appropriate for this Court to find that there is cause to lift the stay because this Court would be required to (or may determine it should) abstain from hearing the State Court Action. *See In re Congoleum*, Case No. 03-51524 (Bankr. D.N.J. Mar. 22, 2004), *Hr'g Tr.* Feb. 2, 2004 (attached hereto as **Exhibit K**) at 38:12-18 ("Here the moving parties allege cause [to lift the automatic stay] in the form of what they see as inevitable mandatory abstention. While it is true that Debtor has not acted to remove the state court proceedings to this court or even to the District Court, that does not mean that this court should not look at the underlying issues to determine whether they must be decided in order to advance the bankruptcy, and if so where they are best decided.").

44. As an initial matter, the doctrine of mandatory abstention under 28 U.S.C. § 1334(c)(2) would require that this Court abstain from hearing the State Court Action.

45. 28 U.S.C. § 1334(c)(2) provides:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11, but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

46. Under the doctrine of mandatory abstention created by this statute, a district court must abstain from hearing state law claims if all of the following requirements are met: "(1) the claims have no independent basis for federal jurisdiction other than section 1334(b) [of the judicial code]; (2) the claim is a non-core proceeding, *i.e.* it is related to a case under title 11 but does not arise under or in a case under title 11; (3) an action has been commenced in state court; and (4) the action could be adjudicated timely in state court." *In re Rupp & Bowman Co.*, 109 F.3d 237, 239 (5th Cir. 1997). Taking each of the factors in turn, it is clear that if the Debtor were to attempt to remove the State Court Action to this Court, this Court would be required to abstain.

47. *First*, this Court would have no independent basis for subject matter jurisdiction over the State Court Action other than "related-to" jurisdiction under Section 1334(b) of the Bankruptcy Code. Federal courts have limited jurisdiction and may only hear cases where either: (a) the civil action presents a federal question or (b) the amount in controversy exceeds $75,000 exclusive of interest and costs and the parties are citizens of different states. *See* 28 U.S.C. §§ 1331-1332. Here, the State Court Action involves only questions of New York state law. Accordingly, there is no federal question jurisdiction. And, both plaintiff UBS Securities LLC and

the defendant Debtor were formed under the laws of the state of Delaware, so diversity jurisdiction is inapplicable. Accordingly, the first element of the test for mandatory abstention is satisfied.

48. *Second*, the State Court Action is only "related-to" the Debtor's chapter 11 case, *i.e.*, it is a non-core proceeding. Bankruptcy courts have jurisdiction over: (a) cases under title 11; (b) proceedings arising in a case under title 11; and (c) proceedings related to a case under title 11. *See* 28 U.S.C. § 157. A case "under" title 11 refers only to the actual filing of the bankruptcy petition. *See e.g.*, *In re Canion*, 196 F.3d 579, 584 (5th Cir. 1999). Proceedings arising under title 11 or arising in a case under title 11 are those that involve rights created by federal bankruptcy law, or those that would arise only in a bankruptcy or would have no existence outside of bankruptcy. *See In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987). Finally, courts define "core proceedings" as those that either invoke a substantive right provided by title 11 or that by their nature can only arise in the context of a bankruptcy case. *See id*. The State Court Action is a non-core proceeding that could only be brought before this Court under "related-to" jurisdiction. It does not invoke any substantive bankruptcy rights; it involves only matters of state law. The State Court Action was pending in the State Court for more than a decade before the commencement of this chapter 11 case, so it can clearly exist outside of bankruptcy. The State Court Action's only relation to the estate is that it potentially affects the pool of claims against the estate. This is a classic formulation of "related-to" jurisdiction, but not "arising in" or "arising under" jurisdiction. *See id.* at 93 (quoting *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), and holding that "related-to" jurisdiction depends on "whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy"); *see also In re Am. Capital Equip., Inc.*, 405 B.R. 415, 425 (Bankr. W.D. Pa. 2009) (holding that liquidation of personal injury tort claims was a non-core proceeding); *In re Trans World Airlines*, 278 B.R. 42, 49 (Bankr. D. Del. 2002) (holding that an adversary proceeding and related state court action based on state law claims

related to debtor's prepetition conduct were non-core proceedings). Accordingly, the second element of the test for mandatory abstention is satisfied.

49. *Third*, the State Court Action has been pending in the State Court for many years, and, accordingly, the third element of the test for mandatory abstention is satisfied.

50. *Fourth*, and finally, the State Court Action can be timely adjudicated in the State Court. UBS and the Debtor have engaged in regular communications with the State Court since the commencement of this chapter 11 case. A trial date can be set quickly in the State Court. *See In re Legal Xtranet, Inc.* 453 B.R. 699, 714-15 (W.D. Tex. 2011) (holding that the party moving for abstention need only show that the matter could be timely adjudicated in the state court). Additionally, bankruptcy courts give great weight to a state court's experience with the claims and the case in deciding whether the timely adjudication element of the test for mandatory abstention is met. *See e.g., In re Trans World Airlines, Inc.*, 278 B.R. 42, 51 (Bankr. D. Del. 2002) (finding that, where an action was dependent solely on a determination of state law and did not implicate the provisions or procedures of the Bankruptcy Code, the action was likely to be litigated more quickly in state court). Here, as described above, the State Court Action, which involves only New York state law claims, has been pending for over a decade. The State Court Action has a very complicated procedural history, and Phase II of the trial was always intended to build upon Phase I. For these reasons, the State Court is the best forum in which to timely adjudicate the State Court Action (even when taking into account any temporary delays relating to the COVID-19 pandemic). Accordingly, the fourth and final element of the test for mandatory abstention is satisfied.

51. Alternatively, if the Debtor was to remove the State Court Action and this Court found that mandatory abstention was not required, permissive abstention under 28 U.S.C. § 1334(c)(1) would be appropriate. That statutory provision provides:

> "[n]othing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11"

28 U.S.C. § 1334(c)(1).

52. Courts have broad discretion to abstain from hearing state law claims on any equitable ground under the doctrine of permissive abstention. *See In re Gober*, 100 F.3d 1195, 1206 (5th Cir. 1996); *see also In re Houston Reg'l Sports Network, L.P.*, 514 B.R. 211, 215 (Bankr. S.D. Tex. 2014) (listing fourteen non-exclusive factors that courts consider in deciding whether to permissively abstain).

53. For all of the reasons set forth in this Motion, were the State Court Action to be removed to this Court, permissive abstention would be appropriate here. The State Court Action involves only issues of New York state law, has been pending for many years, and has a unique and complicated procedural history that the State Court is well familiar with. Further, the only jurisdictional basis for hearing the State Court Action in this Court is "related to" jurisdiction, the State Court Action involves multiple non-Debtor parties over whom this Court's jurisdiction is arguable, and, as set forth above, UBS is entitled to a jury trial in Phase II of the State Court Action.

54. Should the Debtor attempt to remove the State Court Action, either mandatory or permissive abstention would prevent this Court from hearing those claims. Accordingly, the Debtor cannot meet its burden of showing that cause does not exist to lift the automatic stay.

55. As set forth above, the resolution of UBS's remaining claims against the Debtor is vital to the outcome of this chapter 11 case, and the only appropriate forum for resolving those claims is the State Court. UBS requests that the Court lift the automatic stay so that Phase II of the State Court Action can be litigated expeditiously, preserving UBS's right to a jury trial, and providing the certainty necessary for the Debtor to bring this chapter 11 case to a resolution.

C. In Any Event, An Order From This Court Is Necessary To Preserve UBS's Right to A Jury Trial.

56. UBS further requests that the Court enter an Order that UBS's right to a jury trial shall not be deemed waived by UBS's filing of a proof of claim in this chapter 11 case. UBS submits that this relief is warranted now, in light of the Bar Date, regardless of whether the Court decides to lift the stay at this time.

57. Section 105(a) of the Bankruptcy Code authorizes the Court "to issue any order . . . necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105. For the reasons set forth herein and in light of the critical need for UBS to preserve its right to a jury trial on Phase II of the State Court Action, UBS submits that the Court should enter an Order that the filing of a proof of claim will not waive UBS's right to a jury trial.

58. Alternatively, UBS respectfully requests that the Court further extend the Bar Date with respect to UBS's claims, to allow the parties additional time to settle UBS's claims and preserve UBS's right to a jury trial. This Court has the authority to extend the Bar Date pursuant to Bankruptcy Rule 3003(c)(3), which provides that the Court shall "fix and for cause shown may extend the time within proofs of claim may be filed." Fed. R. Bankr. P. 3003(c). Additionally, Bankruptcy Rule 9006(b) provides that the Court may extend the Bar Date for cause shown if the request is made before the expiration of the period originally prescribed by the Court, or extended by previous order of the Court. *See* Fed. R. Bankr. P. 9006(b)(1). Accordingly, UBS respectfully submits that if the Court deems it inappropriate to lift the stay at this time or enter an Order that UBS's filing of a proof of claim does not waive its right to a jury trial, the Court should extend the Bar Date with respect to UBS's claims.

RULE 4001

59. Any order approving this Motion should be immediately effective and not stayed pursuant to Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure because, absent immediate entry of such order, UBS will be required to file a proof of claim in this chapter 11 proceeding which may lead to UBS being deemed to have waived its right to a jury trial in Phase II of the State Court Action. Therefore, UBS requests that the Proposed Order be entered and made immediately effective, and that the stay of Rule 4001(a)(3) be waived.

NOTICE

60. Notice of this Motion shall be provided to (a) the Debtor; (b) counsel for the Debtor; (c) counsel to the Official Committee of Unsecured Creditors; (d) the United States Trustee; (e) those parties requesting notice pursuant to Local Bankruptcy Rule 2002-1(j); and (f) all other parties registered to receive ECF notifications in this case. UBS respectfully submits that such notice is sufficient and that no further notice of this Motion is required.

CONCLUSION

For the foregoing reasons, UBS respectfully requests entry of an order granting UBS immediate relief from the automatic stay and such other and further relief as the Court deems just and proper.

DATED this 20th day of May, 2020.

LATHAM & WATKINS LLP

By /s/ Andrew Clubok

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CERTIFICATE OF CONFERENCE

In accordance with Local Bankruptcy Rule 9014-1(d)(1), I hereby certify that counsel for the movant has engaged in good faith settlement discussions with counsel for the Debtor and was unable to reach agreement.

/s/ Andrew Clubok

CERTIFICATE OF SERVICE

I, Martin Sosland, certify that *UBS's Motion for Relief From the Automatic Stay to Proceed With State Court Action* was filed electronically through the Court's ECF system and served electronically on all parties enlisted to receive service electronically.

Dated: May 20, 2020.

/s/ Martin Sosland

Appendix Exhibit 29

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

SUSAN LANOTTE, derivatively on behalf of HIGHLAND GLOBAL ALLOCATION FUND, and on behalf of herself and all others similarly situated,	§	
Plaintiff,	§	
v.	§	Civil Action No. 3:18-cv-02360-M
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., TIMOTHY HUI, BRYAN WARD, BOB FROEHLICH, JOHN HONIS, and ETHAN POWELL,	§	
Defendants,	§	
and	§	
HIGHLAND GLOBAL ALLOCATION FUND,	§	
Nominal Defendant.	§	

ORDER

Before the Court is Defendants' Motion to Dismiss Plaintiff's Verified Amended Shareholder Derivative and Class Action Complaint. [ECF No. 43]. Plaintiff brings a derivative claim for breach of fiduciary duty and breach of contract and a direct class action claim for breach of fiduciary duty. For the following reasons, the Motion to Dismiss is **GRANTED**.

I. Factual Background

Plaintiff Susan Lanotte alleges that she has been a shareholder of Nominal Defendant Highland Global Allocation Fund (the "GAF Fund") since March 9, 2015. She asserts that the GAF Fund is a mutual fund managed by Defendant Highland Capital Management Fund Advisors, L.P. (the "Investment Advisor"). The Amended Complaint alleges that the GAF Fund

and multiple other funds (the "Trust complex") are series, or separate entities with their own portfolios, of a larger Massachusetts business trust (the "Trust").[1] Plaintiff further claims that the Investment Advisor manages the GAF Fund and six other funds in the Trust complex, including Highland Energy MLP Fund (the "MLP Fund"), under an investment advisory agreement entered into with each fund.

The Investment Advisor is allegedly owned by Highland Capital Management Services, Inc. and Strand Advisors XVI, Inc. Plaintiff asserts that Strand Advisors, XVI, Inc. is the general partner, that it is wholly owned by James Dondero, and that Highland Capital Management Services, Inc. is owned by Dondero and his business partner, Mark Okada. Dondero serves as the Investment Advisor's senior portfolio manager, for both the GAF Fund and the MLP Fund.

The Amended Complaint alleges that Trustee Defendants Timothy Hui, Bryan Ward, Bob Froehlich, John Honis, and Ethan Powell are trustees of the GAF Fund, the MLP Fund, the Trust, multiple other funds in the Trust complex, and a similar set of funds held in a second trust complex, and that they have business and personal connections with the Investment Advisor, the Trust, and the Trust complex, as explained below. The Trustee Defendants, along with Dustin Norris, comprise the board of trustees of the GAF Fund (the "Board").

Trustee Defendant Hui has been a trustee of funds affiliated with the Investment Advisor since 2000. He and his wife are personal friends of Mark Okada and his wife. Hui is also Dean and Special Assistant to the President at Cairn University, where Mrs. Okada serves as a trustee.

[1] "Besides being considered a discrete economic unit, each series often is treated as a separate investment company for various purposes under the ICA, even though it may not have separate legal form and may be covered under the umbrella of a single trust entity." *Hartsel v. Vanguard Grp., Inc.*, No. CIV.A. 5394-VCP, 2011 WL 2421003, at *18 (Del. Ch. June 15, 2011), *aff'd*, 38 A.3d 1254 (Del. 2012).

Plaintiff alleges that his role at Cairn University provides Hui only a minimal salary and that the $150,000 he receives annually in trustee fees forms a significant part of his overall income.

Trustee Defendant Ward has been a trustee of funds affiliated with the Investment Advisor since 2001.

Trustee Defendant Froehlich has been a trustee of funds affiliated with the Investment Advisor since 2013. He was formerly on the boards of two funds managed by American Realty Capital Partners, which Plaintiff alleges committed a large-scale accounting fraud unrelated to this case.

Trustee Defendant Honis has been a trustee of funds affiliated with the Investment Advisor since 2013. He was formerly a partner of Highland Capital Management, L.P. and is owed $880,000 from affiliates of the Investment Advisor under a severance and deferred compensation agreement to which the Investment Advisor is a party. He is also the sole proprietor of Rand Advisors, LLC, a trustee of a trust that owns substantially all of an affiliate of the Investment Advisor, and for which role Rand Advisors, LLC pays Honis $300,000–$350,000 annually. Honis is also alleged to be a close personal friend of Dondero, and the successor trustee of Dondero's personal family trust, and Honis' son has worked as a paid intern at the Investment Advisor.

Trustee Defendant Powell has been a trustee of funds affiliated with the Investment Advisor since 2013. Until 2015, he was Executive Vice President and Principal Executive Officer of the Trust, the Chief Product Strategist of the Investment Advisor, and a Senior Retail Fund Analyst of Highland Capital Management, L.P.

Plaintiff alleges that on January 7, 2015 and thereafter, the Investment Advisor, through Dondero, bought shares of the MLP Fund for the GAF Fund.[2] The Investment Advisor continued to automatically reinvest any dividends from those shares into the MLP Fund. As a result, the GAF Fund owned approximately 63% of the MLP Fund midway through the GAF Fund's 2018 fiscal year. During this time, the MLP Fund was allegedly suffering significant losses due to its role in the oil market. Plaintiff alleges that the Investment Advisor was using the much larger GAF Fund to "prop up" the value of the "failing MLP Fund." [Amended Complaint, ECF No. 37, ¶¶ 4, 62]. This allegedly allowed the MLP Fund to retain investors, stay in operation, avoid liquidation, and pay large fees to and reimburse the costs of the Investment Advisor.

Plaintiff sent a demand letter to the Board, requesting that the GAF Fund take legal action against the Investment Advisor and the Trustee Defendants over the MLP Fund investments. [*Id.* ¶ 82]. In the demand letter [Response Appx., ECF No. 51-2 at 10], Plaintiff argues that the Investment Advisor violated its contractual obligations to the GAF Fund and that the Trustee Defendants violated their fiduciary duties by allowing the investments.

The Board formed a Demand Review Committee (the "Committee") that hired outside counsel, conducted an investigation, and issued the Demand Review Committee Report (the "Report") [ECF No. 44-1, Ex. A] that recommended rejecting Plaintiff's demand. The five Trustee Defendants voted unanimously to adopt the Report's recommendation and reject Plaintiff's demand. Dustin Norris did not participate in the vote.

[2] Defendants also identify one earlier purchase in June 3, 2014. [Motion Appx., ECF No. 44-1 at Appx53].

Plaintiff then brought a purported derivative claim for breach of contract against the Investment Advisor, and a derivative and direct claim against the Trustee Defendants for breaching their fiduciary duties.

II. Applicable Law

The parties do not dispute that Massachusetts law governs the board demand requirements, because the GAF Fund is part of a Massachusetts business trust. Under Massachusetts law, a shareholder cannot commence a derivative action on behalf of a fund unless she first makes a written demand that the fund address her allegations. Mass. Gen. Laws Ann. ch. 156D, § 7.42. A derivative action must be dismissed if it was commenced after "a majority vote of independent directors present at a meeting of the board of directors if the independent directors constitute[d] a quorum" determined that the requested action was "not in the best interests" of the fund and those directors[3] made that decision in "good faith after conducting a reasonable inquiry." Mass. Gen. Laws ch. 156D, § 7.44(a)–(b).[4] Essentially, it is the business judgment rule that governs a decision by an independent board. *Operative Plasterers' & Cement Masons' Local Union Officers' & Employees' Pension Fund v. Hooley*, No. CIV.A. 12-10767-GAO, 2013 WL 5442366, at *6 (D. Mass. Sept. 30, 2013).

A defendant moving to dismiss a derivative action must "make a written filing with the court setting forth facts to show (1) whether a majority of the board of directors was independent

[3] While the statute specifically refers to "directors," the parties do not contest the applicability of § 7.44 to the GAF Fund's board of trustees, and other courts have similarly applied it to trusts. *Halebian v. Berv*, 869 F. Supp. 2d 420, 445 (S.D.N.Y. 2012), *aff'd*, 548 F. App'x 641 (2d Cir. 2013); *Averbuch v. Arch*, No. SUCV201102502, 2013 WL 5531396, at *4 (Mass. Super. Aug. 27, 2013).

[4] Section 7.44 was enacted in 2004, displacing Massachusetts' prior requirements for derivative actions. The majority of cases prior to the enactment of § 7.44 were demand futility actions, in which the plaintiff claimed that a demand on the board was unnecessary because it would have been futile. These actions were eliminated in 2004 by the universal demand requirement in § 7.42. Nevertheless, demand futility actions remain instructive.

at the time of the determination by the independent directors and (2) that the independent directors made the determination in good faith after conducting a reasonable inquiry upon which their conclusions are based." § 7.44(d). Notably, § 7.44(d) requires pleading that a majority of the board was independent, but it is different from the requirement in § 7.44(b)(2) that there was a quorum of independent directors and a majority of independent directors voted to dismiss. Accordingly, while a defendant needs to plead in a motion to dismiss that a majority of the board is independent, it only needs to establish that there was a quorum of independent directors, the majority of whom voted to dismiss the action.

If a defendant sufficiently pleads the requirements of § 7.44(d), the plaintiff must respond with allegations of particularized facts rebutting the motion's allegations. § 7.44(d). A court then assesses the evidence as to the independence of the board and the good faith and reasonableness of its determination. *Blake v. Friendly Ice Cream Corp.*, No. 030003, 2006 WL 1579596, at *11 (Mass. Super. May 24, 2006). If a court finds that the majority of the board is not independent, the defendant bears the burden of proving that dismissal is otherwise warranted under § 7.44(a). Mass. Gen. Laws ch. 156D, § 7.44(e).[5] If a majority of the board is independent, the plaintiff bears the burden to prove that dismissal is not warranted under § 7.44(a). *Id.* While the statute focuses on the use of pleadings and allegations of particularized facts, the Court must ultimately make factual findings as to the independence of the Board and

[5] The Court notes that the commentary to § 7.44 appears to imply that the independence requirement under § 7.44(e) is meant to correspond with the independence requirement of § 7.44(b). § 7.44 cmt. 2. The commentary states that if there is independence under § 7.44(e), then the plaintiff must establish that the board did not conduct a reasonable investigation in good faith. If independence is not established, then the corporation may still obtain dismissal if it proves that the investigation was nevertheless reasonable and done in good faith. *Id.*; *see also Halebian v. Berv*, 644 F.3d 122, 128 (2d Cir. 2011) (describing the burden shifting similarly). While such an approach is consistent with the general application of the business judgment rule, which § 7.44 was intended to embody, it is not supported by the plain language of the statute, which includes different requirements of independence under § 7.44(b) and § 7.44(e), and does not allow a corporation to obtain dismissal by proving the board's investigation was reasonable and done in good faith if the board was not independent.

its good faith and reasonableness in investigating Plaintiff's demand.[6] *Halebian*, 644 F.3d at 128.

III. Independence of the Trustee Defendants

While independence is not defined under § 7.44, it is understood to require trustees to be "disinterested." § 7.44 cmt. 1. It "more broadly encompasses both 'disinterest' which is a lack of a personal interest in the challenged transaction . . . and 'independent' which is freedom from influence in favor of the defendants due to personal or other relationships." *Blake*, 2006 WL 1579596, at *12. The parties agree that Dustin Norris was not independent and properly recused himself from voting on Plaintiff's demand. [Ward Decl., ECF No. 44-1, Ex. 1 ¶ 17]. Instead, they only dispute the independence of the five Trustee Defendants, who all voted to reject Plaintiff's demand. [Motion Appx. at Appx114].

A. Statutory Independence Under the Investment Company Act of 1940

The GAF Fund is distinct from a typical mutual fund, because it has a board of trustees, rather than a board of directors. Under Massachusetts law, a trustee who is not an interested person with respect to the trust, as defined in the Investment Company Act of 1940 ("ICA"), "shall be deemed to be independent and disinterested when making any determination or taking any action as a trustee." Mass. Gen. Laws ch. 182, § 2B. Plaintiff argues, however, that the ICA does not govern the independence of trustees in derivative actions. [Response, ECF No. 52 at

[6] Federal Rule of Civil Procedure 23.1, under which Defendants seek to dismiss Plaintiff's derivative claims, requires a Plaintiff to "state with particularity . . . any effort by the plaintiff to obtain the desired action from the directors or comparable authority." "Because Federal Rule of Civil Procedure 23.1 does not identify applicable substantive standards, the particularity of a plaintiff's pleadings is governed by the standards of the state of incorporation." *Freuler v. Parker*, 803 F. Supp. 2d 630, 636 (S.D. Tex. 2011), *aff'd*, 517 F. App'x 227 (5th Cir. 2013). Section 7.44 not only imposes pleading requirements but also requirements of proof and burden shifting, which the Court will apply as substantive Massachusetts law. *See Rotz v. Van Kampen Asset Mgmt.*, 5 N.Y.S.3d 330 at *4–6 (N.Y. Sup. 2014) (applying the proof and burden shifting requirements of § 7.44 as substantive Massachusetts law).

21]. Instead, Plaintiff reasons that if trustees are treated as directors under § 7.44, then their independence should also be governed only by those provisions of Massachusetts law relating to director independence, including the definitions of independence in § 7.44, and conflicts of interest in Mass. Gen. Laws ch. 156D, § 8.31.

To the extent that there is any conflict between the principles governing directors under § 7.44 and § 8.31 and those related to trustees under § 2B, the latter would govern as it is the more specific statute applicable to trustees. *See Bos. Hous. Auth. v. Labor Relations Comm'n,* 398 Mass. 715, 718 (Mass. 1986) ("[I]n the case of conflicting statutes, normally the more specific statute will prevail over the more general statute."); *N. Shore Vocational Reg'l Sch. Dist. v. City of Salem*, 393 Mass. 354, 359 (Mass. 1984) ("In the absence of irreconcilable conflict between an earlier special statute and a later general one the earlier statute will be construed as remaining in effect as an exception to the general statute.").

Regardless, the requirements of § 7.44, § 8.31, and § 2B do not necessarily conflict. Section 8.31 defines independence only with respect to voiding transactions approved by interested directors. It does not address the independence of directors assessing a shareholder demand, which is governed by the independence requirements in § 7.44. While § 7.44 does not expressly define independence, its commentary references the definition of disinterested in *Harhen v. Brown*, 431 Mass. 838 (Mass. 2000). § 7.44 cmt. 1. There, the Massachusetts Supreme Court defined an interested director as one who "has a business, financial, or familial relationship with a party to the transaction or conduct, and that relationship would reasonably be expected to affect the director's . . . judgment with respect to the transaction or conduct in a manner adverse to the corporation." *Id*. at 844 n. 5 (citing the ALI Principles of Corporate Governance). It does not provide that a director is *per se* interested if he or she has any

relationship with a party to the transaction. Instead, the relationship must rise to a level that would reasonably affect the director's judgment. Nothing prohibits a court from analyzing the likely impact of that relationship on a trustee's judgment under § 7.44, by then looking at the specific principles of Massachusetts law governing the actions of trustees under § 2B, and thereby harmonize the requirements of both provisions. *See generally Ryan v. Mary Ann Morse Healthcare Corp.*, 135 N.E.3d 711, 719 (Mass. 2019) ("[W]henever possible, 'a statute is to be interpreted in harmony with prior enactments to give rise to a consistent body of law.'"); *Cty. Comm'rs of Middlesex Cty. v. Superior Court*, 371 Mass. 456, 460 (Mass. 1976) ("Statutes which do not necessarily conflict should be construed to have consistent directives so that both may be given effect."). Accordingly, it is appropriate to use § 2B, and its incorporation of the interested trustee standard from the ICA, in assessing the independence of the Trustee Defendants. *See Halebian*, 869 F. Supp. 2d at 447 (applying § 2B to assess the independence of trustee board members under § 7.44); *In re Eaton Vance Mut. Funds Fee Litig.*, 380 F. Supp. 2d 222, 239 (S.D.N.Y. 2005) (similarly applying § 2B in a demand futility action under Massachusetts law).

B. Interested Persons and Control Under the ICA

In relevant part, a trustee is interested with respect to a trust under the ICA if he or she is an "affiliated person" of the trust or the trust's investment advisor. 15 U.S.C. § 80a-2(a)(19). A trustee is an "affiliated person" if he or she is directly or indirectly controlled by the person or entity with which the trustee is affiliated. *Id.* § 80a-2(a)(3). "A natural person shall be presumed not to be a controlled person," but the presumption may be rebutted by evidence. *Id.* § 80a-2(a)(9). Overcoming this presumption is not to "be lightly assumed or easily carried to success." *Krantz v. Prudential Investments Fund Mgmt. LLC*, 77 F. Supp. 2d 559, 563 (D.N.J. 1999), *aff'd*,

305 F.3d 140 (3d Cir. 2002). Accordingly, here the burden is on Plaintiff to rebut the presumption that the Trustee Defendants, as natural persons, are not under the control of the GAF Fund, the Trust, or the Investment Advisor.

Control requires "actual domination" or "the latent power to exercise a controlling influence." *Strougo v. BEA Assocs.*, 188 F. Supp. 2d 373, 381–82 (S.D.N.Y. 2002). It can "assume many different forms, and often can be proven only by circumstantial evidence." *Id.* at 381. A plaintiff "should specify the extent of personal benefit or gain which resulted" from the trustee's relationship with the trust or the investment advisor. *Acampora v. Birkland*, 220 F. Supp. 527, 543 (D. Colo. 1963); *see also In re Blackrock Mut. Funds Fee Litig.*, No. 04 CIV 164 TFM, 2006 WL 4683167, at *12 (W.D. Pa. Mar. 29, 2006) (requiring that a plaintiff identify what benefits trustees received, with particularized factual allegations). However, the existence "of a relationship resulting in an economic benefit or interest" or a "[m]ere influence would fall short" of establishing control. *Olesh v. Dreyfus Corp.*, No. CV-94-1664 (CPS), 1995 WL 500491, at *16 (E.D.N.Y. Aug. 8, 1995). Instead, there must be a "causative" relationship, and a plaintiff cannot merely allege the receipt of benefits and "argue that this of itself proves control and affiliation." *Acampora*, 220 F. Supp. at 543.[7]

The Securities and Exchange Commission ("SEC") has identified several factors to consider in assessing control under the ICA:

> (1) selection or nomination of the director by the controlling party; (2) existence of family ties; (3) social relations; (4) former business associations between the director and the controlling person; (5) the amount of time spent by directors at meetings; (6) respective ages; (7) participation in recommending, evaluating, and terminating policies; (8) independent knowledge of corporate affairs; (9) interlocking directors and officers, together with share ownership; and (10) actual domination and operation.

[7] This ICA standard requires more evidence than that needed to rebut independence under Massachusetts law, which requires only a reasonable doubt as to the independence of the directors. *Blake*, 2006 WL 2714976, at *3.

Verkouteren v. Blackrock Fin. Mgmt., Inc., 37 F. Supp. 2d 256, 261 (S.D.N.Y. 1999). Notably, Plaintiff has not addressed the existence of actual domination and control, which is "the single most important factor" because it "speaks directly to the language of the ICA." *Id.*

The parties' dispute over the independence of the Trustee Defendants relates to the following issues: the risk that the Trustee Defendants would be authorizing suit against themselves; appointment of the Trustee Defendants by other Trustee Defendants; the Trustee Defendants' participation on the boards of multiple funds in the Trust complex; the Trustee Defendants' compensation; and the personal and business relationships among the Trustee Defendants, the Investment Advisor, the GAF Fund, and the Trust. Of these allegations, the potential that the Trustee Defendants would be authorizing suit against themselves and the fact that they were appointed to the Board by other Trustee Defendants do not implicate issues of control, as they do not relate to the influence of the GAF Fund, the Trust, or the Investment Advisor over the Trustee Defendants. Plaintiff's remaining allegations—the participation on multiple related boards; compensation; and the Trustee Defendants' personal and business relationships—implicate # 3 (social relationships), # 4 (former business relationships), and # 9 (interlocking directors and officers) of the factors claimed by the SEC.

i. Social Relationships

Plaintiff alleges that the social relationships between the Trustee Defendants and the Investment Advisor compromised their independence when they evaluated Plaintiff's demand. The Amended Complaint highlights that Trustee Defendant Hui and his wife are personal friends with Dondero's business partner, Mark Okada, and his wife, and that Mrs. Okada is also a trustee of Cairn University, where Hui is employed, although the parties dispute to what extent Mrs. Okada has supervisory authority over Hui. [Amended Complaint ¶ 22; Reply, ECF No. 56 at 6].

Similarly, Plaintiff alleges that Trustee Defendant Honis is close personal friends with Dondero, and is the successor trustee of Dondero's personal family trust. [Amended Complaint ¶ 25].

The existence of these social connections does not place Hui or Honis under the Investment Advisor's control. *See Verkouteren*, 37 F. Supp. 2d at 260–61 (finding that directors were not controlled under the ICA by officers of an investment advisor despite the "ample opportunities" to develop personal and business relationships by serving on boards together); *Boylan v. Bos. Sand & Gravel Co.*, No. CIV.A. 02-2296BLS2, 2007 WL 836753, at *10 (Mass. Super. Mar. 16, 2007) (stating that under Massachusetts law a director is not "subject to a controlling influence, and therefore interested, solely because of a long-time friendship or other social relationship"). Instead, the relationship must be such that a director "would be more willing to risk his or her reputation than risk the relationship." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1052 (Del. 2004).[8]

Neither Mark nor Pamela Okada is directly affiliated with the GAF Fund, the Trust, or the Investment Advisor. Instead, Mark Okada and Dondero are the owners of Highland Capital Management Services, Inc., which is a limited partner in the Investment Advisor. [Amended Complaint ¶ 20]. This creates a tenuous connection between Hui and the Investment Advisor. Furthermore, Plaintiff does not allege significant benefits that Hui or Honis received from their social relationships nor how those benefits created a measure of influence and control by others over them. *See Blake*, 2006 WL 1579596, at *14 (finding that a director's lack of personal benefit from his business relationship with defendants supported his independence under § 7.44).

[8] "Massachusetts courts have looked to the decisions of courts in other states (frequently Delaware since many corporations are chartered there) that address similar issues . . . The decisions of the various jurisdictions are generally in harmony." *Operative Plasterers'*, 2013 WL 5442366, at *4.

Plaintiff does claim that Hui received his trusteeship through his relationship with Mr. Okada [Amended Complaint ¶ 22], which also implicates factor 1—selection to a board by the controlling party. Even if true, being recruited for a board by an investment advisor does not, by itself, establish control. *See Alexander v. Allianz Dresdner Asset Mgmt. of Amer. Holding, Inc.*, 509 F. Supp. 2d 190, 197 (D. Conn. 2007) ("The fact that a defendant appointed a board member is insufficient to establish that the board member is interested [under Massachusetts law], even if the position provides the board member with compensation."); *see also* § 7.44(c)(1) ("[N]omination or election of the director by . . . a defendant in the derivative proceeding or against whom action is demanded" is insufficient by itself to make the director not independent.).

Plaintiff also alleges that Honis' son worked as a paid intern at the Investment Advisor. [Amended Complaint ¶ 25]. That relationship is not significant enough to assume, without more, that Honis would risk his professional reputation for that minimal benefit. Accordingly, Plaintiff has not alleged sufficient social connections between the Investment Advisor and Trustee Defendants Hui or Honis to establish control of them.

ii. Business Relationships

Plaintiff alleges that Trustee Defendants Honis and Powell are also controlled through their business connections with the GAF Fund, the Trust, and the Investment Advisor. Powell was an officer of the Trust, the Investment Advisor, and Highland Capital Management, L.P. [*Id.* ¶ 26]. Honis was also a partner at Highland Capital Management, L.P. and is owed $880,000 in severance and deferred compensation from an affiliate of the Investment Advisor. [*Id.* ¶ 25]. While Honis was never employed by the Investment Advisor, Plaintiff alleges that the Investment Advisor is a party to Honis' severance agreement, although she does not identify the Investment Advisor's role in that agreement. [*Id.*]. He is also the sole proprietor of Rand Advisors, LLC, which is a trustee of a trust that owns substantially all of an affiliate of the

Investment Advisor. *Id.* Through Rand Advisors, LLC, Honis is paid approximately $300,000 to $350,000 annually. *Id.*

The mere existence of business relationships is insufficient to establish control under the ICA. *See Strougo*, 188 F. Supp. 2d at 381–82 (finding no control despite a "number [of] former business relationships among the leaders of [the investment advisor] and the Fund"); *Olesh*, 1995 WL 500491, at *11, 16 (finding that directors' "ample opportunity to develop personal business relationships" with officers of the investment advisor did not establish control over those directors). While Plaintiff highlights that the Committee admitted that both Honis and Powell were previously interested persons, based on their prior associations with the Trust and the Investment Advisor [Amended Complaint ¶ 94], this is not dispositive because the assessment of independence is to be made as of the date of the decision on Plaintiff's demand. *See* § 7.44(d) (requiring independence "*at the time* of the determination by the independent directors") (emphasis added).

Under common law, "a long-time business-association" involving "direct pecuniary dealing" may create a reasonable doubt about independence. *Boylan*, 2007 WL 836753, at *10. However, relationships that have been held to create such doubt often "border on or even exceed familial loyalty and closeness." *Beam*, 845 A.2d at 1050; *see also Sandys v. Pincus*, 152 A.3d 124, 130 (Del. 2016) (holding that a director's joint ownership of a private airplane with a defendant created reasonable doubt about the director's independence because it required a level of cooperation that was suggestive of a close personal friendship like that of familial ties). They must also be of a "bias-producing nature." *Brining v. Donavan*, No. CV 16-3422-BLS1, 2017 WL 4542947, at *5 (Mass. Super. Sept. 14, 2017). Thus, "allegations that board members moved in the same social circles, attended the same weddings, developed business relationships

before joining the board, and described each other as friends are insufficient" if they do not point to an actual bias affecting the board members' decision making. *In re ZAGG Inc. S'holder Derivative Action*, 826 F.3d 1222, 1237 (10th Cir. 2016) (internal quotations omitted) (analyzing Delaware law); *see also Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963, 980–81 (Del. Ch. 2000) (finding that a "long-standing 15-year professional and personal relationship" between a director and the defendant did not create a reasonable doubt that the director could exercise independent business judgment).

Plaintiff does not specify how the Trustee Defendants' relationships resulted in a degree of control or influence over them. While Powell was formerly an officer of the Trust and the Investment Advisor, including during the period in which the GAF Fund made the investments at issue, "allegations that the directors themselves participated in the wrongdoing" do not overcome the presumption under the ICA against a finding of control. *Boyce v. AIM Mgmt. Grp., Inc.*, No. CIV.A. H-04-2587, 2006 WL 4671324, at *5 (S.D. Tex. Sept. 29, 2006). Plaintiff does not allege any current relationship beyond Powell's service on multiple boards in the Trust complex, which, as explained below, is insufficient to establish control.

Plaintiff alleges that Honis currently receives significant fees and income from affiliates of the Investment Advisor. However, these payments are not directly from the Investment Advisor and, thus, do not translate into a relationship of control by the Investment Advisor. *See Kaplan v. Wyatt*, 499 A.2d 1184, 1189 (Del. 1985) (concluding that a director's association with a business that had dealings with a defendant did not demonstrate a lack of independence under Delaware law when there were no direct dealings with the defendant and no indication that the association influenced the director's behavior).

The closest connection between Honis and the Investment Advisor is the $880,000 in severance and deferred compensation owed to him, which Plaintiff argued during oral argument functioned like a loan. [Motion Hearing Transcript, ECF No. 62 at 51:22–52:09]. A trustee who has loaned money to the trust is *per se* interested under the ICA. 15 U.S.C. § 80a-2(19)(A). However, the money owed to Honis is due from affiliates of the Investment Advisor, and not the Investment Advisor itself or the Trust. This transaction is not properly characterized as a loan to the Investment Advisor or the Trust for which Honis is being repaid.

As the court found in *Acampora*, in this case, "[i]t does not appear that any [Trustee Defendant] made any decision or any course of decisions because of the business relationship." *Acampora*, 220 F. Supp. at 543. Plaintiff has not alleged sufficient business connections between Honis or Powell and the GAF Fund, the Trust, or the Investment Advisor that exceed the norms of general business dealings and has not identified with particularity how any outside business relationships may have influenced the Trustee Defendants' behavior. *See Pinchuck v. State St. Corp.*, No. 09-2930BLS2, 2011 WL 477315, at *13 (Mass. Super. Jan. 19, 2011) (rejecting the plaintiff's claim of nonindependence under Massachusetts law resulting from a director's "close relationship" with the defendant when there were no particularized facts demonstrating how the directors were influenced by that relationship).

iii. Interconnected Boards and Officers

Clearly, serving on a board of trustees does not make a trustee interested. 15 U.S.C. § 80a-2(a)(19)(A). However, Plaintiff argues that because all the Trustee Defendants served on numerous boards within the Trust complex, their loyalty was to the Investment Advisor and the Trust. [Amended Complaint ¶ 95]. The Court concludes that serving on multiple boards does not make trustees "*per se* interested persons under the ICA, even though pursuing one fund's interests within the complex might adversely affect the complex's other funds." *Hartsel v.*

Vanguard Grp., Inc., No. CIV.A. 5394-VCP, 2011 WL 2421003, at *22 (Del. Ch. June 15, 2011), *aff'd*, 38 A.3d 1254 (Del. 2012); *see also Migdal v. Rowe Price-Fleming Int'l, Inc.*, 248 F.3d 321, 330 (4th Cir. 2001) ("Several courts have likewise held that the fact that a director serves on multiple boards within a fund complex is insufficient to demonstrate control [under the ICA]."). While the Trustee Defendants owed fiduciary duties to other funds in the Trust complex, including the MLP Fund, Plaintiff does not allege how pursuing claims on behalf of the GAF Fund against the Investment Advisor and the Trustee Defendants would harm the MLP Fund or any other funds from whom no recovery was sought. *See Seidl v. Am. Century Companies, Inc.*, 713 F. Supp. 2d 249, 261 (S.D.N.Y. 2010), *aff'd*, 427 F. App'x 35 (2d Cir. 2011) (finding directors who served on the boards of multiple funds were not conflicted under Maryland Law because the plaintiff did not plead why the recovery sought on behalf of the nominal defendant would harm the other funds).

Plaintiff further argues that Trustee Defendant Hui is not independent because the fees he received for acting as a trustee on those multiple boards form "a substantial portion of his overall income." [Amended Complaint ¶ 22]. However, receiving significant fees does not make a trustee interested under the ICA. *See Forsythe v. Sun Life Fin., Inc.*, 417 F. Supp. 2d 100, 111 (D. Mass. 2006) ("In addition, board membership by itself does not warrant a conclusion that the trustee is 'interested,' [under the ICA] even though the trustee is well compensated."); *Migdal*, 2000 WL 350400, at *3 (stating that the "number of interlocking boards on which she or he serves within a family of funds" does not make a director interested under the ICA "notwithstanding the amount or . . . the 'materiality' of the aggregate income such a director receives for such service, at least so long as the aggregate payment is not so large as to shock the conscience of a reasonable person"). The fees involved here do not shock the conscience.

iv. Conclusion

Plaintiff's allegations against the Trustee Defendants are collectively insufficient to rebut the presumption that they, as natural persons, were not controlled under the ICA when they voted to reject Plaintiff's demand. *See Blake*, 2006 WL 1579596, at *13 (considering independence under the "totality of the circumstances"). Plaintiff's only relevant allegation against Ward and Froehlich are that they served on multiple boards in the Trust complex, but that alone is insufficient to establish control.

In addition to Hui's service on multiple boards, Plaintiff's claims of an indirect affiliation with the Investment Advisor, through Hui's social relationship with Okada and his wife, and the receipt of normal compensation for Hui's board services, are not probative of the issue of control. This does not create a bias-producing relationship that would make Hui more willing to risk his reputation as a trustee rather than his relationship with the GAF Fund or the Investment Advisor.

Powell has a similarly attenuated relationship with the GAF Fund and the Investment Advisor, which is based only on his past employment with the Trust, Investment Advisor, and Highland Capital Management, L.P., and his current service on multiple boards in the Trust complex. While long-running, this normal business relationship is not exceptional; it does not rival the essentially familial relationships that courts require to find that a trustee was interested. *See, e.g.*, *Beam*, 845 A.2d at 1050.

Finally, Plaintiff alleges several interactions between Honis and both the GAF Fund and the Investment Advisor, including his social relationship with Dondero, Honis' son's internship with the Investment Advisor, Honis' former employment with affiliates of the Investment Advisor, Honis' current business with affiliates of the Investment Advisor, and his service on multiple boards within the Trust complex. However, these interactions are not especially unique,

such that they establish a relationship between Honis and the Investment Advisor or the GAF Fund that involves the effectively familial level of loyalty necessary for a trustee to be interested. Furthermore, Honis has no direct pecuniary dealings with either the GAF Fund or the Investment Advisor, except his current board memberships. Although Plaintiff alleges an overarching relationship, it is not inherently of a bias-producing nature that would support finding that Honis is under the control of the GAF Fund or the Investment Advisor.

Accordingly, the Court concludes that the Trustee Defendants were all disinterested under the ICA, and in turn independent and disinterested under Massachusetts law when they rejected Plaintiff's demand.[9] As a result, the Court need not address whether the Trustee Defendants would also be independent under the general principles of independence under Massachusetts law.

IV. Majority of Independent Trustees Constituting a Quorum

Given that there were five independent trustees on the six-member Board who voted to reject Plaintiff's demand, Plaintiff bears the burden of establishing that the requirements of § 7.44(b)(1) have not been met. § 7.44(e). To be effective, § 7.44(b)(1) requires that a board decided to reject the demand with "a majority vote of independent directors present at a meeting of the board of directors if the independent directors constitute[d] a quorum." A quorum for the GAF Fund is two trustees, and if two trustees who voted in favor of rejecting the demand were independent, there would be a majority of independent trustees constituting a quorum.[10]

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[9] Even if Defendant Honis, who has the most collective connections with the GAF Fund, the Trust, the Trust complex, and the Investment Advisor, was found to be not independent at that time, it would not affect the resolution of Defendants' Motion, because the vote of four independent trustees is sufficient to satisfy the voting requirements detailed below. While Plaintiff urged that even one non-independent director would taint the entire voting process, as explained below, such a position, without further proof of inappropriate influence, would be inconsistent with the text and purpose of § 7.44.

[10] Plaintiff also argues that the Committee was improperly constituted under § 7.44(b)(2). However, that provision governs a committee formed to vote on the demand. § 7.44(b)(2). Here, the Committee merely investigated the

Plaintiff argued at oral argument that the Court would also need to find that no non-independent trustees participated in the decision to reject the demand. [Motion Hearing Transcript at 48:13–48:19]. However, "[t]he fact that one [trustee] is interested . . . does not taint the entire board." *Canal Capital Corp. By Klein v. French*, No. CIV. A. 11,764, 1992 WL 159008, at *5 (Del. Ch. July 2, 1992). Nothing in § 7.44(b)(1) states that the majority vote of independent directors must be held to the exclusion of any non-independent directors, and Plaintiff has not identified how the participation of any allegedly non-independent Trustee Defendants adversely affected the vote of the independent Trustee Defendants. Furthermore, requiring a court to void any vote by directors if it later finds that one director who participated was not independent would be contrary to the goal of Massachusetts' demand requirement, which is to allow "corporations to assume control over shareholder derivative suits [because c]orporate management may be in a better position to pursue alternative remedies, resolving grievances without burdensome and expensive litigation." § 7.42 cmt. 4. The Court has determined that all five of the trustees that voted in favor of rejecting the demand were independent, satisfying the independence requirement of § 7.44(b)(1). However, clearly a quorum of independent trustees voted to reject the demand, because only two of the five who voted are even alleged to be non-independent in any way beyond their participation on multiple boards.

V. Good Faith and Reasonable Investigation

Given that a majority of the Board or, alternatively, of a quorum of the Board, consisted of trustees who were independent when they voted to reject Plaintiff's demand, Plaintiff bears

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demand and then presented its findings to the Board, which then voted on the demand. Accordingly, § 7.44(b)(2) is inapplicable.

the burden of establishing that that decision was not made in good faith after a reasonable inquiry. § 7.44(e). When made by a properly independent board, "Massachusetts presumes that a decision to reject a shareholder demand was the exercise of valid business judgment, 'absent a showing of bad faith or lack of investigation into the demand.'" *Halebian*, 548 F. App'x at 646. Under the business judgment rule, decisions of a board are presumed to be valid and cannot be second guessed by a court merely because the court believes that the board was mistaken or made an error in judgment. *Evangelist v. Fid. Mgmt. & Research Co.*, 554 F. Supp. 87, 91 (D. Mass. 1982). Instead, a plaintiff must demonstrate a flaw in the process by which the board made its decision that means its decision was not made in good faith or after a reasonable inquiry. *Pinchuck*, 2011 WL 477315, at *15. Massachusetts law "does not prescribe the scope or form of the inquiry that must be taken." *Rotz*, 5 N.Y.S.3d at *9.

Defendants highlight the multiple steps the Board took to investigate the demand. It formed the Committee, which held sixteen meetings, hired independent counsel, who billed for one thousand hours of attorney time, reviewed thousands of pages documents, and interviewed ten witnesses. [Motion Appx. at Appx32–34]. The Committee asked Plaintiff for any relevant documents she had and met with her about whether there were additional issues or facts she wished to raise. [*Id.* at Appx35, 37]. The resulting Report provided an assessment of Plaintiff's demand and explained why it would not be in the GAF Fund's best interests to pursue Plaintiff's requested action. [*Id.* at Appx92–93]. Courts have found that similar efforts adequately demonstrate a reasonable and good faith investigation. *See Operative Plasterers'*, 2013 WL 5442366, at *6 (approving a board's investigation when it created an investigation committee that met twenty-two times, hired independent counsel that billed one thousand hours to the investigation, conducted interviews, reviewed thousands of pages of documents, analyzed the

investment portfolio and public disclosures, and considered legal theories that could be pursued, as well as the chances of recovery on them); *Averbuch*, 2013 WL 5531396, at *4 (finding an investigation committee that "interviewed numerous witnesses, reviewed thousands of pages of documents, obtained expert reports, and met several times to discuss its investigation and findings" was "fairly comprehensive"); *Rotz*, 5 N.Y.S.3d 330 at *11–12 (holding that a review committee that used independent counsel to spend thousands of hours interviewing witnesses and reviewing documents and worked with experts to create an extensive report demonstrated a good faith, reasonable inquiry under Massachusetts law that was not rebutted by the plaintiff).

It is true that an investigation report in response to a demand can be "so lacking in substance, scope and support" that it raises "serious questions about the good faith and reasonableness" of the investigation. *Blake*, 2006 WL 1579596, at *22. Plaintiff claims that four deficiencies in the Report undermine the good faith and reasonableness of the Board's and Committee's actions: 1) the improper assessment of the Trustee Defendants' independence; 2) the inadequate scope of the evidence considered by the investigation; 3) the failure to assess multiple potential factual and legal theories and arguments; and 4) the limited factual support cited by the Report.

A. Independence of the Committee and the Board

Plaintiff argues that the Report does not adequately assess the independence of the Trustee Defendants and instead merely relies on their independence questionnaires, public documents, and interviews. [Amended Complaint ¶¶ 106–07]. In particular, Plaintiff highlights that the Committee did not consider issues of the trustees' compensation and the impact it might have on their independence. [*Id.* ¶ 92]. In fact, the Report contains numerous pages explaining potential conflicts created by the Trustee Defendants' various relationships with the GAF Fund, the Trust, and the Investment Advisor, including items which Plaintiff alleges were not included

in the Trustee Defendants' independence questionnaires. [Motion Appx. at Appx43–50]. Independence questionnaires can be valuable in assessing independence, although that clearly is not the stopping point if other legitimate issues going to independence are raised. *See Halebian*, 548 F. App'x at 647. While Plaintiff is correct that the Report does not specifically address the Trustee Defendants' compensation, it was disclosed in public filings attached to the Report [Highland Energy MLP Fund 2016 Annual Report, ECF No. 61-70 at 23], and the Report cannot be reasonably faulted for not explicitly addressing an issue with which the Trustee Defendants are intimately familiar.

In light of these efforts and the presumption against control to which the Trustee Defendants are entitled under the ICA, the Report's investigation and analysis of independence were not inadequate. While Plaintiff disagrees with the Report's, and the Court's, findings of independence, any alleged biases of the Trustee Defendants did not create "a superficial investigation designed to exonerate the Investment Advisor and [the Trustee Defendants]" [Response at 20], because, as discussed below, the specific deficiencies identified by Plaintiff are insufficient to carry her burden of establishing the lack of a good faith and reasonable investigation.

B. Failure to Address Potential Factual and Legal Arguments

Plaintiff also claims that there were a number of substantive inadequacies in the Report that warrant a finding that the investigation was not reasonable or done in good faith. A board should discuss "on what factors it relied and why those factors support its decision." *Houle v. Low*, 407 Mass. 810, 825 (Mass. 1990). A report may be inadequate if it does not "meaningfully address[]" a plaintiff's claims or is "devoid of analysis" on certain issues. *Blake*, 2006 WL 1579596, at *23–24. A "selective investigation" may raise questions as to the reasonableness of

an investigation and whether it was conducted in good faith. *Sutherland v. Sutherland*, 958 A.2d 235, 244 (Del. Ch. 2008).

Plaintiff alleges that the Committee did not address several factual and legal arguments. Plaintiff first claims that the Report does not address conflicts created by the Investment Advisor's decision to invest in the MLP Fund. [Amended Complaint ¶¶ 110–11]. She alleges that the Report discusses only a half-page memorandum dated in January 2015, which apparently satisfied the Committee that conflicts were addressed by the Investment Advisor and the Board at the time of the investment. In fact, the Report analyzes the propriety of the investments based not only on the January 2015 memorandum but also based on witness interviews and the investigation into the MLP Fund. [Motion Appx. at Appx64–68, 74–82].

Plaintiff also alleges that the Report does not adequately address whether the Trustee Defendants satisfied their duty to monitor the GAF Fund's investments and the activities of the Investment Advisor, including as to the automatic reinvestments of dividends, and to consider the potential termination of the Investment Advisor. [Amended Complaint ¶¶ 97, 112]. In fact, the Report contains several pages analyzing the monitoring of the MLP investments, their performance, and the role of the Investment Advisor. [Motion Appx. at Appx82–86, 88]. It concludes from this analysis that the Trustee Defendants' oversight was "robust." [*Id.* at Appx83]. While it does not specifically discuss the possibility of terminating the Investment Advisor, the Report's conclusion as to the adequacy of the Board's oversight can be reasonably interpreted to include review of the Investment Advisor's role and effectiveness.

Plaintiff also faults the Report for its premature determination that certain claims may be barred by the statute of limitations, because it does not consider possible tolling of the limitations periods. [Amended Complaint ¶ 114]. The Report does not address potential tolling, and

instead, concludes that claims based on transactions that occurred more than three years before the date of the demand are "likely" barred. [Motion Appx. at Appx87]. While Plaintiff may disagree with the Committee's conclusions, the Board is entitled to rely on factors such as the applicable statute of limitations when assessing what is in the best interests of the GAF Fund. *See Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 534 (Mass. 1997) ("[T]he existence of a legal or other impediment is a matter for a corporation's board to consider when deciding whether to accept or decline an opportunity that has been disclosed to it.").

Furthermore, the Report spends several pages detailing the earlier transactions that fell outside of the three-year statute of limitations period [Motion Appx. at Appx29–30, 62–68], and Plaintiff admits that. [Amended Complaint ¶ 114]. The Report's analysis rarely emphasizes any single transaction, and instead, considers Defendants' larger course of conduct, including instances falling outside of the limitations period. [Motion Appx. at Appx90]. To the extent that the Report does not explicitly address earlier transactions falling outside of the claimed limitations period, it did not unduly compromise the good faith and reasonableness of the investigation into her demand.

C. Scope of the Evidence Considered

Plaintiff argues that the limited scope of the evidence the Committee considered reflects a lack of good faith and reasonableness. She urges that the Report does not reveal that emails, electronically stored information, or internal documents other than the January 2015 memorandum and documents provided by Plaintiff were reviewed as part of the investigation. [Amended Complaint ¶¶ 98–101]. She also questions the Committee's choice of witnesses, given that Dondero was the only member of the GAF Fund's management that was interviewed. [*Id.* ¶ 105].

However, "the types of documents reviewed or the persons interviewed in connection with an investigation" are choices "on which reasonable minds may differ." *Belendiuk v. Carrion*, No. CV 9026-ML, 2014 WL 3589500, at *6 (Del. Ch. July 22, 2014). The "failure to interview certain individuals or review [certain] documents" does not negate the reasonableness or good faith of an investigation if "the pressures and motivations that this evidence was meant to highlight" were nevertheless considered. *Averbuch*, 2013 WL 5531396, at *5.

The Committee concluded that the documents it obtained "best documented the Adviser's investment thesis for MLP Fund and why the Adviser was confident in the MLP sector generally and MLP Fund specifically." [Motion Appx. at Appx65]. Plaintiff does not allege with particularity what impact the Committee's choice to exclude certain documents or witnesses had on the investigation nor does she further identify what issues the Committee did not consider as a result.

D. Lack of Supporting Evidence

Plaintiff argues that the Report's lack of citation to supporting evidence further indicates an improper investigation. Although ten interviews are listed in the Report, the Report does not reveal detailed information about the nature of these interviews. [Amended Complaint ¶ 104]. The Report does not set out the questions asked, who conducted the interviews, what documents, if any, were shown to the witnesses, the length of the interviews, or any other substantive information. Instead, Plaintiff alleges that "the Committee consciously determined that its members would not . . . take notes of the interviews or otherwise create a factual record of unsworn, untranscribed interviews." [*Id.*] Defendant mentions that summaries of these interviews exist, but that they could not be provided to Plaintiff because they are privileged. [Motion Brief, ECF No. 44 at 24]. Without supporting documentation indicating how extensively the witnesses were questioned, Plaintiff claims the Court cannot "ascertain the

reasonableness of" an investigation, and that such a deficient record "do[es] not assure the court of the good faith or integrity" of the process. *Sutherland*, 958 A.2d at 243.

Plaintiff also criticizes the lack of clarity as to the documents on which the Committee relied. While the Report extensively explains the facts that the Committee came to learn and understand, there is limited documentation cited for these facts. [*E.g.* Motion Appx. at Appx62–64, 66–67, 74–75, 83–84]. Although the Report cites multiple public documents and indicates that the Committee "reviewed numerous important documents that [it] requested or that counsel identified," [*Id.* at Appx32, 57], it does not explain what those other documents were, the steps the Committee took to obtain them, or the identification of who provided them. The only document request specifically mentioned in the Report—for those supporting the Investment Advisor's 2014 decision to invest in the MLP Fund—did not cause any documents to be produced. [*Id.* at Appx65]. Furthermore, the Report is not attested to and some significant parts lack citation.

Defendants maintain that the contents of documents and what was learned from them were thoroughly discussed in the Report. However in *Blake*, the Massachusetts Superior Court found that a report that "contain[ed] numerous conclusory assertions . . . yet often fail[ed] to cite to any specific source for verification of its conclusions" and did not include "an attestation to the accuracy of [its] contents" created serious questions about the good faith and reasonableness of the inquiry. 2006 WL 1579596, at *22.

In this Court's view, the lack of evidentiary support identified by Plaintiff is insufficient to carry Plaintiff's burden of establishing "serious questions" about the good faith and reasonableness of the Board's investigation. While the Report does not include an attestation as to its accuracy, it is attached to the Ward Declaration, which declares the accuracy of the Report

under penalty of perjury. [Ward Decl. ¶ 19]. Notwithstanding the flaws identified by Plaintiff, her ultimate complaint is that "the recommendation not to move forward with the prosecution is not supported by the facts disclosed in the Report itself." [Amended Complaint ¶ 88]. However, the correctness of the Report's analysis and whether the conclusions are justified are squarely protected by the Committee's and the Board's right to rely on the business judgment rule.

E. Conclusion

As analyzed above, the Report demonstrates that several of Plaintiff's claimed deficiencies regarding the Committee's investigation are without merit. The Report establishes that, contrary to Plaintiff's allegations, the Committee's deliberations considered the independence of the Trustee Defendants, potential conflicts created by the GAF Fund's investments into the MLP Fund, potential termination of the Investment Advisor, and claims that may be time-barred. Plaintiff's remaining concerns as to the evidence and witnesses that the Committee reviewed and cited in the Report reflect choices upon which reasonable minds may disagree. While Plaintiff may not agree with the specific evidence and witnesses the Committee chose to interview and review, and with the Committee's failure to include citations in several portions of the Report, these choices, as a whole, do not demonstrate a serious or fundamental flaw that causes the Court to doubt the good faith and reasonableness of the Committee's and Board's investigation.

The Court concludes that Defendants have established that the independent Trustee Defendants voted to reject Plaintiff's demand after a reasonable and good faith investigation, and Defendants' Motion to Dismiss Plaintiff's derivative claims is therefore **GRANTED**.

VI. Plaintiff's Direct Class Action Claim

Plaintiff also brings a direct class action claim against the Trustee Defendants for breach of fiduciary duties. [Amended Complaint ¶¶ 141–47]. Defendants argue that these claims must

be dismissed because a breach of fiduciary duty claim can only be brought derivatively. [Motion Brief at 30]. The "crux of the inquiry" of whether an action is direct or derivative under Massachusetts law is whether the harm that shareholders complain of "resulted from a breach of duty owed directly to them, or whether the harm claimed was derivative of a breach of duty owed to the corporation." *In re PHC, Inc. S'holder Litig.*, 894 F.3d 419, 427–28 (1st Cir.) (citing *Int'l Bhd. of Elec. Workers Local No. 129 Benefit Fund v. Tucci*, 476 Mass. 553, 558 (Mass. 2017)). Furthermore, a direct claim requires an injury that "is distinct from the injury suffered generally by the shareholders as owners of corporate stock." *Tucci*, 476 Mass. at 558.

Under Massachusetts law, a "director's fiduciary duties are generally owed only to the corporation" and "any suit to enforce those duties ordinarily must be brought as a derivative action." *In re PHC, Inc. S'holder Litig.*, 894 F.3d at 428. As Plaintiff argues, however, trustees owe fiduciary duties to both the trust and its beneficiaries, including its shareholders. *Fogelin v. Nordblom*, 402 Mass. 218, 222 (Mass. 1988). Nevertheless, even when a director or trustee owes a fiduciary duty to both an organization and its shareholders, "plainly not all fiduciary duty claims are individual claims." *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1138 n. 66 (Del. 2016) (analyzing Delaware law). Instead, "the focus should be on the nature of the injury," so as to distinguish between breaches of fiduciary duty to the shareholders, which are to be brought individually, and those owed to the corporation, which are to be brought derivatively. *Id.*

Here, Plaintiff's claimed harm is a decrease in the value of the GAF Fund, which is felt by all shareholders equally, based on their status as shareholders. Plaintiff argues that the distinction between direct and indirect injuries is less meaningful in the context of mutual funds like the GAF Fund. [Response at 31]. In a typical corporation, a harm to the corporation's

assets or operations affects its overall value, which then indirectly harms all shareholders by decreasing the value of their individual shares. In contrast here, however, Plaintiff argues that mutual funds are unique, because a mutual fund's operations are to make other investments, in which shareholders are entitled to a pro rata share. Plaintiff reasons that owning a share of a mutual fund, which makes other underlying investments, functionally equates to the shareholder directly owning a pro rata share of the mutual fund's underlying investments, so that harms to those underlying investments should be held to flow directly to the investors.

Courts that have addressed this issue are divided. *Compare Northstar Fin. Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1058 (9th Cir. 2015), *as amended on denial of reh'g and reh'g en banc* (Apr. 28, 2015) (finding that under Massachusetts law "the distinction between direct and derivative actions has little meaning in the context of mutual funds") *with Stegall v. Ladner*, 394 F. Supp. 2d 358, 366 (D. Mass. 2005) (rejecting the argument that mutual funds were unique under Massachusetts law because there was nothing "materially different" in how harms to a corporation and harms to a mutual fund flow to investors); *Forsythe*, 417 F. Supp. 2d at 112 (holding similarly); *Hogan v. Baker*, No. CIV.A. 305CV0073P, 2005 WL 1949476, at *4 (N.D. Tex. Aug. 12, 2005) (holding similarly to *Forsythe* under Delaware law). The Court agrees with those courts characterizing the decrease in value of a mutual fund as a derivative injury. Ownership of a share of a mutual fund does not make the shareholder the owner of any of the mutual fund's underlying investments. While any diminution in value of those underlying investments is closely tied to the value in the shareholder's shares of the mutual fund, that harm follows a decrease in the value of the *mutual fund*, making the shareholder's injury derivative of that decrease in value.

Plaintiff further argues that even if her claim is properly characterized as derivative, a derivative recovery would not properly remedy the harm at issue. [Response at 32]. Under Massachusetts law, a derivative action must seek a "recovery [that] provides a just measure of relief to the complaining stockholder." *Crowley v. Commc'ns For Hosps., Inc.*, 30 Mass. App. Ct. 751, 765 (Mass. App. Ct. 1991). Application of this exception requires unique circumstances, such as when a minority shareholder seeks recovery from a majority shareholder on behalf of the corporation, which would merely result in the majority shareholder regaining control of the recovered corporate funds. *Orsi v. Sunshine Art Studios, Inc.*, 874 F. Supp. 471, 475 (D. Mass. 1995); *see also Serrano v. Serrano*, No. CIV.A. 2011-1948, 2011 WL 3930207, at *1 (Mass. Super. June 24, 2011) ("The facts of this case suggest that any recovery the plaintiff may receive in a derivative action would not provide an effective remedy since the only other shareholder in the corporation is one of the defendants.").

Plaintiff does not demonstrate a similarly compelling situation that requires her to proceed directly to adequately compensate complaining shareholders. Plaintiff's only claim that a derivative recovery would not be just is that former shareholders will not benefit from a corporate recovery. However, this is always true in a derivative action. *Forsythe*, 417 F. Supp. 2d at 112 n. 15. To the extent that former shareholders believed that the GAF Fund's investments were unlawful, they could have held their shares and sought to bring a derivative action. Instead, they sold their shares and gave up that right. Their situation is not so unique as to conclude that a derivative action is unjust. Accordingly, Plaintiff's claims for breach of fiduciary duties against the Trustee Defendants can only be brought derivatively and Defendants' Motion to Dismiss Plaintiff's direct fiduciary duty class action claims is **GRANTED.**

VII. Conclusion

Defendant has established that a majority vote of the independent trustees constituting a quorum voted to reject Plaintiff's demand that the Board pursue legal action against the Investment Advisor and the Trustee Defendants with respect to the GAF Fund's investments in the MLP Fund. That vote occurred after a reasonable and good faith investigation by the Committee appointed by the Board and after the Board's consideration of that investigation. As a result, Plaintiff's derivative claims against the Investment Advisor and the Trustee Defendants must be dismissed. Furthermore, the fiduciary duty claims against the Trustee Defendants must be brought derivatively, and Plaintiff's direct class action alleging those same claims must also be dismissed. Accordingly, Plaintiff's Motion to Dismiss is **GRANTED**. Given that the contract and fiduciary duty claims are barred by the Board's independent and good-faith investigation of those claims, it is **ORDERED** that this action is **DISMISSED WITH PREJUDICE**.

SO ORDERED.

May 26, 2020.

BARBARA M.G. LYNN
CHIEF JUDGE

Appendix Exhibit 30

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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]	§	Case No. 19-34054-sgj11
Debtor.	§	Related to D.I. 644

DEBTOR'S OBJECTION TO UBS'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO PROCEED WITH STATE COURT ACTION

[1] The last four digits of the Debtor's taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

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Rules

Highland Capital Management, L.P., the debtor and debtor-in-possession ("Debtor") in the above-captioned chapter 11 case ("Bankruptcy Case"), submits this objection to the *Motion for Relief from the Automatic Stay to Proceed with State Court Action* [D.I. 644] ("Motion") filed by UBS Securities LLC and UBS AG, London Branch (collectively "UBS").[2]

Preliminary Statement

1. After eleven years of litigation, UBS holds an uncollectible $1 billion breach of contract judgment against two insolvent offshore funds (the "Funds"), and is still searching for a way to pin that liability on the Debtor. UBS has used the purported amount of its claim to gridlock the entire Bankruptcy Case, with the uncertainty as to the amount of UBS's claim interfering with negotiations among the Debtor and its other creditors, and stalling any meaningful progress towards a successful chapter 11 exit. While the Debtor has attempted to negotiate in good faith with all of its creditors, there is a billion dollar "elephant in the room" that UBS is pretending not to see: UBS's supposed $1 billion claim against the Debtor has no basis in reality.

2. In the Motion, UBS tries to convince the Court that its claim is just too complex for this Court to handle, spending pages of its Motion and roughly 200 pages of exhibits on contract issues that have nothing to do with what this Court would need to decide if it denies the Motion. If, like all other creditors, UBS is required to assert its claim against the Debtor in the Bankruptcy Case, there are two threshold issues that can be fairly and efficiently resolved in this Court, using the streamlined claim objection and/or estimation procedures designed by the Bankruptcy Code. Both issues are straightforward and can be determined well in advance of any adjudication of the merits of UBS's claim or the Debtor's defenses: the first issue involves the application of prior rulings by the Appellate Division in the state court litigation, which preclude

[2] Exhibits 1-12 to this objection are attached to *Appendix A of Exhibits in Support of Debtor's Objection to UBS's Motion for Relief from the Automatic Stay*, filed concurrently herewith, and all citations herein to "A__" refer to Appendix A. Exhibits 13-17 to this objection are attached to *Appendix B of Exhibits in Support of Debtor's Objection to UBS's Motion for Relief from the Automatic Stay*. Concurrently herewith, the Debtor is requesting the Court's permission to file Appendix B under seal. All citations herein to "B__" refer to Appendix B.

UBS from enforcing its breach of contract judgment against the Debtor; and the second issue involves the enforcement of settlement agreements by which UBS released the vast majority of its claim against the Debtor, leaving UBS with a maximum potential principal recovery against the Debtor of less than $50 million. Summary proceedings in this Court to determine these threshold issues, implementing the "speedy, efficient and economical method for the determination and allowance of claims" contemplated by the Bankruptcy Code, *In re Curtis*, 40 B.R. 795, 801 (Bankr. D. Utah 1984), will fairly and promptly eliminate uncertainty as to the amount of UBS's claim and encourage negotiations towards a possible resolution with UBS, and thereby pave the way for a successful resolution of the Bankruptcy Case.

3. As to the **first** threshold issue, UBS's assertion that it can hold the Debtor "responsible for the [breach of contract] judgment awarded to UBS in Phase I" of the state court litigation (Motion at ¶¶ 17-18) can easily be laid to rest by applying three decisions issued by the Appellate Division in this case. The first of those decisions resulted in the dismissal of UBS's original complaint against the Debtor (filed on February 24, 2009) and a judgment on the merits in favor of the Debtor on UBS's breach of contract claim. The Appellate Division based its determination on the fact that the Debtor did not promise to undertake liability as to UBS's losses, or to ensure the Funds' performance under their contracts with UBS. *See UBS v. Highland Capital Mgmt., L.P.*, 2010 NY Slip Op 1436, ¶ 1 (N.Y. App. Div.) [**Exhibit 1** at A002].

4. The second decision, issued after UBS tried to re-assert the same claim against the Debtor by labeling it as different legal theories (much like UBS is now doing in the Bankruptcy Case), held that UBS is barred, under the doctrine of *res judicata*, from asserting claims against the Debtor that "implicate events alleged to have taken place before the filing of the original complaint" on February 24, 2009. *See UBS v. Highland Capital Mgmt., L.P.*, 86 A.D.3d 469, 474 (N.Y. App. Div. 2011) [**Exhibit 2** at A010].

5. In its third decision, the Appellate Division extended its *res judicata* ruling to the Debtor's co-defendants in the state court litigation, holding that UBS's claims against other defendants – including a claim that Highland Financial Partners, L.P. ("HFP") is the alter ego of one of the Funds – are likewise limited to conduct that occurred after February 24, 2009. *See UBS v. Highland Capital Mgmt., L.P.*, 93 A.D.3d 489, 490 (N.Y. App. Div. 2012) [**Exhibit 3** at A014]. Because UBS terminated the agreements underlying its breach of contract claim on December 3, 2008, and the New York trial court ("State Court") identified December 5, 2008 as the date on which the foreign Funds breached the agreements, the Appellate Division's decisions preclude UBS from attempting to hold the Debtor liable for UBS's breach of contract judgment against the Funds, either directly or under some type of alter ego theory.

6. By limiting UBS's claims to post-February 24, 2009 conduct, the Appellate Division's decisions also transformed what UBS tries to portray as an exceedingly complex case into what is really a run-of-the-mill fraudulent transfer case – a meat-and-potatoes issue for this Court. The only post-February 24, 2009 conduct at issue is a March 2009 transaction that, even at the highest amount originally alleged by UBS, involved less than $240 million of transfers allegedly made by HFP.[3] UBS asserts that the March 2009 transaction was a fraudulent conveyance, and has conceded that its only other claim against the Debtor – an implied covenant claim – is nothing more than a restatement of its fraudulent transfer claim. *See, e.g.*, 05/01/18 State Court Hrg. Tr. at 10:13-16 [**Exhibit 5** at A063] (in discussing whether the implied covenant claim is based solely on the March 2009 transaction, UBS's counsel stated "basically, you know, the implied covenant of good-faith and fair-dealing claim that we now have is that they shouldn't have committed fraudulent conveyances …"). In other words, with no ability to establish a billion dollar breach of contract claim against the Debtor (because it cannot base its claim on conduct that

[3] *See* NY D.I. 411 at pg. 22 of 36 [**Exhibit 4** at A038] (State Court decision reciting that, in UBS's complaint, UBS alleged that $239 million of assets were transferred in the March 2009 transaction).

occurred prior to February 24, 2009), UBS has admitted that all that is left of its claim is a potential fraudulent transfer recovery of less than $240 million.

7. The **second** threshold issue that can readily be resolved in this Court involves the enforcement of releases granted to the Debtor pursuant to settlement agreements UBS entered into in 2015 with two of the Debtor's co-defendants, who allegedly received the majority of the transfers made during the March 2009 transaction. As set forth above, even at the highest amount alleged by UBS, UBS's fraudulent transfer claim based on the March 2009 transaction involved less than $240 million of transfers. However, the actual maximum principal amount UBS could ever recover from the Debtor on that claim is substantially less because (among other reasons) UBS released the Debtor from any claims "for losses or other relief specifically arising from" the allegedly fraudulent transfers made in March 2009 to the settling defendants. *See* **Exhibit 13** at Section 5.3, pg. 6 [B007]; **Exhibit 14** at Section 5.3, pg. 5 [B037]. Significantly, the allegedly fraudulent transfers to the settling defendants totaled more than 80% of the amount transferred in March 2009 and ultimately challenged by UBS.[4] In other words, UBS voluntarily reduced any potential recovery against the Debtor to less than 20% of the amount transferred in March 2009 – meaning a potential principal recovery of less than $50 million on UBS's best day, without even taking into account whether UBS can establish its claim, or the Debtor's numerous defenses.

8. As outlined above, a straightforward application of the doctrine of *res judicata* and the plain language of the prior settlement agreements demonstrates the fallacy of the $1 billion position UBS has taken in its Motion and in negotiations in the Bankruptcy Case. This Court, via a dispositive motion in a claim objection proceeding and/or the claims estimation process, can (and should) quickly and efficiently decide the question of whether UBS has a $1

[4] In its motion for injunctive relief against the settling defendants, UBS (i) reduced the total amount it claimed was transferred in the March 2009 transaction, and (ii) identified the transfers to the settling defendants as totaling more than 80% of the total amount of the March 2009 transaction. *See* NY D.I. 315 at pg. 6 [**Exhibit 15** at B061].

billion claim or a less than $50 million claim against the Debtor based on the straightforward defenses outlined above. While acknowledging that the "uncertainty over the amount" of its claim *must* be resolved in order for the Bankruptcy Case to proceed to an orderly and efficient conclusion, UBS argues nonetheless that stay relief is appropriate because (according to UBS) its claim against the Debtor will be resolved in "relatively short order" in State Court. Motion at ¶ 37. Nothing could be further from the truth.

9. New York courts are notoriously overburdened and backlogged, and this case was no exception. As just a few examples, it took 4½ years to resolve the motions and appeals directed to UBS's pleadings, UBS filed its note of issue indicating that the case was trial-ready in September 2013 but Phase I of the trial did not commence until July 2018, and the Phase I decision was issued almost 16 months after the bench trial concluded.

10. The situation has not improved since the State Court issued its Phase I trial decision against the offshore Funds in late 2019. The COVID-19 outbreak hit New York City particularly hard, and the City essentially remains closed for business. Jury trials were halted in mid-March 2020 and there is no set date for the resumption of anything resembling business as usual in the New York County courthouse where UBS's case against the Debtor is pending. It is an understatement to say that the pandemic has placed enormous strain on New York's state court system, and New York City's in particular, and will continue to do so even after New York courts return to normal operations, whenever that may be. While there is no planned date for reopening, one commentator, a retired Federal District Judge, predicted that in all likelihood, civil trials will not proceed in New York until the end of 2020 or early 2021. *See* Shira A. Scheindlin, U.S.D.J. (Ret.), *Why Not Arbitrate? Breaking the Backlog in State and Federal Courts*, 263 N.Y. L.J. 94, May 15, 2020 at pg. 6, col. 4. [**Exhibit 7** at A124] ("When the courts reopen, there will be a large backlog of civil matters. With the best of intentions, it is apparent that civil trials will not go forward for many months, particularly if there has been a jury

demand. Some have predicted that there will be no civil juries in New York until 2021."). Moreover, when civil trials finally do go forward in New York, there is no reason to believe that the trial in this case would be at or even anywhere near the top of the State Court's trial queue. In short, given the size of UBS's asserted claim and the need to resolve it to conclude the Bankruptcy Case, lifting the stay to allow UBS's lawsuit to proceed in state court would subject this case to lengthy and indeed indefinite delay.

11. UBS's remaining arguments regarding "cause" to lift the automatic stay – that requiring UBS to file a proof of claim in the Bankruptcy Case will (according to UBS) prejudice UBS but not harm the Debtor or its constituencies, and that lifting the stay supposedly will promote judicial economy – likewise lack merit. With respect to the purported "prejudice" to UBS, UBS asserts that the adjudication of its fraudulent transfer-related claims "was intended to build upon" the Phase I trial on UBS's breach of contract claim against the Funds, and that UBS will be prejudiced if the fraudulent transfer-related claims are now adjudicated in this Court instead of the State Court. Motion at ¶¶ 16, 36. UBS provides no support for that position and indeed its current position is completely at odds with arguments it made to the State Court in 2018, which convinced the State Court to bifurcate the breach of contract claim from all other remaining claims. As just a few examples, and in UBS's own words:

- The "facts relevant" to Phase I of the trial vs. all of UBS's remaining claims "are distinct" [**Exhibit 6** at A113];
- The "issues and evidence" in Phase I and Phase II "are largely separate and certainly will not be inextricably interwoven and intertwined" [*Id*. at A114];
- UBS's remaining claims "relate to new parties and different claims, [and] will involve new factual issues" not addressed "at all" in Phase I [*Id*. at A118]; and
- The "parties, witnesses, and issues" in the trial of UBS's remaining claims will be "significantly different" from those in Phase I of the trial [*Id*. at A121].

Given how UBS itself has characterized its claims, the arguments that it will be more efficient for the State Court to adjudicate Phase II issues (someday) and that UBS will be prejudiced if its remaining claims are decided by this Court hold no water.

12. The Debtor and its constituencies, on the other hand, will be severely prejudiced if UBS is granted stay relief. As discussed above, the untenable position UBS has taken in the Bankruptcy Case – that it somehow has a $1 billion claim to hold the Debtor "responsible" for the breach of contract judgment – has effectively stalled negotiations between the Debtor and its creditors, and stymied all progress towards resolution of the Debtor's chapter 11 case. Not surprisingly, other creditors are generally unwilling to engage without an understanding of the extent to which UBS's asserted claim might dilute their recoveries. If UBS is granted stay relief, the "billion dollar question" will not be answered for years in State Court. In all likelihood, that type of delay – given that UBS's claim, as articulated in the Motion, is supposedly the largest claim asserted against the Debtor – would eliminate the possibility of a successful reorganization. This Court, however, can answer the "billion dollar question" promptly and efficiently, to the benefit of all interested parties (including UBS). Thus, UBS has failed to establish that the "balancing of the harms" weighs in favor of stay relief.

13. With respect to judicial economy, UBS relies in large part on its remaining claims against the Debtor's co-defendants, arguing that filing a proof of claim in this Court will require UBS to litigate its claims twice, in two different courts. Motion at ¶ 41. This is, by and large, a makeweight argument. UBS has identified the following remaining claims in the State Court litigation: (i) the fraudulent transfer and related implied covenant claim against the Debtor; (ii) a general partner liability claim against Strand Advisors, Inc. ("Strand"), the general partner of the Debtor; (iii) a fraudulent transfer claim against Highland Credit Opportunities CDO, L.P. k/n/a Highland Multi Strategy Credit Fund, L.P. ("Multi Strat"); (iv) a fraudulent transfer claim against HFP, and a related alter ego claim against HFP seeking a determination that HFP was the alter ego of one of the Funds; and (v) fraudulent transfer and fraudulent inducement claims against the foreign Funds. Exhibit 6, A105-A106. UBS already holds an uncollectible $1 billion judgment against the Funds, and would stand to gain nothing by litigating its remaining claims

against the Funds in any court. Similarly, it is the Debtor's understanding that HFP no longer has any meaningful assets, and thus it is highly unlikely that UBS would continue to litigate in State Court to seek any type of money judgment against HFP.

14. The remainder of UBS's claims are derivative of its claim against the Debtor (*e.g.*, the general partner claim), will necessarily be determined in the course of adjudicating UBS's claim against the Debtor (*e.g.*, the claim that HFP was the alter ego of one of the Funds, which UBS must prove in order to obtain "creditor standing" to assert its fraudulent transfer claim against the Debtor), and are closely related to the Bankruptcy Case (*e.g.*, the claim against Multi Strat, which is a key asset in the Bankruptcy Case that is approximately 59% owned, directly and indirectly, by the Debtor). As such, in the event that UBS intends to continue to litigate its remaining claims, and the Debtor seeks to remove and transfer venue of those claims to this Court, neither mandatory nor permissive abstention would be appropriate.

15. While abstention is not presently before the Court, it bears noting that:

- Mandatory abstention would not apply to UBS's claim against the Debtor or any subsequent objection/estimation proceedings, which (if the Motion is denied) will be a quintessentially "core" proceedings, and would not apply to any of UBS's other remaining claims because, as outlined above, nothing is going to be timely adjudicated in New York's state court system in the near future;
- While UBS's claims are New York state law claims, the claims present no difficult or unsettled state law issues, and are unrelated to the discrete breach of contract claim previously decided by the State Court; and
- UBS filed its note of issue in the State Court requesting that all of its contract and tort claims be adjudicated in a bench trial, not a jury trial. In any event, as discussed in this Court's decision in *In re Brook Mays Music Co.*, 363 B.R. 801, 818 (Bankr. N.D. Tex. 2007), any right to a jury trial that UBS might have on its claims against the non-Debtor defendants does not warrant abstention where, as here, there are pre-trial matters that can be promptly addressed by this Court to meaningfully advance the chapter 11 case.

16. Thus, none of the arguments advanced by UBS establish cause to lift the automatic stay. To the contrary, maintaining the automatic stay, and requiring UBS to assert its

claim against the Debtor in the Bankruptcy Case, is the only means by which UBS's claim can be promptly adjudicated without sacrificing the Debtor's chances of a successful reorganization or prejudicing all of the parties.

17. Perhaps in recognition of its inability to establish cause to lift the stay, UBS also asserts that the Debtor waived the automatic stay in or around December 2019, based on a series of emails exchanged between UBS, pre-petition counsel for the defendants in the State Court litigation (who has not been retained in the Bankruptcy Case), and the Debtor's in-house counsel. The Debtor's lead bankruptcy counsel – Pachulski Stang Ziehl & Jones LLP ("PSZJ") – was not a party to any of those discussions. As one of the Debtor's largest creditors, a member of the Official Committee of Unsecured Creditors ("OCUC"), and an active participant in the Bankruptcy Case, UBS cannot credibly claim that it was unaware of PSZJ's representation of the Debtor in the Bankruptcy Case. Nonetheless, UBS chose to exclude PSZJ from its discussions with pre-petition state court counsel and in-house counsel regarding the automatic stay, a bankruptcy-specific issue that impacts the Debtor and all of its bankruptcy constituencies. In other words, while UBS attempts to manufacture some type of "quid pro quo" arrangement tying its discussions regarding the automatic stay to the OCUC's position regarding the Debtor's governance structure, UBS in fact was participating in negotiations with PSZJ in the Bankruptcy Case while at the same time surreptitiously trying to obtain an agreement as to stay relief from the Debtor's non-bankruptcy counsel and in-house counsel without PSZJ's knowledge or involvement.

18. Tellingly, when pre-petition counsel reminded UBS on December 2, 2019 that the Debtor's bankruptcy counsel needed to sign off on any agreement regarding relief from the automatic stay, UBS waited three months before first raising the issue with PSZJ in or around early March 2020. *See* **Exhibit 8** [A127] (December 2, 2019 email to counsel for UBS); **Exhibit 9** [A130-A134] (March 6, 2020 email chain between PSZJ and UBS's counsel). In the interim, the Debtor and OCUC reached agreement as to the Debtor's governance structure, and sought

the Court's approval of that agreement. If there really was some type of "quid pro quo" arrangement in place with UBS, surely UBS would have reached out to the Debtor's bankruptcy counsel to finalize its proposed stipulation regarding the automatic stay before "supporting" the agreement between the Debtor and OCUC, which was still being negotiated well into late December 2019 and was not finalized until January 2020.

19. In any event, when UBS finally provided PSZJ with a draft of its stipulation for stay relief in March 2020, PSZJ promptly notified UBS that the Debtor would not stipulate to lift the stay. Furthermore, even if the Debtor had signed UBS's draft stipulation regarding stay relief, that would not have effectuated a waiver of the automatic stay. Any relief from the automatic stay, even if the debtor consents to such relief, can only be obtained with the bankruptcy court's approval, after sufficient notice and opportunity to object has been afforded to creditors and other interested parties. *See, e.g.*, *Commerzanstalt v. Telewide Sys.*, 790 F.2d 206, 207 (2d Cir. 1986) ("Since the purpose of the stay is to protect creditors as well as the debtor, the debtor may not waive the automatic stay."); Fed. R. Bankr. P. 4001(d) (requiring that any motion for approval of an agreement modifying the automatic stay must be served on the committee of unsecured creditors, and other entities as directed by the bankruptcy court, with a 14-day opportunity to object). Obviously, at no time did the Debtor move for approval of any waiver of the automatic stay on notice to parties in interest, and indeed that was deliberate as the putative "agreement" UBS relies upon was inappropriate and unenforceable.

20. Finally, in the Motion, UBS also requests (i) an order providing that its filing of a proof of claim will not waive its right to a jury trial, and/or (ii) a further extension of the bar date. Both requests should be denied. By filing a proof of claim, UBS will invoke the Court's equitable jurisdiction, including its power to allow or disallow claims, which is "to be exercised in summary proceedings and not by the slower and more expensive processes of a plenary suit." *Katchen v. Landy*, 382 U.S. 323, 329 (1966). Allowing a creditor who has filed a proof of claim

to then rely on 11 U.S.C. § 105 to create a jury trial right where one no longer exists would "interfere with the equity jurisdiction of the bankruptcy courts" and "be antithetical to the policies underpinning" the Bankruptcy Code. *In re Endeavour Highrise L.P.*, 425 B.R. 402, 417 (Bankr. S.D. Tex. March 12, 2010). With respect to UBS's request for a further extension of the bar date, UBS asserts that, if the Court denies the Motion and declines to lift the stay, it also should further extend the bar date so that UBS does not need to file its claim in the Bankruptcy Case. That will accomplish nothing except further delay in the Bankruptcy Case. As UBS itself has acknowledged, the elimination of "uncertainty" as to UBS's claim will encourage plan negotiations and expedite the resolution of the Bankruptcy Case. Requiring UBS to file its proof of claim is a necessary first step in that process, and therefore UBS's request for a further extension of the bar date also should be denied.

21. In sum, UBS has failed to establish that cause exists to lift the automatic stay, has failed to establish that the Debtor waived the automatic stay, has failed to establish that an order modifying the equitable jurisdiction of this Court would be permissible or appropriate, and has failed to establish that any further extension of the bar date for UBS's claim is warranted. Therefore, the Debtor respectfully requests that the Court deny the Motion in its entirety.

Statement of Facts

I. Relevant Procedural History of the State Court Litigation

22. UBS filed its first complaint against the Debtor and the Funds on February 24, 2009, in *UBS v. Highland Capital Management, L.P., et al.*, Index No. 650097/2009 (N.Y. Sup. Ct.) (the "2009 Action"). In that complaint, UBS asserted a breach of contract claim against the Debtor based on warehouse agreements which provided that the Funds (not the Debtor) would bear the risk of investment losses. The Debtor moved to dismiss UBS's complaint on May 1, 2009. From the filing of that motion on May 1, 2009 to the State Court's entry of its decision on

the last motion to dismiss (filed by other defendants) on November 25, 2013 [NY D.I. 351], it took more than 4½ years to "finalize" the pleadings in the State Court litigation.

23. The May 1, 2009 motion to dismiss resulted in the entry of final judgment in favor of the Debtor, dismissing UBS's complaint against the Debtor. NY D.I. 84. Judgment was entered based on the Appellate Division's decision that the warehouse agreements contained no promise by the Debtor "to undertake liability" with respect to UBS's losses or "to ensure or guarantee" the Funds' performance. Exhibit 1 at A002.

24. After the Debtor was dismissed from the 2009 Action, UBS twice amended its complaint in the 2009 Action to add five new defendants, and filed a new action against the Debtor on June 28, 2010, captioned as *UBS v. Highland Capital Management, L.P.*, Index No. 650752/2010 (N.Y. Sup. Ct.) (the "2010 Action").[5] The majority of UBS's new claims challenged certain transfers made in 2008 and March 2009 by HFP, an entity that was not a party to the warehouse agreements or any other transaction with UBS, and was not named as a defendant in the February 24, 2009 complaint. In recognition of the fact that UBS was not a creditor of HFP (and thus lacked standing to challenge the transfers), UBS's amended complaint in the 2009 Action included a claim for declaratory relief against HFP seeking a determination that HFP was the alter ego of one of the Funds. The alter ego claim against HFP is the only alter ego cause of action that UBS asserted in the State Court litigation.

25. In 2011 and 2012, the Appellate Division eliminated, or otherwise significantly limited, UBS's claims against the Debtor and new defendants. Both decisions applied *res judicata* to restrict UBS from seeking recovery for any conduct that occurred prior to the date on which UBS filed its original complaint in the 2009 Action (*i.e.*, February 24, 2009), which resulted in the final judgment on the merits in favor of the Debtor. *See* Exhibit 2 at A010; Exhibit 3 at A014.

[5] The operative complaint against the Debtor, filed in the 2010 Action, is attached as **Exhibit 16** to Appendix B [B064-B121], and the operative complaint against the remaining defendants, filed in the 2009 Action, is attached as **Exhibit 17** to Appendix B [B123-B180].

26. In light of the Appellate Division's decisions, the only claims remaining in the State Court litigation are claims that arise out of the allegedly fraudulent transfers in March 2009. As described by UBS in its pre-trial brief seeking bifurcation of its breach of contract claim, on the one hand, and its implied covenant and fraudulent transfer claims, on the other hand, UBS's implied covenant claim "involves [the Debtor's] role in the March 2009 fraudulent conveyances [and] overlaps factually with the ... fraudulent conveyance claims." Exhibit 6 at A106. UBS further elaborated on its position regarding the close nexus between its fraudulent transfer claim and its implied covenant claim during the related telephonic hearing with the State Court, conceding that its implied covenant claim is basically the same as its fraudulent transfer claim:

> THE COURT: And is it also the plaintiffs' position that the implied covenant claim relates to the fraudulent conveyance claim and not to the fraudulent inducement?
>
> MR. CLUBOK: Absolutely, yes.
>
> ...
>
> THE COURT: Ms. Klein, isn't the implied covenant claim as pleaded based solely on post entry into transaction alleged wrongful or fraudulent conveyances?
>
> ... [response by defendants' counsel] ...
>
> THE COURT: Mr. Clubok, will you respond.
>
> ...
>
> MR. CLUBOK: ... basically, you know, the implied covenant of good-faith and fair-dealing claim that we now have is that they shouldn't have committed fraudulent conveyances to make it certain that these two parties couldn't have paid.

05/01/18 State Court Hrg. Tr. at 5:14-18 and 7:16-10:16 [Exhibit 5 at A058, A060-A063].

27. UBS's claims arising out of the March 2009 transaction challenge transfers made in March 2009 that, even at the highest amount originally pleaded by UBS, totaled less than $240 million – a far cry from the $1 billion claim UBS now says it holds against the Debtor. Exhibit 4 at A038. UBS subsequently reduced the amount it alleged was transferred in March 2009 [Exhibit 15 at B061] and then, in June 2015, UBS released its claims to the majority of the challenged amount, via its settlement agreements with Highland Crusader Offshore Partners,

L.P. ("Crusader Fund") and Highland Credit Strategies Master Fund, L.P. ("Credit Strategies"). Both settlement agreements provided that UBS released the Debtor and its affiliates from, among other things, "losses or other relief specifically arising from" the allegedly fraudulent transfers made to Crusader Fund and Credit Strategies. Exhibit 13 at Section 5.3, pg. 6 [B007]; Exhibit 14 at Section 5.3, pg. 5 [B037]. As asserted by UBS, the settling defendants received more than 80% of the amount transferred in the March 2009 transaction. Exhibit 15 at pg. 6 [B061].

II. Relevant Facts Regarding the Phase I Trial on UBS's Discrete Contract Claim

28. UBS filed its note of issue in the State Court litigation, indicating that its case was ready for trial and should be placed on the trial queue, on September 3, 2013, almost five years before Phase I of the trial commenced on July 9, 2018. NY D.I. 320 [**Exhibit 10** at A137]. During that five year period, various motions were filed by the parties, including a motion for summary judgment filed by the Debtor in October 2013 and decided by the State Court approximately 3½ years later, in March 2017. *See* Exhibit 6 at pg. 8 [A111].

29. In its note of issue, UBS did not demand a jury trial on its contract claims or its tort claims against the Debtor or any of the other defendants. A136. UBS subsequently confirmed that its implied covenant claim against the Debtor is an equitable claim that should be tried to the court, not a jury. 05/01/18 State Court Hrg. Tr. at 5:9-13 [Exhibit 5 at A058] (UBS's counsel responding in the affirmative to the question of whether "it is the plaintiffs' position that the implied covenant claim will be for the Court").

30. The Phase I trial was limited to UBS's breach of contract claim against the Funds. As described *by UBS*, the breach of contract claim was separate and distinct from all of UBS's remaining claims – the remaining claims "have little to do" with the breach of contract claim, and involve new parties and "new factual issues" not addressed "at all" in Phase I, as well as different witnesses and evidence. A106, A114, A118, A121.

31. Phase I of the trial began on July 9, 2018 and concluded on July 27, 2018. The State Court issued its decision on the Phase I issues almost 16 months later, on November 14, 2019. By its terms, the Phase I decision was sealed for ten business days – until December 2, 2019 – to allow the parties an opportunity to request redaction of any confidential information. Motion at Ex. B, pg. 40. The decision was unsealed on January 23, 2020, but the Phase I judgment was not entered until almost three weeks later, on February 10, 2020. The Phase II trial has not been scheduled in light of the stay, and even if there were no stay, given the pandemic, it is unlikely the Phase II trial could be conducted in State Court before 2021.

Argument

I. UBS Has Failed to Establish Cause to Lift the Automatic Stay

32. The automatic stay is "one of the fundamental debtor protections provided by the bankruptcy laws." *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986) (citations omitted). As the party seeking relief from the automatic stay, UBS bears the burden of establishing that "cause" (*i.e.*, a legally sufficient basis) exists to lift or modify the stay. *See* 11 U.S.C. § 362(d)(1) (providing that a court may grant relief from the automatic stay "for cause"); *Mooney v. Gill*, 310 B.R. 543, 547 (N.D. Tex. 2002) (party seeking stay relief bears the initial burden of establishing a legally sufficient basis for such relief). Here, UBS has not established, and cannot establish, that cause exists to lift the automatic stay.

33. A "decision to lift the automatic stay is an exercise of discretion." *Mooney*, 310 B.R. at 547; *see also In re Choice ATM Enters.*, 2015 Bankr. LEXIS 689, *12 (Bankr. N.D. Tex. Mar. 4, 2015) (stay relief is determined on a case-by-case basis). To guide the exercise of that discretion, courts have identified numerous factors that, depending on the circumstances of each case, may be relevant to a creditor's request for stay relief. *See, e.g., In re Choice ATM Enters.*, 2015 Bankr. LEXIS 689 at *12-13 (denying stay relief after considering whether claim was critical to success or failure of reorganization, avoidance of unnecessary expense and delay,

judicial economy, and whether claim required "expertise beyond the abilities of the bankruptcy court"); *Mooney*, 310 B.R. at 546 (bankruptcy court "must balance the hardships of the parties" and base its decision "on the degree of hardship involved and the goals of the Bankruptcy Code"); *In re U.S. Brass Corp.*, 173 B.R. 1000, 1006 (Bankr. E.D. Tex. 1994) (stay relief "will be granted to an unsecured creditor ... only when the 'balance of hardships' tips in the creditor's favor" and, when balancing the hardships, the "most important factor is the effect of such litigation on the administration of the estate; even slight interference ... may be enough to preclude relief"). As discussed herein, UBS's request for relief from the automatic stay should be denied for three critical reasons: (i) granting stay relief will interfere with the Bankruptcy Case, unnecessarily delay the adjudication of key issues related to UBS's claim, and potentially jeopardize the Debtor's chances of achieving a successful chapter 11 exit; (ii) the hardship and prejudice to the Debtor and its constituencies if the stay is lifted far surpasses any inconvenience to UBS; and (iii) granting stay relief will not promote judicial economy.

A. Granting Stay Relief Will Interfere With and Delay the Bankruptcy Case, and Potentially Jeopardize the Debtor's Reorganization Efforts

34. The "most important factor in determining whether to grant relief from the automatic stay to permit litigation against the debtor in another forum is the effect of such litigation on the administration of the estate." *In re Curtis*, 40 B.R. at 806. Therefore, in considering whether to lift the automatic stay, "it must be borne in mind that the process of determining the allowance of claims is of basic importance to the administration of a bankruptcy estate." *Id.* at 800-01 (denying stay relief because, among other reasons, allowance of claims against the estate is a "fundamental" bankruptcy issue). *See also In re Crespin*, 581 B.R. 904, 909 (Bankr. D.N.M. 2018) ("Given the centrality of the claims allowance process to the bankruptcy system, the Court's inclination in these matters is to keep the stay in place and liquidate the claim.").

35. Relief from the automatic stay is particularly inappropriate where, as here, the resolution of a creditor's large but disputed claim is critical to the success or failure of the

reorganization, and key issues regarding the creditor's claim can be expeditiously resolved in the bankruptcy court. *See In re Choice ATM Enters.*, 2015 Bankr. LEXIS 689 at *15-16 (denying stay relief because creditor's counterclaim, if allowed, would be the largest claim against the debtor; by retaining the counterclaim, the bankruptcy court could "rapidly proceed through the claims estimation process" and avoid unnecessary delay and expense, while permitting the counterclaim to go forward in a different forum would "go against Congress's design in the [Bankruptcy] Code"); *In re Crespin*, 581 B.R. at 910 (denying stay relief where the timing of plan confirmation would be "heavily affected by the outcome of [the] litigation" and the "quickest way to liquidate the [creditors'] claim is in bankruptcy court").

36. Here, UBS concedes that prompt resolution of its claim is critical to the success of the Debtor's reorganization efforts. Motion at ¶ 38. In the Motion and in negotiations in the Bankruptcy Case, UBS has described its claim as a more than $1 billion claim to hold the Debtor "responsible for the [breach of contract] judgment awarded to UBS in Phase I" of the State Court litigation. Motion at ¶ 18. At present, there is an insurmountable chasm between UBS and the Debtor with respect to the amount of UBS's claim, based primarily on two key issues that can be quickly and efficiently determined in this Court.

37. First, the Debtor can readily establish that UBS is barred, under the doctrine of *res judicata*, from seeking to hold the Debtor responsible, either directly or under an alter ego theory, for the judgment against the Funds for the December 5, 2008 breach of contract. The Appellate Division already has determined that UBS cannot assert, in the State Court litigation, any claim against the Debtor based on conduct that occurred prior to February 24, 2009. *UBS*, 86 A.D.3d at 474 [Exhibit 2 at A010]. The Appellate Division has applied that same restriction to UBS's claims against other defendants in the State Court litigation, including UBS's claim that HFP was the alter ego of one of the Funds. *UBS*, 93 A.D.3d at 490 [Exhibit 3 at A014]. While UBS may attempt to argue that the Appellate Division's decisions would not apply if it pursues

its claim against the Debtor under an alter ego theory, because alter ego is a "remedy" and not a claim, that position is inconsistent with and refuted by the Appellate Division's decision regarding UBS's alter ego allegations against HFP, and other established case law.[6] *See, e.g., Bd. of Managers v. Jeffrey M. Brown Assocs.*, 652 F. Supp. 2d 463, 478-82 (S.D.N.Y. 2009) (holding that where, as here, a judgment on the merits has been entered in favor of one defendant, a plaintiff cannot later seek to hold that defendant liable under an alter ego theory for a judgment entered against a different defendant, where the facts giving rise to potential alter ego liability existed at the time of the first action and arose out of the same transaction). Because the doctrine of *res judicata* bars UBS from asserting any claim that arose prior to February 24, 2009, and the State Court determined that the breach of the warehouse agreements occurred in December 2008, UBS's claim against the Debtor is limited to the March 2009 transaction. As that transaction involved transfers totaling much less than $240 million – not $1 billion – the determination of the *res judicata* issue will meaningfully impact the parties' negotiations regarding UBS's claim.

38. Second, with respect to the March 2009 transaction, UBS has already released the Debtor from "losses or other relief specifically arising from" more than 80% of the total amount transferred in March 2009. While UBS likely will argue that its implied covenant claim against the Debtor does not "specifically arise" from the transfers made in March 2009, that position is belied by UBS's own descriptions of its implied covenant claim. *See, e.g.*, 05/01/18 State Court Hrg. Tr. at 10:13-16 [Exhibit 5 at A063] (in response to the question of whether the implied covenant claim is based solely on the allegedly fraudulent March 2009 transaction, UBS's counsel stated "basically, you know, the implied covenant of good-faith and fair-dealing claim that we now have is that they shouldn't have committed fraudulent conveyances …"); NY D.I.

[6] The *res judicata* effect of the State Court's prior judgment in favor of the Debtor is governed by New York law. *See, e.g., Richardson v. Wells Fargo Bank, N.A.*, 839 F.3d 442, 449 (5th Cir. 2016). New York and federal doctrines of *res judicata* are "virtually identical." *Kamdem-Ouaffo v. PepsiCo, Inc.*, 160 F. Supp. 3d 553, 562 n.10 (S.D.N.Y. 2016) (citations omitted).

472 at pg. 3 [Exhibit 6 at A106] (in seeking bifurcation of its breach of contract claim, UBS argued that its implied covenant claim "involves [the Debtor's] role in the March 2009 fraudulent conveyances [and] overlaps factually with the ... fraudulent conveyance claims").

39. The adjudication of these two key issues will meaningfully impact the negotiations between UBS and the Debtor, and thus the progress of the chapter 11 case. Furthermore, both issues can be decided promptly and efficiently in this Court long before these or any other issues could be adjudicated in State Court. All new civil jury trials in New York were suspended as of March 16, 2020, and all filings in non-essential matters were banned as of March 22, 2020. *See, e.g.*, **Exhibit 11** at A139 (March 22, 2020 order of the Chief Administrative Judge of the Courts of New York); **Exhibit 12** at A146 (excerpts from a May 26, 2020 Law360 article describing New York's court closures). The ban on filings in New York County, where the State Court litigation is pending, was only recently lifted on May 25, 2020. A146. No date has been set for the commencement or continuation of civil trials in New York County, and there is no way to determine when a trial in this case would be scheduled – given the amount of time it took for this case to proceed through Phase I of the trial, it is highly likely that a trial in the State Court on the remaining issues and the resolution of any related appeals would not be completed until sometime in 2021 or possibly even 2022.

B. The Harm the Debtor and Its Constituencies Will Suffer if Stay Relief Is Granted Far Outweighs Any Purported Harm to UBS

40. The effect that litigation in a non-bankruptcy forum will have on the administration of the estate is the most critical factor to consider on a motion for stay relief. *In re Curtis*, 40 B.R. at 806. "Even slight interference with the administration may be enough to preclude relief in the absence of a commensurate benefit." *Id*. at 806-07 (denying stay relief because it was "not possible to determine that the hardship to movants would outweigh the hardship to the debtors.").

41. Here, UBS has failed to establish that the "balance of harms" weighs in favor of granting stay relief. UBS argues that it will suffer prejudice if this Court decides the remaining claims in the State Court litigation because, according to the position UBS now takes in its Motion, the remaining claims are related to or will "build upon" the breach of contract issues adjudicated by the State Court in the Phase I trial. UBS took the exact opposite position in persuading the State Court to bifurcate UBS's breach of contract claim against the Funds from all other remaining claims, arguing that the two categories of claims were completely separate, and involved different factual issues, parties, witnesses and evidence. In light of UBS's own characterizations of its claims, UBS's arguments regarding the purported prejudice it will suffer are untenable.

42. In contrast to the lack of any prejudice to UBS, the Debtor and its bankruptcy constituencies will be extremely prejudiced if the Motion is granted. Through proceedings on an objection to UBS's claim and/or the claims estimation process, this Court can efficiently answer the "billion dollar question" in this case, *i.e.*, whether UBS has a $1 billion claim against the Debtor, or a claim in a principal amount of less than (at best) $50 million. If stay relief is granted, on the other hand, the Debtor and its bankruptcy constituencies will have to wait years before UBS's claim is resolved in State Court. The potential impact that type of delay would have on the Debtor's prospects of a successful reorganization precludes the relief requested in the Motion.

C. Granting Stay Relief Will Not Promote Judicial Economy

43. UBS's main argument regarding judicial economy is that, if the Motion is denied, it will need to litigate its claims twice, once in this Court against the Debtor and again in State Court against the remaining defendants. Even setting aside the question of whether it would be economically rational for UBS to separately pursue its claims against the other defendants (several of whom are, as discussed above, judgment-proof), UBS would not need to litigate its claims in two different courts because, to the extent UBS seeks to continue the State Court

litigation, the action could be removed to federal court, with a motion to transfer venue to this Court, and neither mandatory nor permissive abstention would be applicable.

44. Mandatory abstention does not apply to claims "arising in a case under title 11," and does not apply to claims that cannot be timely adjudicated in state court. 28 U.S.C. § 1334(c)(2). Here, if the Motion is denied, UBS's proof of claim, and any objection/estimation proceedings related to that claim, would be core proceedings within this Court's "arising in" jurisdiction. *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987). As to the claims against other defendants, mandatory abstention would not apply because there is no chance that those claims could be timely adjudicated in State Court.

45. Based on the factors identified in *In re Brook Mays Music Co.*, 363 B.R. at 817-18, permissive abstention likewise would not be appropriate for at least the following reasons:

- This Court would be able to adjudicate UBS's claims, particularly as to the two key issues discussed above – *res judicata* and the enforcement of UBS's settlement releases – much more quickly than the State Court.
- UBS's claims do not involve any novel state law issues. UBS's claims are, essentially, fraudulent transfer claims that are well within this Court's bailiwick.
- UBS's claim against the Debtor (if the Motion is denied) will be a core proceeding that, given the amount asserted by UBS, will be central to the Bankruptcy Case. UBS's claims against the other defendants are closely related to the claim against the Debtor and/or the Bankruptcy Case: the general partner claim against Strand is derivative of the claim against the Debtor; Multi Strat is a key asset in the Bankruptcy Case, and the fraudulent transfer claim against it is identical to the claim against the Debtor (except as to amount); and the alter ego claim against HFP must be decided in connection with the fraudulent transfer claim against the Debtor.
- Upon the filing of its proof of claim, UBS will have no right to a jury trial on its claim against the Debtor. As to UBS's claims against the remaining defendants, (i) UBS itself filed its note of issue indicating that all of its claims should be tried to the court, and (ii) if UBS intends to proceed with a jury trial against the remaining defendants, the reference can be withdrawn at the appropriate time.

46. Accordingly, UBS has failed to establish that either mandatory or permissive abstention would apply to any of its claims, or that the interests of judicial economy otherwise weigh in favor of granting relief from the automatic stay.

II. UBS's Discussions With Pre-Petition State Court Counsel and In-House Counsel Do Not Relieve UBS of Its Burden to Establish Cause to Lift the Automatic Stay

47. UBS has not established that the Debtor agreed to waive the automatic stay, or that any agreement between UBS and the Debtor could have relieved UBS of its burden to establish that cause exists to lift the automatic stay. As an initial matter, the Debtor's pre-petition state court counsel advised UBS on December 2, 2019 that the Debtor's bankruptcy counsel needed to sign off on the proposed agreement regarding stay relief. Exhibit 8 at A127. Nonetheless, UBS waited three months before contacting the Debtor's bankruptcy counsel [Exhibit 9 at A130-A134], at which time PSZJ promptly informed UBS that the Debtor did not consent to any modification of the stay.

48. Furthermore, even if the Debtor had signed UBS's draft stipulation, that agreement would not have effectuated an automatic waiver of 11 U.S.C. § 362 as to the Debtor or its constituencies. "Since the purpose of the stay is to protect creditors as well as the debtor, the debtor may not waive the automatic stay." *Commerzanstalt*, 790 F.2d at 207 (rejecting agreement by debtors that appeals could continue despite the automatic stay, and holding that parties would need to seek stay relief in the bankruptcy court); *see also Ass'n of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir. 1982) (staying appeals filed by both debtor and creditor, noting that "[u]nder the old Bankruptcy Act, a debtor apparently could waive a stay" but "[u]nder the new Code, relief from a stay must be authorized by the Bankruptcy Court ..."); *United States v. Moore*, 1990 U.S. App. LEXIS 13768, *2-3 (5th Cir. July 24, 1990) (citing *Commerzanstalt* with approval and holding that appeal was stayed, notwithstanding that debtor was the appellant, because "[r]elief from the effect of the stay provisions must be sought in the bankruptcy court" pursuant to 11 U.S.C. § 362(d)).

49. In other words, any relief from the automatic stay, whether a debtor consents to such relief or opposes it, can only be obtained with the bankruptcy court's approval, after sufficient notice and opportunity to object has been afforded to creditors and other interested parties. The requirements of notice, an opportunity to object, and bankruptcy court approval of any agreement to modify the automatic stay are expressly set forth in Fed. R. Bankr. P. 4001(d). *See* Fed. R. Bankr. P. 4001(d) (requiring that any motion for approval of an agreement modifying the automatic stay must be served on the committee of unsecured creditors, and other entities as directed by the bankruptcy court, with a 14-day opportunity to object).[7]

50. Finally, UBS has not shown that it "detrimentally relied" on its discussions with pre-petition counsel and in-house counsel, or suffered any prejudice. UBS asserts that it suffered prejudice because (i) both the Debtor and UBS requested that the Phase I decision issued on November 14, 2019 remain under seal for a short period of time while the parties engaged in settlement discussions, (ii) it "supported" the changes to the Debtor's governance structure, which resulted in the appointment of independent directors and an independent CRO with authority over all restructuring issues, and (iii) it refrained from immediately seeking stay relief. Motion at ¶¶ 22, 30. All of these contentions strain credulity.

51. First, the State Court issued its Phase I decision almost **16 months** after the Phase I trial concluded. By its terms, the decision was to remain sealed until December 2, 2019 to allow the parties time to confer and advise the State Court as to whether the decision contained any confidential information. Even when the decision eventually was unsealed in late January 2020, the Phase I judgment was not entered for another almost three weeks, not on request of the parties, but instead likely due to the endemic delays in New York's overburdened state court

[7] This was the procedure followed in the case cited at ¶ 29 of the Motion, *In re GenOn Energy, Inc.*, Case No. 17-33695 [Docket No. 449] (Bankr. S.D. Tex.), which involved an agreed order to resolve three stay relief motions that was "entered in the manner of a settlement pursuant to" Fed. R. Bankr. P. 4001(d)(4).

system. UBS has not identified any prejudice it suffered by agreeing that the decision remain under seal for a brief period of time.

52. Second, UBS cannot articulate how it was prejudiced by the appointment of independent directors and an independent CRO. In any event, as discussed above, pre-petition state court counsel reminded UBS in early December 2019 that the Debtor's bankruptcy counsel needed to sign off on any agreement regarding the automatic stay – a reminder that, given UBS's role in the Bankruptcy Case, should not have been necessary. UBS chose not to contact the Debtor's bankruptcy counsel about the automatic stay for almost three months, long after the Debtor and OCUC agreed to the Court-approved changes in the Debtor's governance structure.

53. Third, and finally, UBS cannot establish that it suffered any prejudice as to the timing of its Motion. In light of the pandemic, and the particularly severe impact the outbreak has had in New York, there is absolutely no likelihood that the current procedural status of the State Court litigation would be any different if UBS had filed its Motion months ago. Furthermore, when UBS finally did choose to contact PSZJ in March 2020 regarding the stay, the stipulation the parties agreed upon provided that UBS could file its Motion any time up to 5:00 p.m. on May 20, 2020. Nothing prevented UBS from filing its Motion well in advance of that deadline, yet UBS waited until just 20 minutes shy of its deadline to file the Motion.

54. Thus, UBS has not established that the Debtor waived the protections of the automatic stay, or that UBS suffered prejudice as a result of any "misunderstanding" between the parties – a "misunderstanding" that easily could have been avoided had UBS not excluded the Debtor's bankruptcy counsel from the discussions regarding the very bankruptcy-specific issue of relief from the automatic stay.

III. UBS Is Not Entitled to an Order Granting UBS a Right to a Jury Trial on Its Proof of Claim, and No Further Extension of the Bar Date Is Warranted

55. The filing of a proof of claim gives rise to "a matter that is equitable in nature (*i.e.*, a matter involving claim allowance/disallowance) so that the jury trial right is lost." *In re*

Brook Mays Music Co., 363 B.R. at 811 (citing *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 109 S. Ct. 2782 (1989)). By filing a proof of claim, UBS will invoke the Court's equitable jurisdiction, including its power to allow or disallow claims, which is "to be exercised in summary proceedings and not by the slower and more expensive processes of a plenary suit." *Katchen*, 382 U.S. at 329. UBS's request for an order granting it a right to a jury trial on its proof of claim (and related proceedings) must be denied because such an order – which could be requested by every creditor with pre-petition jury trial rights, in every bankruptcy case – would "interfere with the equity jurisdiction of the bankruptcy courts" and "be antithetical to the policies underpinning" the Bankruptcy Code. *In re Endeavour Highrise L.P.*, 425 B.R. at 417.

56. UBS's final request, seeking a further extension of the bar date to file its claim against the Debtor in the event that the stay is not lifted, likewise should be denied. UBS's request, if granted, would essentially leave the parties in limbo. Given that all parties agree that a prompt resolution of UBS's claim is in the best interests of the Debtor and all of its constituencies (including UBS), UBS's suggestion – doing nothing for some unspecified amount of time – will not benefit any of the parties or foster the resolution of the chapter 11 case.

Conclusion

WHEREFORE, the Debtor respectfully requests that the Court deny the Motion in its entirety, and grant the Debtor such other and further relief as the Court deems just and proper.

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Dated: June 3, 2020

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Appendix Exhibit 31

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. 19-3 !" -s#$11
	Docket Ref. No. 644

OBJECTION OF THE OFFICIAL
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FRO THE AUTO ATIC STAY TO PROCEED " ITH STATE COURT ACTION

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Appendix Exhibit 32

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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-sgi11
	§	
Debtor.	§	Related to D.I. 644

REDEEMER COMMITTEE'S OBJECTION TO UBS'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO PROCEED WITH STATE COURT ACTION[1]

[1] This objection contains redactions for information potentially protected by certain protective orders. An unredacted version of this objection may be filed pending the Court's ruling on the Redeemer Committee's motion to seal. [Docket No. 691].

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The Redeemer Committee of the Highland Crusader Funds (the "Redeemer Committee")[2] objects to UBS's motion [Doc. No. 644] (the "Motion")[3] to lift the automatic stay to divest this Court of the ability to determine the validity and, if applicable, the amount of the largest disputed and unliquidated claim asserted in this chapter 11 case.

I. INTRODUCTION

Allowing UBS to litigate its claim in the New York state court would fundamentally prejudice all of the Debtor's other unsecured creditors and contravene the fundamental principle that creditors and parties in interest may be heard with respect to matters that are central to the chapter 11 process. Granting the Motion would elevate UBS to an almost unassailable negotiating position in connection with the formulation of a plan. Moreover, contrary to UBS's arguments, its claim is by no means "trial ready" in New York. Resolution of UBS's claim in New York likely will delay recovery to all creditors for years, while this Court is well-suited to resolve the claim expediently.

UBS is asserting a disputed $1 billion claim that is more than five times the size of the largest liquidated claim: the Redeemer Committee's $190.8 million claim. If UBS's contested $1 billion claim is not subject to this Court's claims resolution process, it will not be feasible to conduct negotiations regarding a plan to allocate the value of the Debtor's estate equitably. Granting UBS the right to litigate in New York—where no other creditor may appear as a matter of right—would give UBS tremendous leverage simply because of the time it will take the New York court to resolve that claim. Creditors should not be compelled to negotiate a plan where one

[2] The Redeemer Committee is a committee of investors, elected pursuant to the Scheme and Plan of Liquidation of the Highland Crusader Funds (the "Crusader Fund") approved by the Bermuda Court, to oversee Highland's management of the Crusader Fund through what was intended to be the complete liquidation of the fund.
[3] All capitalized terms that are not defined in this Objection have the meanings given to such terms in the Motion.

creditor holds outsized leverage not due to the underlying merits of its claim, but due to permission to litigate outside of the Bankruptcy Court.

Moreover, UBS's claim is by no means ready to be tried in New York in the next six months, as UBS asserts. UBS conveniently fails to mention that the principal claim that it now asserts against the Debtor, Highland Capital Management, L.P. ("Highland" or the "Debtor")—that Highland is the alter ego of certain of its affiliates and therefore should be held responsible for a $1 billion judgment entered against those affiliates—is a *new* claim which UBS has not yet pleaded in the New York court. Given the threshold pre-trial legal issues that a court will need to decide, and given that New York civil procedure freely permits interlocutory appeals, no one can predict when the New York court would issue a final, non-appealable judgment. The inevitable delay caused by those proceedings would essentially ensure that no meaningful distributions could be made to creditors until those proceedings conclude. And, as demonstrated below, UBS's claim against the Debtor is not so uniquely complicated that it must be heard by the New York court. This Court is well-suited to determine the validity and amount of UBS's claim.

Nor should the Court give any effect to UBS's assertion that the Debtor entered into an agreement with UBS in December 2019 to lift the automatic stay. It is well-settled that an agreement by a debtor-in-possession to lift the automatic stay is only enforceable upon Bankruptcy Court approval, which in turn requires that creditors receive notice of such request and have an opportunity to be heard.

At bottom, it is transparent that UBS—a member of the Official Committee of Unsecured Creditors—is attempting to obtain the benefits of this chapter 11 proceeding without subjecting its claim to the jurisdiction of this Court, to the material prejudice of all other creditors. UBS seeks to avoid application of Supreme Court precedent establishing that a creditor that files a proof of

claim submits itself to the jurisdiction of the Bankruptcy Court. Granting UBS's Motion would turn the principles animating the Bankruptcy Code on their head. This Court, not the New York court, should resolve UBS's claim.

II. BACKGROUND

The claim that UBS asserts now against the Debtor essentially relates to two sets of events. First, UBS seeks to hold the Debtor responsible for the failure by some of the Debtor's affiliates to honor certain contractual margin calls in the fall of 2008. UBS's claims against those affiliates resulted in the $1 billion judgment entered late last year; its claim to hold the Debtor responsible for that judgment is new. Second, UBS seeks to hold the Debtor responsible for certain alleged fraudulent transfers involving other affiliates of the Debtor that took place in early 2009. Those claims have not yet been tried.

While the procedural history of UBS's litigation against the Debtor and several of its affiliates is admittedly somewhat dense, including multiple interlocutory appeals, one advantage of considering the dispute at this point is that the threshold legal issues that will need to be decided are well-defined. As discussed below, two legal questions will be critical: (i) the extent to which, as a result of prior rulings in the New York litigation, res judicata bars UBS from asserting a claim against the Debtor to recover for conduct prior to February 24, 2009; and (ii) the extent to which UBS has already released the Debtor from claims arising from the post-February 2009 allegedly fraudulent transfers, as part of settlements that UBS reached with the Crusader Fund and the Highland Credit Strategies Fund (the "Credit Strategies Fund"). Neither issue has been decided, and the Court's ruling on those issues will have a material impact on the size of any allowable claim by UBS.

A. Highland's Affiliates Fail to Meet Margin Calls.

In April 2007, UBS entered into agreements (collectively, the "CLO Warehouse Agreements") with Highland and two affiliates—Highland Special Opportunities Holding Co. ("SOHC") and Highland CDO Opportunity Master Fund, L.P. ("CDO Fund," and together with SOHC, the "Fund Counterparties")—to establish a warehouse facility to finance the acquisition of syndicated leveraged loans and credit default swaps. (Ex. A, 4/12/07 Original Synthetic Warehouse Agreement; Ex. B, 4/20/07 Original Engagement Ltr.; Ex. C, 5/22/07 Original Cash Warehouse Agreement.) Those assets, in turn, were to serve as the basis for a securitization pursuant to which notes would be sold to investors. Due to market conditions, the securitized offering did not occur by the contractual deadline, and the CLO Warehouse Agreements terminated. In March 2008, UBS, the Debtor, and the Fund Counterparties entered into restructured warehouse agreements (collectively, the "Restructured CLO Warehouse Agreements"). (Motion at ¶6, Exs. C, D, E.) The Restructured CLO Warehouse Agreements gave UBS the right to make margin calls on the Fund Counterparties in the event of a decline in the market value of the loans and swaps. Furthermore, those agreements explicitly placed the risk of loss on the Fund Counterparties, and not Highland, as the New York court has found. *UBS Securities LLC v. Highland Capital Mgmt., L.P.*, 893 N.Y.S.2d 869 (N.Y. App. Div. 2010) ("the agreements between the parties contain no promise on the part of Highland to undertake liability with respect to the investment losses suffered by plaintiffs, or to ensure or guarantee the performance of [Fund Counterparties]' obligations to bear the risk of investment losses.").

As the market deteriorated in the fall of 2008, UBS made three margin calls on the Fund Counterparties. SOHC satisfied the first two margin calls in September and October 2008, using funds provided by SOHC's parent corporation, Highland Financial Partners, L.P. ("HFP"). *UBS*

Securities LLC, et al v. Highland Capital Mgmt., L.P., et al, No. 650097-2009, at 4 (N.Y. Sup. Ct. Nov. 19, 2019). The Fund Counterparties failed to satisfy a third margin call in November 2008, and UBS issued a notice of termination of the Restructured CLO Warehouse Agreements in December. *Id.*[4]

Meanwhile, during the fall of 2008, certain funds then managed by the Debtor—including Highland Crusader Offshore Partners, L.P.[5]—transferred certain assets to HFP in exchange for HFP 10% promissory notes (the "HFP Notes Transactions"). (*See* Ex. D, Expert Report of Louis G. Dudney, Mar. 8, 2013, at 21-24.) HFP was not a party to either the CLO Warehouse Agreements or the Restructured CLO Warehouse Agreements.

On February 24, 2009, UBS commenced a lawsuit against Highland and the Fund Counterparties in New York state court, alleging breach of the Restructured CLO Warehouse Agreements by the Fund Counterparties and seeking indemnification from Highland for certain losses. (Ex. F, Compl., *UBS Sec. LLC v Highland Capital Mgmt., L.P.*, No. 650097/09 (N.Y. Sup. Ct. Feb. 24, 2009).) In the course of that litigation, the indemnification claim—the only cause of action that UBS asserted against Highland in its initial complaint—was dismissed by the New York appellate court. *UBS Securities LLC v. Highland Capital Mgmt., L.P.*, 893 N.Y.S.2d 869 (N.Y. App. Div. 2010) ("the agreements between the parties contain no promise on the part of Highland to undertake liability with respect to the investment losses suffered by plaintiffs, or to ensure or guarantee the performance of [Fund Counterparties]' obligations to bear the risk of

[4] UBS's Motion employs sleight of hand by defining the term "Highland" to include the Fund Counterparties. Motion at 3. Accordingly, while the Motion states that "Highland posted the required collateral" and refers to "Highland's default on UBS's third margin call," it was the Fund Counterparties that posted collateral and failed to meet the final margin call. *See* Motion at 7.

[5] The other transferees were Highland CDO Opportunities Master Fund, Ltd., Highland Credit Strategies Master Fund, L.P., Highland Credit Opportunities CDO, Ltd., Highland Crusader Holding Co., and Highland Capital Management L.P. (Ex. D, Expert Report of Louis G. Dudney, Mar. 8, 2013, at 21-24; *see* Ex. E, 3/20/2009 Termination, Settlement, and Release Agreement at 2.)

investment losses."). That court also barred UBS from asserting any claims against Highland for conduct occurring before UBS filed its initial complaint (i.e., before February 24, 2009) because UBS failed to plead such claims in its initial complaint. *UBS Securities LLC v. Highland Capital Mgmt., L.P.*, 927 N.Y.S.2d 59 (N.Y. App. Div., Jul. 21, 2011) (holding that "res judicata applied to bar claims in second action to the extent that they implicated events alleged to have occurred before filing of original complaint.").

As discussed below, one of the key threshold issues which a court will need to decide—and which the New York court has not yet considered—is the extent to which res judicata bars UBS from any recovery from the Debtor's estate that is based on conduct occurring before February 24, 2009. If res judicata bars such claims, UBS cannot now hold the Debtor responsible for the $1 billion judgment that UBS obtained against the Fund Counterparties.

B. The HFP Notes Transactions are Unwound

The parties to the HFP Notes Transactions unwound those transactions on or about March 20, 2009. (Ex. E, 3/20/2009 Termination, Settlement, and Release Agreement.) As a result, the notes were cancelled and HFP returned the assets to the applicable transferors, including the Crusader Fund and the Credit Strategies Fund. (*See* Ex. D, Expert Report of Louis G. Dudney, Mar. 8, 2013, at 32.) On February 16, 2010, UBS sought to file an amended complaint that included claims against Highland asserting that the unwinding of the HFP Notes Transactions was a fraudulent conveyance that benefitted Highland, and that by causing the unwinding Highland breached the implied covenant of good faith and fair dealing. (Ex. G, 2/16/10 UBS Ltr. to Court, *UBS Sec. LLC v Highland Capital Mgmt., L.P.*, No. 650097/09 (N.Y. Sup. Ct.). The court did not allow all of UBS's amendments, so UBS commenced another action against Highland and other entities, including the Highland Crusader Fund, and the lawsuits filed in 2009 and 2010 were later

consolidated into one action. *See* Compl., *UBS Sec. LLC v Highland Capital Mgmt., L.P.*, No. 650752/10 (N.Y. Sup. Ct.) (ECF Nos. 2, 22).

C. UBS Releases Claims Against Highland.

Extensive pre-trial litigation ensued. In 2015, two of the defendants to the fraudulent transfer claims relating to the unwinding of the HFP Notes Transactions—the Crusader Fund and the Credit Strategies Fund—entered into settlements with UBS. Highland was a party to each settlement agreement.[6] Those agreements settled all of UBS's claims in the New York Action against those two funds. In addition, the settlement agreements explicitly provided that UBS released Highland from all claims arising from the allegedly fraudulent transfers to the Crusader Fund or the Credit Strategies Fund, respectively, in connection with the unwinding of the HFP Notes Transactions. Highland is one of the "Covered Persons" in the following operative release provision:

> UBS Releasing Parties do hereby release, and covenant not to sue, the Covered Persons[7] with respect to such Claims to the limited extent the Claims are for losses or other relief specifically arising from the fraudulent transfers to Crusader alleged in the UBS Litigation.

(Ex. H, 6/17/15 UBS and Crusader Fund Settlement Agreement, at 5.3; *see* Ex. I, 6/11/15 UBS and Credit Strategies Fund Settlement Agreement, at 5.3.)

According to UBS's expert in the New York action, the assets that were the subject of the alleged fraudulent transfers to the two settling defendants represented 83.35% of the value of all

[6] The Crusader Fund's settlement was reached through the efforts of the Redeemer Committee.
[7] A "Covered Person," under the agreement is: "[Highland Capital Management, L.P.] and its past, present, or future parents, subsidiaries (other than the Crusader Released Parties), affiliates (other than the Crusader Released Parties), administrators, predecessor entities, officers, directors, partners, members, managers, successors and assigns, transferees, attorneys, insurers, sureties, feeder funds and employees." (Ex. H, 6/17/15 UBS and Crusader Fund Settlement Agreement, at 5.3; *see* Ex. I, 6/11/15 UBS and Credit Strategies Fund Settlement Agreement, at 5.3.)

of the assets that are the subject of the fraudulent transfer claims. (Ex. D, Expert Report of Louis G. Dudney, Mar. 8, 2013, at 77.) No court has yet decided the extent to which the releases in those settlement agreements bar portions of UBS's claim against the Debtor. That issue should materially limit the amount of UBS's claim.

D. UBS Requests Bifurcated Trials

In 2018, UBS moved the New York court to bifurcate the proceedings against Highland, the Fund Counterparties and the other remaining defendants into: (i) a trial on the claims against the Fund Counterparties relating to the breach of the Restructured Warehouse Agreements, and (ii) a trial on the claims against Highland and the remaining Highland affiliate defendants with respect to the unwinding of the HFP Notes Transactions and related matters that took place after February 24, 2009. (Ex. J, Pl's Mot. to Bifurcate, *UBS Securities LLC, et al v. Highland Capital Mgmt. L.P., et al*, No. 650097-2009 (N.Y. Sup. Ct. Apr. 18, 2018) ("UBS Bifurcat. Mot.").) Significantly, UBS argued that "the facts relevant to the claims in the two trials are distinct," and that the trials would "have minimal overlap in evidence and issues." (UBS Bifurcat. Mot., at 10.) Further, UBS argued that "the second trial, which will relate to new parties and different claims, will involve new factual issues that will not be addressed at all in the first trial," and that "the issues and evidence are largely separate and certainly will not be inextricably interwoven and intertwined." (*Id.* at 11, 15.) The New York court ruled in favor of UBS, and bifurcated the proceedings. (Ex. K, 5/1/2018 Hearing Tr., *UBS Securities LLC, et al v. Highland Capital Mgmt. L.P., et al*, No. 650097-2009 at 35:15-22 (N.Y. Sup. Ct. May 1, 2018).)

The New York court held a bench trial in July 2018 on the breach of contract claims against the Fund Counterparties under the Restructured CLO Warehouse Agreements. The trial court issued its decision in November 2019, finding the Fund Counterparties liable for breaching the

Restructured CLO Warehouse Agreements and awarded damages in the amount of $519,374,149, plus prejudgment interest, for a total judgment of approximately $1.05 billion. *UBS Securities LLC, et al v. Highland Capital Mgmt. L.P., et al*, No. 650097-2009 (N.Y. Sup. Ct. Nov. 19, 2019) [Doc. No. 641]. However, the New York court made no findings with respect to Highland or the remaining defendants.[8] Those claims were scheduled to be heard during a second trial.

III. ARGUMENT

This Court should not exercise its discretion to lift the automatic stay to permit UBS to litigate its claim in the New York court. As discussed below, each element of UBS's position either is lacking in merit or is outweighed by the prejudice that the Debtor's unsecured creditors would experience if UBS were permitted to litigate in the New York court.

A. There is No Basis to Lift the Stay Because of a Purported Agreement with the Debtor

It is well settled that a debtor-in-possession's agreement to lift the automatic stay is not enforceable absent Bankruptcy Court approval. "As a rule, a debtor may not unilaterally waive the automatic stay. The stay protects both debtors and creditors, and 11 U.S.C. § 362 grants the bankruptcy court the exclusive authority to grant relief from the stay." *In re Delta Investments & Dev., LLC*, 2019 WL 137578, at *13 (Bankr. S.D. Miss. Jan. 8, 2019) (internal citation omitted); see *Hill v. Wilson*, 2009 WL 10689099, at *1 (N.D. Ala. Mar. 17, 2009) ("Likewise, Trucking cannot waive the automatic stay, because any relief from a stay must be authorized by the bankruptcy court."); *In re Enron Corp.*, 300 B.R. 201, 213 (Bankr. S.D.N.Y. 2003) ("It is well

[8] In UBS's motion to bifurcate, UBS identified the remaining defendants and the respective claims against them as: (1) Highland CDO Master Fund, L.P., fraudulent inducement and fraudulent conveyance; (2) Highland Special Opportunities Holding Company, fraudulent inducement and fraudulent conveyance; (3) Highland Financial Partners, L.P., alter ego and fraudulent conveyance; (4) Strand Advisors, Inc., general partner liability; and (5) Highland Credit Opportunities CDO, L.P., fraudulent conveyance. *See* UBS Mot. to Bifurcate at 2-3. UBS did not include any alter ego claim against Highland.

settled that, since the purpose of the automatic stay is to protect creditors as well as the debtor, the debtor may not waive the stay."). The automatic stay is not an asset of the debtor that may be bargained away in a private negotiation, and then presented to this Court after the fact for formulaic approval. Instead, an "agreement to modify or terminate the automatic stay requires court approval after notice and an opportunity to object is provided to all parties in interest." *Matter of Pease*, 195 B.R. 431, 433 (Bankr. D. Neb. 1996).

UBS cannot persuasively assert that it has been prejudiced by entering into a supposed agreement with Highland to lift the stay when any such agreement is not enforceable absent Bankruptcy Court approval. However, the Debtor's other unsecured creditors would be greatly prejudiced if this Court were to enforce such an agreement. That would effectively call a halt to these bankruptcy proceedings for the benefit of a single creditor who asserts an oversized claim.

B. There Is No Cause to Lift the Automatic Stay

"The automatic stay is intended to 'allow the bankruptcy court to centralize all disputes concerning property of the debtor's estate so that reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas.'" *In re Residential Capital, LLC*, 2012 WL 3555584, at *4 (Bankr. S.D.N.Y. Aug. 16, 2012) (*citing SEC v. Brennan*, 230 F.3d 65, 71 (2d Cir. 2000)). Under § 362(d)(1), a bankruptcy court may lift the automatic stay for "cause." "There is no mandatory standard for finding 'cause' in the Fifth Circuit." *In re Choice ATM Enterprises, Inc.*, 2015 WL 1014617, at *5 (Bankr. N.D. Tex. Mar. 4, 2015). "Ultimately, the granting of relief from the automatic stay is left to the discretion of the Bankruptcy Court and decided on a case by case basis." *Id. citing In re Fowler*, 259 B.R. 856, 858 (Bankr. E.D. Tex. 2001).

Courts consider any number of factors when determining whether to lift the automatic stay. *In re Choice ATM Enterprises, Inc.*, 2015 WL 1014617, at *5 (Bankr. N.D. Tex. Mar. 4, 2015)

(discussing various factors applied by different courts). In order to streamline the analysis, this Objection addresses the two factors that UBS highlights: (i) the prejudice to the parties, and (ii) judicial economy. UBS fails to carry its burden as to each of these factors.

i. Lifting the Stay Will Substantially Prejudice Other Creditors

When considering whether to lift the automatic stay to permit a creditor to continue litigation in another forum, courts consider the centrality of the claim to the overall estate. *See, e.g., In re Choice ATM Enterprises, Inc.*, 2015 WL 1014617, at *6 (Bankr. N.D. Tex. Mar. 4, 2015) In *Choice ATM Enterprises*, the court denied a motion to lift the automatic stay because the moving creditor's claim "would be the largest claim against the estate" and thus "critical to the reorganization." *Id.* Because of the importance of the claim, the court reasoned that "by retaining [the claims], this court can rapidly proceed through the claims estimate process and impose a lesser burden on [the debtor] and avoid the aforementioned unnecessary delay and expense." *Id.*

It cannot be disputed that the validity and amount of UBS's claim is of central importance to the Debtor's estate and the creditors' ultimate recoveries. UBS asserts the largest disputed claim in this case by a significant margin—more than five times greater than the largest liquidated claim. If the stay is lifted, creditors will have no right to participate in the New York action, and will be relegated to sitting on the sidelines with respect to the determination of what could well be the most important dispute in this chapter 11 case. If history is any guide, the adjudication of that claim by the New York court will take several years. As a result, UBS would be able essentially to dictate the terms of any plan simply as a consequence of its ability to litigate before the New York court. Moreover, given the overhang of a $1 billion disputed claim that would not be subject to this Court's claims reconciliation process, it is difficult to envision how creditors could receive any meaningful recoveries until the New York court enters a final, non-appealable order. This

Court should "preserv[e] a level playing field for negotiation of a consensual reorganization plan" and promote prompt and equitable distributions to all creditors by denying UBS's motion. *In re Conejo Enterprises, Inc.*, 96 F.3d 346, 352 (9th Cir. 1996) ("[T]he bankruptcy court's efforts to preserve a level playing field for all parties to negotiate a plan was a rational basis for denying relief from the automatic stay.") (internal citations and quotations omitted).

Not surprisingly, UBS fails to cite a single case where a bankruptcy court has lifted the stay, or otherwise abstained, to permit a state court to adjudicate a claim that would largely determine the outcome of a chapter 11 case and control when creditors receive distributions. Requiring Highland to litigate "damages claims in another forum would upend the strong bankruptcy code policy that favors centralized and efficient administration of all claims in the bankruptcy court. It would be unfair to other creditors who must bring their claims in this Court." *In re Residential Capital, LLC*, 2012 WL 3555584, at *4 (Bankr. S.D.N.Y. Aug. 16, 2012) (internal citation and quotation omitted).

ii. Judicial Economy is Best Served by this Court Resolving UBS's claim Against Highland.

UBS contends that judicial economy is best served by having the New York court adjudicate its claim against the Debtor. That argument relies upon obfuscations of the scope of the issues the New York court addressed in the bench trial involving the Fund Counterparties and the claims that UBS has litigated against the Debtor to date in New York. Contrary to UBS's argument: (a) the claims against Highland in what would be "trial number two" in New York are distinctly different from the case that was tried there in 2018, as UBS itself persuasively argued to get the claims bifurcated for trial; (b) the most significant remedy that UBS now seeks to assert against the Debtor—namely, that the Debtor is the alter ego of the Fund Counterparties—has not

been pleaded, much less litigated, in New York; and (c) there are at least two threshold legal issues—res judicata and release—which are likely to impact materially the size of any allowable claim against the Debtor. Particularly given that New York civil procedure freely allows interlocutory appeals, and that the New York court has been closed for several months in response to the pandemic (and that it is uncertain when it will resume holding jury trials),[9] it will certainly be several years before the New York court can enter a final, non-appealable order. It will be much more efficient for this Court to determine the validity and, if applicable, amount of UBS's claim against the Debtor.

When it sought bifurcation in New York, UBS accurately described the relationship between the first trial against the Fund Counterparties based on breach of the Restructured CLO Warehousing Agreements and the trial against Highland and other defendants involving post-February 2009 transactions. UBS represented that "the facts relevant to the claims in the two trials are distinct," and that the trials would "have minimal overlap in evidence and issues." (UBS Bifurcat. Mot., at 10.) UBS stressed that "the second trial, which will relate to new parties and different claims, will involve new factual issues that will not be addressed at all in the first trial," and that "the issues and evidence are largely separate and certainly will not be inextricably interwoven and intertwined." (*Id.* at 11, 15.)

Even if the underlying facts and legal theories with respect to each trial were not as distinct as UBS previously admitted, UBS's claim against the Debtor requires resolution of two threshold issues that the New York court has not considered. The first threshold issue is whether the doctrine

[9] Due to the Covid-19 epidemic, New York courts initially did not accept papers on any non-essential matters during the period beginning March 22, 2020 and ending May 25, 2020, and, beginning on March 16, has not been holding civil jury trials. (Ex. L, NYS Court Admin. Order A0-78-20 (Mar. 22, 2020); Ex. M, NYS Court Admin. Order AO-68-20 (Mar. 16, 2020)). As of May 25, 2020, the New York court may accept papers, but only in electronic format. (Ex. N, NYS Court Admin. Order AO/115/20, at ¶3, Ex. B (May 28, 2020).

of res judicata precludes any part of the claim that UBS is now asserting against the Debtor. As noted above, the New York Appellate Division held that res judicata bars UBS from asserting any claim against Highland based on conduct occurring before February 24, 2009. *UBS Sec. LLC v. Highland Capital Mgmt., L.P.*, 86 A.D.3d 469, 927 N.Y.S.2d 59 (2011). That court ruled, "Here, to the extent the claims against Highland in the new complaint implicate events alleged to have taken place before the filing of the original complaint, res judicata applies. That is because UBS's claims against Highland in the original action and in this action all arise out of the restructured warehousing transaction." *Id.* at *474.[10] The application of res judicata is critical given that UBS now apparently seeks to hold the Debtor liable as the alter ego of the Fund Counterparties in connection with the Fund Counterparties' pre-February 24, 2009 breach of the Restructured CLO Warehouse Agreements.

The second threshold legal issue is the extent to which the releases UBS gave to Highland in the Crusader Fund and Credit Strategies Fund settlements in 2015 apply to foreclose or limit any recovery against the Debtor arising from the post-February 24, 2009 fraudulent transfer claims and the related claim asserting breach of the implied covenant of good faith and fair dealing. In those settlements, UBS released claims applying to 83.35% of the challenged asset transfers. (*See* Ex. D, Expert Report of Louis G. Dudney, Mar. 8, 2013, at 77.)

This Court is well positioned to address these legal questions, which do not involve novel or uncertain issues of New York state law, and to do so expeditiously. *Colvin v. Amegy Mortg. Co.*, 507 B.R. 915, 921 (W.D. Tex. 2014) (*citing Matter of Wood*, 825 F.2d 90, 96 (5th Cir. 1987)

[10] In addition, as previously discussed, the New York Appellate Division dismissed UBS's claim for indemnification that was based on conduct prior to February 24, 2009. *UBS Securities LLC v. Highland Capital Mgmt., L.P.*, 893 N.Y.S.2d 869 (N.Y. App. Div. 2010) ("the agreements between the parties contain no promise on the part of Highland to undertake liability with respect to the investment losses suffered by plaintiffs, or to ensure or guarantee the performance of [Fund Counterparties]' obligations to bear the risk of investment losses.").

("the bankruptcy judge is constantly enmeshed in state-law issues."); *In re Breitburn Energy Partners LP*, 571 B.R. 59, 68 (Bankr. S.D.N.Y. 2017) ("Further, in contrast to the property issues discussed earlier, the Tort Counts do not present difficult issues of Texas law.") One court noted that "the mere presence of state law issues does not mean that jurisdiction over bankruptcy issues should be left to the state courts" and that their presence is not "enough for permissive abstention." *In re Kewanee Boiler Corp.*, 270 B.R. 912, 923 (Bankr. N.D. Ill. 2002). The court reasoned that, "[o]therwise, the central goal of bankruptcy which is the centralized administration of a debtor's estate would usually be impossible to achieve since most bankruptcy cases involve some issues of state law." *Id.* Moreover, UBS does not argue that its claims for fraudulent transfer or breach of good faith and fair dealing involve unsettled questions of state law. *See In re Chateaugay Corp.*, 1990 WL 692236, at *2 (Bankr. S.D.N.Y. Jul. 11, 1990) ("The issues presented in this Adversary Proceeding are not redolent with unsettled questions of state law. The state law issues involved require only the application of settled principles of contract law.").

Judicial efficiency will be served by having this Court timely adjudicate the dispute given the more streamlined claims reconciliation process available under the Federal Rules of Bankruptcy Procedure. This is particularly true because New York civil procedure freely permits interlocutory appeals. *See* N.Y. C.P.L.R. 5701 (McKinney). "On the spectrum of what is appealable, New York is the most generous." HANNAH M. SMITH, *Using the Scientific Method in the Law: Examining State Interlocutory Appeals Procedures That Would Improve Uniformity, Efficiency, and Fairness in the Federal Appellate System*, 61 CLEV. ST. L. REV. 259, 272 (2013). Even the most cursory review of the ten years of litigation that UBS has already engaged in with Highland and its affiliates reveals that repeated appeals of the trial court's decisions resulted in substantial delays.

That New York practice allows interlocutory appeals is particularly important because UBS—notwithstanding the decade of litigation—is only now attempting to recover against the Debtor as the alter ego of the Fund Counterparties. While the Motion does not disclose how UBS would attempt to accomplish this in the New York court, it is fair to conclude that UBS's pursuit of this new remedy would involve litigation that would permit the losing party to appeal each of the trial court's decisions along the way. Conversely, UBS can assert such a claim in its proof of claim filed with this Court, and the dispute can be decided efficiently without pauses to learn the outcomes of numerous interlocutory appeals. *See, e.g., In re Dorris Mktg. Grp., Inc.*, 2005 WL 6267050, at *2 (Bankr. E.D. Va. Jan. 27, 2005) ("[I]t is nevertheless the exceptional case in which the stay will be modified to permit litigation" in part because maintaining the stay prevents the "efficient administration of bankruptcy cases from being held hostage to the crowded condition of another court's docket.").

For all of these reasons, this Court should not exercise its discretion to lift the automatic stay.

C. There is No Basis for a Further Extension of the Bar Date

In a final plea to be treated uniquely from other creditors, UBS asks the Court, in the alternative, to extend the bar date as to UBS so that UBS does not have to submit itself to the jurisdiction of this Court and waive any right to a jury trial. UBS does not cite any precedent in support of its request that this Court employ its authority under section 105(a) of the Bankruptcy Court to further extend the bar date. That is because section 105(a)—which authorizes the Bankruptcy Court to "issue any order . . . necessary or appropriate to carry out the provisions" of the Bankruptcy Code—cannot be used to perform an end-run around well settled authority or contravene an order of this Court. UBS acknowledges that the Supreme Court has consistently

ruled that a creditor who submits a proof of claim has no right to a jury trial. Motion at 13, 14. UBS's proposed solution is that this "Court should enter an Order that the filing of a proof of claim will not waive UBS's right to a jury trial." Motion at 25. Section 105(a) does not grant a Bankruptcy Court the authority to effectively override two Supreme Court cases. *In re Legendary Field Exhibitions, LLC*, 2020 WL 211409, at *4 (Bankr. W.D. Tex. Jan. 13, 2020) ("Because *Granfinanciera* held that the right to a jury trial only extends to matters that are legal in nature and involve private rights, a creditor that files a claim loses its Seventh Amendment right to a jury trial. . . . Even if a creditor attempts to couch its claim in protective language reserving the right to a jury trial, such protective language is not binding on the Court; rather, the Court is bound by *Langenkamp* and *Granfinanciera*, which found that filing a proof of claim results in waiver of the right to jury trial."); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1981); *Langenkamp v. Culp*, 498 U.S. 42, 45, (1990).

UBS's alternative solution is even bolder, and represents perhaps the purest expression of its litigation strategy. UBS asks this Court to extend the bar date as to UBS's claim for an indeterminate period. Motion at 25. In addition to this proposal being impractical—and demonstrating that UBS's underlying intention is simply to gain negotiating leverage through delay—UBS's proposal directly conflicts with an agreement that UBS entered into with the Debtor which, unlike the alleged agreement to lift the automatic stay, was approved by this Court. The Joint Stipulation and Order Extending Bar Date, entered by this Court on March 22, 2020, expressly provides, in relevant part, that the bar date for UBS to file its claim is extended to the date that is five business days after this Court enters an order on the Motion. [Docket No. 543 at 2.] UBS fails to set forth any basis why it should not be held to the terms of its agreement, approved by this Court and memorialized in a final order. *See* Fed. R. Bankr. P. 9024 (providing that Fed.

R. Civ. P. 60 applies in bankruptcy cases) & Fed. R. Civ. P. 60(b) (setting forth the basis upon which a court may relieve a party from a final order).

For all these reasons, this Court should decline to extend the bar date for UBS any further.

Dated this 3rd day of June, 2020

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Appendix Exhibit 33

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COUNSEL FOR ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC

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.,	§	
	§	
	§	
DEBTOR.	§	**Chapter 11**

ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC'S JOINDER TO THE REDEEMER COMMITTEE'S OBJECTION TO UBS'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY TO PROCEED WITH STATE COURT ACTION

Acis Capital Management, L.P. ("Acis LP") and Acis Capital Management GP, LLC ("Acis GP," together with Acis LP, "Acis") file this *Joinder* (the "Joinder") to the *Redeemer Committee of the Highland Crusader Funds' Objection* [Docket No. 692](the "Redeemer Objection") to *the Motion for Relief from the Automatic Stay to Proceed with State Court Action* [Docket No. 644] (the "UBS Motion") filed by UBS Securities LLC and UBS AG, London Branch (together "UBS").[1]

[1] Unless otherwise defined herein, Acis incorporates by reference all defined terms in the Redeemer Objection.

I. JOINDER

1. On June 3, 2020, the Redeemer Committee of the Highland Crusader Fund (the "Redeemer Committee") filed the Redeemer Objection, objecting to the UBS Motion.

2. Acis hereby joins the Redeemer Objection, objects to the UBS Motion, and adopts the Redeemer Committee's legal argument and authority.

3. In addition to the points made by the Redeemer Committee, Acis notes something about UBS's claim that is not apparent from the UBS Motion. As outlined in the New York Court's decision, from the time UBS seized the assets from the Fund Counterparties until UBS sold them, the assets appreciated *significantly* in value. Docket No. 644-2 at 28-36. The New York Court ruled that the Fund Counterparties were not entitled to an offset from the enormous post-breach gains UBS made when it ultimately sold the assets it seized, instead finding damages based on the depressed value of the assets on the date of breach. *Id*. But Acis believes offset *will* factor prominently in any assessment of whether the Debtor is the alter ego of the Fund Counterparties such that "the corporate form [should] be disregarded to achieve an equitable result." *Clark Rigging & Rental Corp. v. Liberty Mut. Ins. Co.*, 179 A.D.3d 1510, 1511 (N.Y. App. Div. 2020) (emphasis added). In light of UBS's enormous post-breach gains, whether UBS needs or is entitled to *equity* is an issue that the New York Court has not yet addressed, and which this Court of equity is uniquely situated to promptly adjudicate after hearing from all parties in interest. Debtor's creditors, minus UBS, will have no such voice in the New York Court.

II. PRAYER

Acis respectfully requests that this Court deny the UBS Motion. Acis also requests such other and further relief to which it may show itself to be justly entitled.

DATED: June 3, 2020.

Respectfully submitted,

By: */s/ Brian P. Shaw*

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2020, notice of this document will be electronically mailed to the parties that are registered or otherwise entitled to receive electronic notices in this case pursuant to the Electronic Filing Procedures in this District.

/s/ Brian P. Shaw
Brian P. Shaw

Appendix Exhibit 34

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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]	§	Case No. 19-34054-sgj11
Debtor.	§	

Response Deadline: July 23, 2020 at 4:00 p.m. (ET)
Hearing Date: August 6, 2020 at 9:30 a.m.

OBJECTION TO PROOF OF CLAIM OF ACIS CAPITAL MANAGEMENT L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC

Pursuant to sections 502(b)-(d) and 558 of Title 11 of the United States Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (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.

"Bankruptcy Rules"), debtor and debtor in possession Highland Capital Management, L.P. (the "Debtor") hereby objects to Proof of Claim No. 3 (the "Acis Claim") filed by claimants Acis Capital Management L.P. and Acis Capital Management GP, LLC (together, "Acis").

The Debtor respectfully submits that there are numerous bases for the summary disposition of all claims for relief asserted in the Acis Claim, and represents as follows:

Preliminary Statement

1. The Acis Claim incorporates the complaint from litigation commenced by the trustee of the former estate in the Acis bankruptcy case (the "Acis Case") at a time when Acis had unpaid creditors (the "Acis Complaint").[2] The trustee sought to avoid and recover certain transfers by Acis that were allegedly intended to prevent its largest creditor, Josh Terry, from collecting his $8.168 million arbitration award (the "Arbitration Award"). The transfers, allegedly orchestrated by James Dondero using his common control and ownership interests in Acis, the Debtor and the other Highland entities, were purportedly intended to "denude" Acis by transferring certain of its management contracts and interests in the managed assets to its affiliates, including the Debtor. Finding a likelihood of success that certain transfers were avoidable, the Court issued a preliminary injunction, which was carried over into a "Temporary Plan Injunction" that allowed Acis to manage those assets to pay creditors. Consistent with that substantive basis, the injunction expires once those creditors are paid in full. That is the operating principle of the Acis Plan: creditors are paid using assets temporarily diverted from the putative transferees that are named as defendants in the Acis Complaint.

[2] Specifically, the Acis Claim incorporates the *Second Amended Complaint (Including Claim Objections and Objections to Administrative Expense Claims)* filed in Adversary No. 18-03078 in the Acis Case.

2. The Acis Plan has worked as intended. The income diverted by the temporary injunction will soon have paid Mr. Terry and Acis's other creditors 102% of their claims, *plus* all of the administrative expenses incurred to achieve that result. There will no longer be an estate or estate claims to administer. Having served its purpose, the injunction dissolves and the creditor remedies asserted in the Acis Complaint become moot. But Acis is doing the opposite. It filed the Acis Claim in the amount of "at least $75 million" and has initiated new lawsuits in federal and state court against employees, advisors and professionals for allegedly breaching duties owed not to creditors but ***purportedly owed to Acis***. The sole beneficiary of these far-flung litigations would be Mr. Terry, whose claim is paid in full under the Acis Plan, except for $1 million with which he chose to purchase Acis's equity.[3] Now Mr. Terry seeks a $75 million windfall, which would come not at Dondero's expense but from the pockets of the Debtor's innocent creditors (including unsecured trade creditors, the Redeemer Committee of the Highland Crusader Fund ("Redeemer"), with an arbitration award of $190,824,557, and UBS Securities LLC ("UBS").

3. Attempted windfalls usually have a fallacious premise, and this one is a $75 million whopper. The fallacy is that Reorganized Acis has greater rights than "old Acis," which at the time of the transfers was a member of the Highland related entities that Acis itself alleges were controlled and primarily owned by Dondero. Acis alleges that each was an alter ego of the others, which means that *Acis is just as culpable, and just as much an alter ego, as*

[3] Inasmuch as claims against Acis are worth 102%, Terry's $1 million reduction of his claim was the substantive equivalent of paying $1 million, not a typical debt for equity exchange.

any of the others. Coupled with the fact that Acis's creditors are being paid in full, several things follow that are instantly fatal to the Acis Claim. None are subject to any factual dispute.

a. First, it is undisputed that at the time of the transfers, James Dondero and Mark Okada were Acis's sole owners, and it is hornbook law that sole owners do not owe fiduciary duties ***to their company***. Subject of course to the rights of creditors to claw back transfers that leave a company unable to pay its debts, Dondero and Okada as Acis's sole owners were free to transfer its assets to other entities, and third parties had no duty or right to stop them. "Delaware law is clear that a company's sole owner cannot breach fiduciary duties 'owed to the companies he wholly owned.' … [Plaintiff] has not cited legal support for the proposition that a nonowner can be liable for conspiring with the sole owner of a partnership for breaching duties that the owner owes himself." *Tow v. Amegy Bank N.A.*, 976 F. Supp. 2d 889, 906-07 (S.D. Tex. 2013) (internal citation omitted). Whatever their motive, if Acis's owners wanted to shut it down, they were free to do so, subject to the rights of creditors, who are being paid in full without any further recovery.[4] Nor can Acis base its claims on the rights of Acis's former creditors. For one thing, they've been paid, and for another, Delaware law does not permit creditors of a limited partnership to sue third parties for breach of fiduciary duty, *nor does*

[4] Acis relies heavily on the Arbitration Award, but the panel found no violation of any duty ***to the partnership***. The only duty that the panel found was breached was between partners: it was the duty of the majority partners not to exceed the ratio of expenses to revenue while Terry was a 25% limited partner. Even that duty expired with Terry's partnership interest when his employment was terminated. About that there is no dispute: the cash-out of his partnership interest was the primary component of the Arbitration Award. The panel found that Terry was not wrongfully terminated because his employment was "at-will," but that he was entitled to payment for his partnership interest because the termination was not for cause. Most of the rest of his award was his pro rata partnership share of the alleged Overpayments (which he now seeks to recover *twice* by claiming them through Acis).

it permit a trustee to sue on their behalf.[5] These claims are not and cannot as a matter of law be brought for the benefit of Acis's former creditors.

b. Second, even if fiduciary duties had been owed, Acis's duty-based claims against the Debtor and other third parties are barred by the *in pari delicto* defense. It is a paradigmatic application of the doctrine: Acis cannot sue others for participating in a scheme in which it, as one of the entities it alleges was commonly owned and controlled, was equally culpable. This fundamental defect is obscured by the subsequent appointment of a trustee and change of ownership. But while the Fifth Circuit has not decided the issue, it has affirmed that Bankruptcy Code § 541 subjects trustees and successors to whatever defenses existed against the debtor, and most courts of appeal hold that, as a result, the appointment of a trustee does not "cleanse" the *in pari delicto* defense (much less, as here, where the claims purportedly revested in the reorganized debtor). Even if the equities are applied, as this Court once held they may, there is no equity in permitting a new owner to sue persons for conspiring with the old owner, in order to parlay a $1 million investment into $75 million, *at the expense of this Debtor's creditors*. These facts are not in dispute, and the issue can and should be decided on the record before the Court.

c. Third, the fraudulent transfer claims fail, and may be summarily resolved, because the Debtor did not receive the benefit of the alleged fraudulent transfers since (with one exception) it was not the transferee of the transferred rights. Bankruptcy Code §

[5] *Beskrone v. OpenGate Capital Grp. (In re Pennysaver USA Publ'g, LLC)*, 587 B.R. 445, 467 (Bankr. D. Del. 2018); *Gavin/Solmonese LLC v. Citadel Energy Partners, LLC (In re Citadel Watford City Disposal Partners, L.P.),* 603 B.R. 897, 905 (Bankr. D. Del. 2019).

550(a) is not satisfied as to those transfers for which the Debtor was not the initial transferee: it is insufficient as a matter of law simply to allege an amorphous benefit from being part of the same corporate group. This is all that the Acis Claim alleges – the Debtor benefited solely because it was a Highland related entity. Furthermore, if the Debtor did not receive the benefit from a transfer, there are no damages in the first place. That is shown *conclusively* by the fact that the earnings derived by Acis from the enjoined transfer of the ALF PMA have already paid Acis's creditors and administrative expenses. That is presumably why the Acis Claim lacks any damage allegations – there are none.

d. Fourth, the fraudulent transfer claims also fail, along with preference claims as well, for another reason that may also be summarily resolved: a debtor cannot recover avoidance claims for its own benefit under section 550(a) of the Bankruptcy Code. There must be a benefit to the debtor's estate. Here, there is nothing left of the former Acis estate: creditors were paid, old equity was canceled, and the new equity is held by a purchaser who paid $1 million, no different than if he had done so in an auction. There is no estate to benefit. Authority before and after *Mirant* holds that avoidance recoveries should be limited based on equitable considerations, which in this case are conclusively in favor of limiting any recovery to the amount required to satisfy creditors' claims. Unlike *Mirant* and this Court's *Texas Rangers* decision, this is not a case in which a recovery will enable a debtor to satisfy outstanding plan obligations, or one in which creditors were forced to take equity instead of cash

and are depending on its value for a recovery on their claims.[6] There is no estate and no equities to support Mr. Terry's windfall.

e. Fifth, Acis may not assert for its own benefit any claims against prior equity holders or third parties that were not pending when Mr. Terry purchased the company. The *Bangor Punta* doctrine holds that a purchaser of controlling equity in a company may not then use the control over the corporate machinery to turn around and assert claims against the prior owners if the claims arose prior to the date when the purchaser took control.[7] The reasons are self-evident and squarely applicable here: the purchaser paid what it considered fair value and has suffered no damage, and to permit such claims would promote the kind of litigation free-for-all in which Mr. Terry is presently engaged. This bars standing as to all claims except those the trustee had already asserted prior to Mr. Terry's purchase (relating to the ALF share transfer, ALF PMA transfer and the note transfer described herein), all of which claims fail for multiple other independent reasons.

f. Sixth, Acis's four claims seeking $7 million in so-called "Overpayments" have no legal basis and should be summarily disallowed. These are payments for services that exceeded, in gross, the expense ratio that was permitted under Acis's limited partnership agreement (the "Acis LPA") without partner consent. The only alleged substantive basis for recovery is the claim that the Overpayments were *ultra vires* acts, which would be flatly wrong even if it applied in concept (which it does not): (i) Acis was indisputably *authorized* to

[6] Significantly, any recovery on preference or constructive fraudulent transfer claims would be offset by the Debtor's resulting claims under Bankruptcy Code § 502(h), which would be entitled to full payment under the Acis Plan.

[7] *Bangor Punta Operations, Inc. v. Bangor & A. R. Co*., 417 U.S. 703, 710, 94 S. Ct. 2578 (1974); *Midland Food Servs., LLC v. Castle Hill Holdings V, LLC*, 792 A.2d 920, 929 (Del. Ch. 1999).

pay for services, which is all that matters legally; any excess was not *ultra vires* but an inter-partner issue already addressed by the Arbitration Award (through which Mr. Terry already recovered his share); (ii) turnover under Bankruptcy Code § 542(a) does not apply to disputed debts as a matter of law; and (iii) and the "money had and received" and conversion claims are equally inapplicable as a matter of law. In any event, most of the time period during which the alleged Overpayments were made is beyond the two year statute of limitations under Texas law.

g. Seventh, Acis's civil conspiracy claim also fails as a matter of law because the claim is not recognized: section 550 provides the statutory remedies for any fraudulent transfer liabilities, and it may not be circumvented by a conspiracy claim.

h. Eighth, Acis's tortious interference claim fails as a matter of law because it does not apply to at-will contracts, and the Debtor had the right to compete for the business.

i. Ninth, Acis's breach of contract claim, like its claim for breach of fiduciary duty, rests on the fallacy that Acis had legal interests that were distinct from those of its sole owners, duties that parties contracting with Acis had a duty to identify and protect even though Acis's sole owners instructed otherwise. That is not the law.

j. Tenth, alter ego liability is inadequately pled; it is a remedy and not a claim and, moreover, is unavailable on the alleged grounds. What Acis alleges is "single enterprise" liability based on common control by Mr. Dondero, a theory never adopted under Delaware law (which controls) and also rejected by the Texas Supreme Court.

k. Numerous other of the Debtor's defenses are meritorious but cannot be decided summarily, including defenses such as solvency (Acis was manifestly solvent without recovering *all* of the alleged fraudulent or preferential transfers), preference defenses and punitive damages (to the extent any tort claim is not dismissed; notably, such damages would be subordinated at best).

4. The rights of creditors to be paid were the legal basis of the Acis Plan injunction, which is why the injunction terminates once those creditors are paid in full. Mr. Terry elected to acquire new equity for $1 million; he is not entitled to receive another $75 million by claiming that *Acis* was damaged by those transfers, much less from the pockets of the Debtor's unpaid creditors. To impose on the former partners and third parties such as the Debtor a duty to "restore" $75 million to the former business, not to pay its creditors but for the sole benefit of a successor owner who bought the diminished entity for $1 million, would be a legally groundbreaking windfall, to say the least. The Acis Claim can and should summarily be disallowed in its entirety on the record before the Court.

Jurisdiction

5. The Court has jurisdiction over this matter under the Bankruptcy Code and pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. §§ 157(b)(2)(A), (B) and (L). Venue is proper in this District under 28 U.S.C. §§ 1408 and 1409.

6. The statutory predicates for the relief requested herein are 11 U.S.C. § 502(b)-(d), 11 U.S.C. § 558 and Fed. R. Bankr. P. 3007.

Factual Background

7. 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").

8. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in the Delaware Court.

9. On December 4, 2019, the Delaware Court entered an order transferring venue of the Debtor's Bankruptcy Case to this Court [Docket No. 186].[8]

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

11. The Settlement Order approved, among other things, certain operating and reporting protocols [Docket Nos. 354, 466].

12. In connection with the Settlement Order, an independent board of directors was appointed on January 9, 2020, at the Debtor's general partner, Strand Advisors, Inc. (the "Independent Board")

13. 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

[8] All docket numbers refer to the docket maintained by this Court.

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

Objection

A. Legal Standard

14. The Bankruptcy Code establishes a burden-shifting framework for proving the amount and validity of a claim. "A claim . . . , proof of which is filed under section 501 [of the Bankruptcy Code], is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). "A proof of claim executed and filed in accordance with the [Bankruptcy Rules] shall constitute *prima facie* evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f); *see also In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006). However, the ultimate burden of proof for a claim always lies with the claimant. *Armstrong*, 347 B.R. at 583 (citing *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15 (2000)).

15. The Acis Claim incorporates and is expressly based upon the claims and causes of action asserted in the Acis Complaint filed in the Acis Case. It purports to assert thirty-four claims for relief, which are described and addressed *seriatim* below.

B. Claims 1-4 to Recover the Alleged Overpayments Must be Disallowed

16. The first four claims are based on service and expense payments by Acis to the Debtor that allegedly exceeded 20% of revenues, without Mr. Terry's consent, in violation of section 3.10(a) of the Acis LPA, which provides that "the aggregate annual expenses of the Partnership … may not exceed 20% of Revenues without the consent of all of the members of

the Founding Partner Group." The arbitration panel found that Mr. Terry (still a partner at that time) had not consented to these so-called "Overpayments," which totaled $7,021,924.

17. Acis asserts four claims: (1) the alleged Overpayments were void or voidable *ultra vires* acts because all of the partners had not consented; (2) the Overpayments are Acis's estate property subject to turnover under Bankruptcy Code § 542(a); (3) the Debtor is liable to return the Overpayments as "money had and received"; and (4) the Debtor is liable for conversion of the alleged Overpayments.[9]

18. Each of the four claims is frivolous, and all should be summarily disallowed: (1) the Alleged Overpayments were not *ultra vires*; (2) the turnover statute does not apply when the right to the property is disputed; (3) "money had and received" does not apply as a matter of law; and (4) neither does conversion. (As discussed below, even if these claims were not frivolous, because they are brought for the benefit of Acis's equity acquirer and not for the benefit of creditors, they are also barred by the *Bangor Punta* doctrine.)

1. The Alleged Overpayments Were Not Void or Voidable as Ultra Vires

19. Acis obviously had the *power* to make payments for services. That is all that would matter even if Delaware had not essentially abolished the *ultra vires* doctrine.[10] If Acis paid more for services than the Acis LPA permitted without the partners' consent, that is a

[9] Acis appears to base its claims solely on allegations that the alleged Overpayment are void, not on the alleged excessive contract rates. As set forth herein, the Debtor believes all four claims may be summarily disallowed as a matter of law on undisputed facts. Nonetheless, the Debtor reserves the right to bring defenses with respect to whether the rates were reasonable or any other applicable defenses.

[10] *See* discussion *infra*; *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 648 (Del. Ch. 2013) (*ultra vires* applied under former law when "the corporation acted outside the scope of . . . its authorized powers.").

matter *between partners*, not an *ultra vires* act. That is how the arbitration panel treated it for purposes of valuing Mr. Terry's partnership interest: it calculated how much Mr. Terry would have received as a 25% partner had expenses not exceeded the limit, and included it in the Arbitration Award. By necessary extension, the rest of any recovered money should be distributed to the *other* partners; instead, Mr. Terry seeks to recover it a second time.

20. Regardless, *ultra vires* is inapplicable. It formerly applied under Delaware law only when "the corporation acted outside the scope of … its authorized powers" (which was not the case here) but the superseding statute essentially eliminated any utility the *ultra vires* doctrine had. *See* Delaware General Corporation Law, § 124 ("No act of a corporation and no conveyance of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer. . . "); *see also Carsanaro v. Bloodhound Techs., Inc*., 65 A.3d 618, 648 (Del. Ch. 2013).

21. Furthermore, contrary to Acis's suggestion, even if Delaware had not statutorily eliminated *ultra vires* as a valid concept in corporate law, the concept of *ultra vires* acts never applied to partnerships. The Acis Claim blatantly misstates the law and the cited decision in stating that corporate law on *ultra vires* applies by analogy. *In re Mesa Ltd. P'ship Preferred Unitholders Litig*., Civil Action No. 12,243, 1991 Del. Ch. LEXIS 214, at *20 (Dec. 10, 1991) did not apply *ultra vires* to a partnership, by analogy or otherwise. In fact, it had nothing whatsoever to do with *ultra vires*. It was an unpublished decision involving a ratification issue in a breach of fiduciary duty case. *Ultra vires* was mentioned as one of several

things that can be cured by ratification, after which the court began the next paragraph with: "Case rulings construing statutory corporation law are not necessarily binding precedents as to issues arising under contractual partnership agreements but they may often be helpful by analogy." The Eleventh Circuit Court of Appeal has suggested that *ultra vires* does not apply to partnerships even in concept.[11]

22. Acis does not claim that the alleged Overpayments are void or voidable on any substantive basis other than *ultra vires*, and thus has no colorable claim under state law to recover its own payments. Accordingly, claims 1-4 must be disallowed under Bankruptcy Code § 502(b)(1). A claimant may not simply venture forth recovering payments a debtor has made without some substantive basis; whether Mr. Terry was deemed to consent to them under the Acis LPA is completely irrelevant.

2. Turnover Under Bankruptcy Code § 542(a) is Inapplicable

23. It is axiomatic that turnover under Bankruptcy Code § 542(a) applies only to obtain possession of property that is indisputably property of the estate. *See, e.g., United States v. Inslaw, Inc.*, 932 F.2d 1467, 1472 (D.C. Cir. 1991) ("It is settled law that the debtor cannot use the turnover provisions to liquidate contract disputes or otherwise demand assets whose title is in dispute."); *In re Amcast Indus. Corp.*, 365 B.R. 91, 122 (Bankr. S.D. Ohio 2007) ("Recovery under 11 U.S.C. § 542 is limited to assets that are undisputedly property of the

[11] *In re Sec. Grp.*, 926 F.2d 1051, 1054 n.5 (11th Cir. 1991) ("The appellants consistently cast their argument as one alleging the guaranties were ultra vires with respect to the partnerships. Ultra vires is a uniquely corporate concept, arising out of an historical fear and distrust of the corporate form. [citation omitted] Indeed, almost all of the cases cited by the appellants involve corporations, not partnerships. We do not believe that this uniquely corporate concept controls this case.").

estate.") (citation omitted). Here, Acis's purported right to the property at issue is clearly in dispute, and section 542(a) is therefore inapplicable.

3. "Money Had and Received" is Also Inapplicable

24. "The quasi-contractual action for money had and received is a cause of action for a debt not evidenced by a written contract between the parties" (*MGA Ins. Co. v. Chesnutt*, 358 S.W.3d 808, 815 (Tex. App. 2012)). Here, the alleged Overpayments were made pursuant to valid contracts. Once again, therefore, Acis's theory of relief is conceptually inapplicable.

25. Even if there were a claim for "money had and received," a substantial portion of such a claim would be time-barred. The Arbitration Award found that the alleged Overpayments were made from 2014 to May 2016. Texas applies a two-year statute of limitations to claims for money had and received. *Merry Homes. Inc. v. Luc Dao*, 359 S.W.3d 881, 884 (Tex. App. 2012) (citing "clear precedent"). Accordingly, Acis cannot recover any alleged Overpayments that were made prior to January 31, 2016 (two years prior to the Acis petition date).

4. Conversion is Also Inapplicable

26. Conversion is another inapplicable claim. The Debtor has no identifiable, segregated money subject to recovery through a conversion cause of action, and Acis has not even attempted to identify any such money or property. *See, e.g., Lawyers Title Co. v. J.G.*

Cooper Dev., Inc., 424 S.W.3d 713, 718 (Tex. App. 2014) ("an action for conversion of money arises only where the money can be identified as a specific chattel, meaning it is (1) defined for safe keeping; (2) intended to be kept segregated; (3) substantially in the form in which it is received or an intact fund; and (4) not the subject of a title claim by the keeper"). As noted above, conversion and similar claims are subject to a two-year statute of limitations (Tex. Civ. Prac. & Rem. Code 16.003(a)). Acis cannot meet its burden of proving these requirements.

C. Claims 5-25: All Avoidance Claims Should be Disallowed Because They Seek Recovery Under Section 550(a) of Amounts in Excess of Acis's Plan Obligations

27. Reorganized Acis will no doubt contend that it may prosecute avoidance claims and recover damages without regard to whether creditors are paid in full, because the company itself was damaged by the transfers. The argument is invalid and is based on a gross oversimplification of the law. Reorganized Acis stands in the shoes of old Acis, and debtors cannot recover transfers for their own benefit, except to the extent the recovery is effectively in payment of a claim. Acis has paid its creditors; in fact, it did so with money effectively recovered from the Debtor on one of the very claims it asserts here, by virtue of the Temporary Plan Injunction! Bankruptcy Code § 550 does not permit a debtor or anyone standing in the shoes of the debtor to recover another $75 million for the benefit of the debtor. ***This is a summary basis for disallowance of all avoidance claims alleged in Claims 5-25***.

28. "Courts have consistently held that an avoidance action can only be pursued if there is some benefit to creditors and may not be pursued if it would only benefit the debtor." *Balaber-Strauss v. Harrison (In re Murphy)*, 331 B.R. 107, 122 (Bankr. S.D.N.Y.

2005) (citing *Wellman v. Wellman*, 933 F.2d 215, 218 (4th Cir. 1991) (denying recovery "when the result is to benefit only the debtor rather than the estate")). Consistent with that principle, the Acis Plan provides that "the Reorganized Debtor shall have exclusive standing . . . to prosecute . . . Estate Claims *for the benefit of the Estate* . . . ." Acis Plan, § 7.03 (emphasis added). But a recovery of "at least $75 million" in damages demanded by Reorganized Acis will benefit only one person or entity, namely Mr. Terry, who bought the equity interests in the new Acis. Acis's creditors will have been paid in full; none are depending for their recovery on anything more than has already been recovered by means of the Temporary Plan Injunction. Mr. Terry is among those Acis creditors who will have been paid in full. He may claim that he acquired his equity interest in the new Acis in a debt for equity exchange, *i.e.*, by shaving $1 million off his $8.168 million claim, but that is not a recovery on behalf of his claim, but on behalf of the new equity that he bought. There is no substantive difference between discounting a hundred cent claim and a cash purchase. Even if there was, it would not justify such a windfall, much less at the expense of *the Debtor's creditors*. These include unsecured trade creditors, Redeemer, which has filed a proof of claim in respect of its arbitration award of $190,824,557 in damages as of the petition date, and UBS.

29. Restoring the pre-transfer equity value of the old Acis, after its creditors have been paid in full, and the equity to be "restored" is newly issued and purchased equity, is not the kind of "benefit to the estate" contemplated by *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.)*, 675 F.3d 530, 534 (5th Cir. 2012), as discussed below. There is no post-confirmation "estate" to benefit within the meaning of section 550(a). Unlike any decision

in which a recovery was found to at least indirectly benefit an estate, where, e.g., plan obligations were unfulfilled, or even simply to boost equity value where creditors had received new equity interests on account of their claims (as opposed to purchasing the new equity, as Mr. Terry effectively did), there is no benefit to the estate here. Creditors were paid and Acis's equityholders' interests were canceled under the Acis Plan, and with it their partnership, a relationship that dissolved by operation of law upon the bankruptcy of their general partner, Acis LLC.[12] There is only a new owner, Mr. Terry, who purchased the new equity under the Acis Plan exactly as if it were sold at auction. There is no legal basis for Mr. Terry's attempt to stand in the shoes of the preconfirmation partnership in order to recover more assets than necessary to satisfy its liabilities.

30. In fact, there is a triple irony to Reorganized Acis's demand: (i) first, Mr. Terry is already the only person who was paid for his former equity interest in Acis (the value of which was the main component of the Arbitration Award, for which he has been paid in full in cash); (ii) second, the petition-date Acis equity holders (the persons who might have benefited from Acis recovering its prepetition transfers if their interests had not been canceled) will not

[12] As a Delaware entity, Acis LP was governed by the Delaware Revised Uniform Limited Partnership Act ("DRULPA"). DRULPA specifies six different events that trigger the dissolution of a Delaware limited partnership. Pertinent here, these include a withdrawal of the general partner "upon the happening of events specified in a partnership agreement…." Article 5 of the Acis LP Agreement,, captioned "Dissolution and Winding Up," provides that Acis LP "shall be dissolved" upon any of four events, which include the bankruptcy of the general partner (Sec. 5.01(a)). Here, the general partner was co-debtor Acis LLC. State law dissolution may be prevented by an election by the partners to continue the partnership, made within 90 days of the general partner's bankruptcy filing, but that did not occur. "Because these dissolution provisions have been adopted into the partnership law of almost every state, federal bankruptcy courts have generally enforced the UPA and RULPA dissolution provisions as incorporated in state law, and have held partnerships to be dissolved upon the filing of a bankruptcy petition by a general partner." Lawrence J. La Sala, *Partner Bankruptcy and Partnership Dissolution: Protecting the Terms of the Contract and Ensuring Predictability*, 59 Fordham L. Rev. 619, 621(1991) (citing cases) (available at: https://ir.lawnet.fordham.edu/flr/vol59/iss4/5).

only see none of any recovery, they or their affiliates are actually the ones being asked to pay it; *and* (iii) third, the only recipient of the $75 million would be Mr. Terry himself! Presumably, Mr. Terry purchased Reorganized Acis in anticipation of earning money managing assets while it paid Acis creditors; if he anticipated a $75 million return on his $1 million investment at the expense of the Debtor's creditors, it was a gross miscalculation, inconsistent with the law.

31. *Mirant* is entirely consistent with the Debtor's position, and is not in derogation of the substantial body of authority holding that section 550 is subject to equitable limitations. In *Mirant*, the debtor had sued its lenders to avoid a guaranty and recover payments thereunder. Its plan of reorganization provided for the creation of a special litigation entity ("MCAR"). Unsecured creditors received Reorganized Mirant stock and an interest in MCAR's recoveries. The lender moved for summary judgment in part on the basis that creditors would be paid in full and so MCAR lacked standing. The district court found that MCAR had standing (while granting summary judgment on other grounds), ruling in part:

> Finally, and ***most importantly, the fact that the creditors were paid in New Mirant stock confers standing on MCAR to pursue the avoidance action based on the indirect benefit to the creditors from a more financially sound estate***…. [S]ee also Acequia, 34 F.3d at 811-12 (discussing broad interpretations of 'benefit the estate' in context of avoidance actions and fact that equity stake to creditors results in benefit to estate)… ***In the instant case, the creditors were paid in stock; thus, the prospect of a more financially sound estate would provide MCAR with standing***.

Mirant, 441 B.R. 791, 803 (N.D. Tex. 2010) (emphases added).

32. The Fifth Circuit agreed with the district court's ruling on standing (while vacating on other grounds):

> A bankruptcy trustee may still have standing to avoid a fraudulent transfer after the unsecured creditors are satisfied in full. The fraudulent transfer injured the estate and § 550 ensures that the injury is redressed because a trustee may only avoid a transfer to the extent it benefits the estate. ***Therefore, to the extent that MCAR's successful avoidance of fraudulent transfers will benefit the bankruptcy estate, MCAR has Article III standing to avoid transfers that injured the estate***.

Mirant, 675 F.3d at 534 (emphasis added).

33. This Court followed *Mirant* in the *Texas Rangers* case. The former debtor, Texas Rangers Baseball Partners ("TRBP") had sued its former ultimate parent, HSG Sports Group ("HSG"), to avoid obligations under an aircraft sharing contract signed on the eve of bankruptcy. TRBP had paid its creditors in full under a confirmed plan. HSG argued that TRBP therefore lacked standing as there would be no benefit to the estate from avoiding the contract. This Court observed *Mirant's* broad interpretation of "benefit to the estate," while noting two facts critical here: (1) the case at hand was for avoidance only, and not for recovery under section 550(a), and (2) TRBP still had obligations to lenders that had *not* been paid their entire prepetition indebtedness under the plan. On these facts, the Court found that TRBP had Constitutional standing to assert the fraudulent transfer claim because it would produce a plausible "benefit to the estate."

> *Mirant* makes clear that "benefit to the estate" does not hinge on whether a Chapter 5 action will result in a pool of assets being garnered for the benefit of unsecured creditors. Here, it is a matter of public record that the equity holders of TRBP have obligations to certain lenders that TRBP was also liable to. . . .
>
> Thus, to the extent the equities matter here, it would seem that such equities weigh in favor of finding there to be a plausible "benefit to

> the estate" argument articulated by TRBP. Accordingly, the court finds that here, TRBP does have Constitutional standing to assert a fraudulent transfer claim under section 548(a)(1)(A) of the Bankruptcy Code, even though unsecured creditors were paid in full under the Plan, and that the Avoidance Complaint should not be dismissed.

Paradigm Air Carriers, Inc. v. Tex. Rangers Baseball Partners (In re Tex. Rangers Baseball Partners), 498 B.R. 679, 709 (Bankr. N.D. Tex. 2013).

34. The great weight of authority, both pre- and post-*Mirant*, holds that recovery under section 550(a) is subject to a case-by-case analysis of the facts of the case and the equities. Section 550(a) provides that "the trustee may recover, ***for the benefit of the estate***, the property transferred, or, if the court so orders, the value of such property[.]" 11 U.S.C. § 550(a) (emphasis added).

> Under §550, courts have limited the recovery of pre-petition transfers on equitable principles in a manner consistent with the purposes of the Bankruptcy Code and §550, in particular. *See, e.g.*, *In re Sawran*, 359 B.R. 348, 353 (Bankr. S.D. Fla. 2007) (citing cases). For a concise discussion of the rationales for limiting recovery under 11 U.S.C. §550 based on equitable principles, see Robert B. Bruner and Gerard G. Pecht, The Unexplored Limits of Moore v. Bay: Statutory and Equitable Basis for Limiting Money Damage Awards on Fraudulent Transfer Claims, 26 J. Bankr. L. & Prac. NL Art. 2 (June 2017).

Holber v. Nikparvar (In re Incare, LLC), Nos. 13-14926 ELF, 14-0248, 2018 Bankr. LEXIS 1339, at *35-36 (Bankr. E.D. Pa. May 7, 2018) (citing, among others, *Crescent Res. Litig. Tr. ex rel. Bensimon v. Duke Energy Corp*., 500 B.R. 464, 481-82 (W.D. Tex. 2013)).

35. *Duke Energy* is an instructive, post-*Mirant* decision from the district court in the Western District of Texas, noting that the power to avoid a transfer is not the same as the

power to recover under section 550(a) and holding that while the full amount of the fraudulent transfer was legally avoidable, as per *Mirant*, the court could nonetheless consider "the equitable impact of the Trust's potential recovery" and limit the recovery under section 550. *Id*. at 481-83.

36. In *Duke Energy*, the Crescent Resources post-confirmation Trust sued to avoid a 2006 spinoff transaction that allegedly rendered Crescent Resources insolvent while Duke received $1.6 billion. The plan gave the original lenders all of the equity and allowed unsecured claims for the $961 million difference between those claims and the value of their new equity interests. The Plan also formed the Trust and authorized it to pursue claims against third parties. The Trust had two classes of beneficiaries: Class A comprised creditors with $279 million in unrelated claims and Class B included the lenders with their $961 million in allowed claims.

37. Duke Energy defended in part on the basis that the original lenders entered into the 2006 transaction knowing how the loan proceeds would be distributed, and should not benefit from its avoidance. *Id*. at 478. The district court agreed, referring to *Mirant* and offering the following section 550(a) analysis:

> There is precious little guidance from the Fifth Circuit on the scope of Section 550(a)'s "for the benefit of the estate" language. Other courts generally interpret the language broadly. *See In re Acequia, Inc.*, 34 F.3d 800, 811 (9th Cir. 1994); *In re Tronox Inc*., 464 B.R. 606, 617 (Bankr. S.D.N.Y. 2012) (citing *Acequia*, 34 F.3d at 811). Still, there are numerous examples of cases where courts have denied or limited recovery based on the equitable principles underlying the Bankruptcy Code and Section 550(a) in particular. *See, e.g., Wellman v. Wellman*, 933 F.2d 215, 218 (4th Cir. 1991) (affirming district court's order holding debtor's avoidance action was not "for the benefit of" the estate); *In re Yellowstone Mountain Club, LLC*, 436 B.R. 598, 678 (Bankr. D. Mont. 2010) (refusing to

> award any recovery to the original lender who was complicit in the fraudulent transfer, as well as syndicate lenders "who have speculated on a monumental award against" the plaintiff); *In re Jackson*, 318 B.R. 5, 27-28 (Bankr. D.N.H. 2004), *aff'd*, 459 F.3d 117 (1st Cir. 2006) (because "equity guards against windfalls in general," amount of recovery through Section 550(a) on a Section 544(b) claim may be equitably adjusted); *but see Tronox*, 464 B.R. at 614 (collecting cases interpreting Section 550(a) as setting "a minimum floor for recovery in an avoidance action," but not "any ceiling on the maximum benefits that can be obtained once that floor has been met").
>
> The one consistent vein traveling through all of these cases is the fact-specific nature of the inquiry. *See, e.g., Wellman*, 933 F.2d at 218 ("benefit of the estate" question requires "a case-by-case, fact-specific analysis"); *In re Murphy*, 331 B.R. 107, 121 (Bankr. S.D.N.Y. 2005) (limiting recovery under Section 550 based on the "extremely unusual" facts of the case). It is therefore instructive to consider the factual circumstances of this case, and the equitable impact of the Trust's potential recovery.
>
> * * *
>
> If the Trust is allowed to recover the $961 million of the term loan proceed transfer destined for the Class B creditors—a group of creditors who all derive their interest in the estate from the original lenders—the banks' high risk investment will pay off in the form of a massive windfall.

Duke Energy, 500 B.R. at 481-82. The district court concluded that there was "no equitable basis" for allowing a recovery to Class B creditors, and granted summary judgment in favor of Duke Energy.

38. Where this Court found the facts and equities in *Texas Rangers* to favor finding a "benefit to the estate," the facts and equities here point decisively to the opposite conclusion. By comparison, here: (1) Reorganized Acis is seeking not just to avoid obligations but to recover $75 million under section 550(a), (2) Acis's creditors will already have been paid in full at 102% (once Mr. Terry actually elects to pay creditors with the cash at Acis), (3) there

are ***no*** creditors relying on Reorganized Acis's equity or financial condition to recover on their claims, (4) any recovery would come at the expense of the Debtor's unsecured creditors, and (5) the person to receive the asserted $75 million windfall (*i.e.*, Mr. Terry) paid only $1 million to purchase Acis's interests to take a flyer on this and related litigation. As the court stated in *Blixseth v. Kirschner (In re Yellowstone Mt. Club, LLC)*, *supra*, 436 B.R. at 678 "the Court will not at this time enter an order that would in any way benefit Credit Suisse, the Prepetition Lenders or other parties who have speculated on a monumental award against Blixseth." *See also Wellman, supra,* 933 F.2d at 219 (Fourth Circuit denied recovery where the plaintiff/debtor "executed the non-recourse promissory notes to the creditors in an attempt to create a claim in the estate so that he could obtain a "massive surplus recovery" for himself in addition to the surplus distributed to him.").

39. The facts here are firmly aligned with cases dealing with recoveries under section 550(a) such as *Adelphia Recovery Trust v. Bank of America, N.A.,* 390 B.R. 80, 97 (S.D.N.Y. 2008), where the court found no benefit to the estate where all creditors were "paid in full with interest under the Plans and no creditors have been issued shares" in the Adelphia Recovery Trust. As noted, Mr. Terry did not receive the ownership interests in Acis in payment of his claim against the Acis estate (for which claim he received or will receive 102% of his claim amount); he purchased the debtor – Acis – for $1 million, and it is only Mr. Terry who would benefit, not Acis's creditors, employees (there are none) or prior equity holders. "Courts have consistently held that an avoidance action can only be pursued if there is some benefit to creditors and may not be pursued if it would only benefit the debtor." *Balaber-Strauss v.*

Harrison (In re Murphy), 331 B.R. at 122 (citing *Wellman*, *supra*, 933 F.2d at 218 (no recovery "when the result is to benefit only the debtor rather than the estate")).

40. Thus, under sections 548 and 550, "only net amounts diverted from, that is damages consequently suffered by the creditor body of, a debtor may be recovered via a fraudulent conveyance action." *In re Foxmeyer Corp*., 296 B.R. 327, 342 (Bankr. D. Del. 2003). To do otherwise is solely to benefit the debtor (or, as here, the debtor's purchaser). That is inappropriate under either federal or state fraudulent transfer laws, as discussed at length in *Murphy*, 331 B.R. at 124-25. As a Minnesota bankruptcy court explained:

> Whether there is a benefit to the estate depends on a case-by-case, fact-specific analysis. [ ] This is not the usual case in which an increase in dollars to the estate results in a patent benefit to the estate. In this case, the increase in dollars to the estate which would result from the requested relief would not provide a benefit to the estate. In this case, the trustee has advised that the amount on hand for distribution from the estate already exceeds the total amount of estimated administrative expenses and all claims. Thus, in this case, the only party to benefit from avoiding and recovering the Transfer would be the debtor.
>
> Such a benefit to the debtor would be inappropriate. The provisions of MUFTA "protect creditors rather than transferors of debt." *See Bartholomew v. Avalon Capital Group, Inc*., 828 F.Supp.2d 1019, 1025 (D. Minn. 2009). "Only creditors are entitled to remedies under the UFTA." *Id*., *citing* Minn. Stat. §§ 513.47, 513.48(b).

Running v. Dolan (In re Goodspeed), 535 B.R. 302, 315-16 (Bankr. D. Minn. 2015). Noting that trustees are the exception since they sue on behalf of creditors, the court observed that nonetheless there must be a benefit to creditors, citing and extensively quoting *Murphy* and *Wellman*, *supra*.

41. To permit any recovery under section 550(a) beyond the amount needed to pay creditors would create a new duty under state law. Acis's former equity holders, as its sole owners, had no duty under applicable state law *to Acis*, or anyone else other than creditors, to refrain from making the transfers at issue, nor did the Debtor or any of the other related entities or professionals who are now litigation targets have any right or obligation to stop them. Thus in a trustee's lawsuit against former partners of a debtor partnership, in which the trustee alleged in part that the partners had conspired to "set into motion a series of transactions that crippled [the debtor partnership]," the district court for the Southern District of Texas explained and held in part:

> Delaware law is clear that a company's sole owner cannot breach fiduciary duties "owed to the companies he wholly owned." *See Midland Food Services, LLC v. Castle Hill Holdings V, LLC*, 792 A.2d 920, n. 14 (Del. Ch. 1999) (citing *Goodman v. Futrovsky*, 42 Del. Ch. 468, 213 A.2d 899, 902 (1965) (the defendants could not defraud company since they "were the sole owners . . . and could do with it as they wished"), cert denied, 383 U.S. 946, 86 S. Ct. 1197, 16 L. Ed. 2d 209 (1966). ***Tow has not cited legal support for the proposition that a nonowner can be liable for conspiring with the sole owner of a partnership for breaching duties that the owner owes himself***.

Tow v. Amegy Bank N.A., 976 F. Supp. 2d 889, 906-07 (S.D. Tex. 2013) (emphasis added). *See also Newman v. Toy*, 926 S.W.2d 629, 631 (Tex. App.-Austin 1996, writ denied) ("A sole shareholder or all shareholders acting in agreement, being all the beneficial owners of corporate property, may themselves deal with such property so long as the rights of creditors are not prejudiced ...").

42. Accordingly, any recoveries of the transfers sought to be avoided in the Acis Claim should be limited to any amount needed to satisfy obligations under the Acis Plan, that is to say, to pay creditors and administrative claimants in full. No creditors have a stake in restoring Acis to the financial condition it occupied prior to any of the transfers that are the subject matter of the Acis Claim, at least not on account of any unpaid claims. Upon payment of creditors in full under the Acis Plan, therefore, all avoidance claims should be dismissed as moot, and the only thing stopping the avoidance claims from actually being moot is Mr. Terry's unwillingness to pay Acis's creditors with the cash at Acis.

D. Acis is Barred Under the *Bangor Punta* Doctrine From Asserting For Its Own Benefit All Claims Not Asserted Pre-Acquisition – Claims 1-8 and 21-34 – Excepting Only Claims Related to the ALF PMA Transfer (Claims 9-12), the ALF Share Transfer (Claims 13-16), and the Note Transfer (Claims 17-20)

43. In *Bangor Punta Operations, Inc. v. Bangor & A. R. Co*., 417 U.S. 703, 94 S. Ct. 2578, 2584-85 (1974); the Supreme Court held that a stockholder who has purchased all or substantially all of the shares of a corporation from a vendor at a fair price may not seek to have the acquired corporation recover against the vendor for prior corporate mismanagement and waste of corporate assets that may have occurred during the prior vendor's ownership. *Bangor Punta*, 417 U.S. at 710. "What the *Bangor Punta* Doctrine does prohibit is purchasers . . . from accepting their end of the bargain - - ownership and control of the corporation - - and attempting to sweeten their end of the deal by suing the seller to recover damages to the corporation allegedly caused by the seller before the sale. The *Bangor Punta* Doctrine properly prohibits as

inequitable such attempts at re-trading commercial transactions through litigation. *Midland Food Servs., LLC v. Castle Hill Holdings V, L.L.C.*, 792 A.2d 920, 933-34 (Del. Ch. 1999). The nature of the claim does not matter. *Id*. at 930.

44. The doctrine does not apply to claims brought for the benefit of creditors. *Bangor Punta*, 417 U.S. at 715 (rejecting argument that plaintiff-corporation should be entitled to recovery since any recovery would benefit the public where the plaintiff-corporation "would be entitled to distribute the recovery in any lawful manner it may choose"); *Wieboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, 508 (N.D. Ill. 1988) (permitting debtor in possession to assert breach of fiduciary claim but only to extent of creditor injury – "The creditors cannot receive a "windfall" recovery, but may recover only to the extent of their claims."). *Cf. Meyers v. Moody*, 693 F.2d 1196, 1207 (5th Cir. 1982) (*Bangor Punta* doctrine inapplicable to suit brought by receiver for benefit of creditors); *Think3 Litig. Tr. v. Zuccarello (In re Think3, Inc.)*, 529 B.R. 147, 185 (Bankr. W.D. Tex. 2015) (doctrine inapplicable where "Plaintiff Trust was created by a confirmed plan of reorganization in the Think3 bankruptcy case for the purpose of bringing suits for the benefit of creditors of insolvent Think3.").

45. The doctrine also does not apply to claims that were pending when the acquisition occurred. *Meyers v. Moody*, 693 F.2d at 1208 ("Moody is thus urging us to extinguish a cause of action that both existed and was pursued long before the transfer of Empire's assets took place. Neither law nor equity permits us to do so."); *TNS Media Research, LLC v. TiVo Research & Analytics, Inc*., 193 F. Supp. 3d 307, 312 (S.D.N.Y. 2016) ("Once

brought, a claim is not released merely and necessarily based on a change in corporate ownership.").

46. Mr. Terry agreed to purchase Acis's equity on July 5, 2018 and the Acis Plan was confirmed on January 1, 2019. The only claims pending at either time were those asserted by the Acis trustee in his counterclaim filed on July 2, 2018 (Acis Adversary No. 18-03078, at Docket No. 23). That counterclaim asserted only fraudulent transfer claims for (1) the ALF Share Transfer, (2) the ALF PMA Transfer, and (3) the Note Transfer (all as described below). Acis's amended complaint, asserting for the first time *all other claims* asserted in the Acis Claim, all of which relate to other transactions, was filed on ***June 20, 2019***. The *Bangor Punta* doctrine, therefore, bars all claims other than Claims 9-20.

E. Claims 5-8: Fraudulent Transfer Claims - Sub-Advisory Agreement Modifications

47. Claims 5 through 8 are claims to avoid as fraudulent transfers and recover unspecified damages based on modifications to the Sub-Advisory Agreement by and between Acis LP and the Debtor dated January 1, 2011. The modifications were made on July 29, 2016, and raised the Debtor's rates from 5 to 20 basis points. Those claims are: (5) for actual fraudulent transfer under section 548; (6) for actual fraudulent transfer under section 544(b) and Texas law; (7) for constructive fraudulent transfer under section 548; and (8) for constructive fraudulent transfer under section 544(b) and Texas law.

48. There are numerous bases on which Claims 5-8 can and should be disallowed entirely, some on a summary basis and others for which further factual development would be required, as follows:

a. As set forth above, Acis is not entitled to any recovery beyond that required to satisfy obligations under the Acis Plan. The Debtor believes this issue can be summarily adjudicated at this time.

b. The claims are barred by the *Bangor Punta* doctrine, which can be summarily adjudicated at this time.

c. In addition, the Debtor objects to these claims on the following grounds, which are not subject to summary adjudication at this time:

(1) Acis cannot meet its burden of proving insolvency at the time of the modifications. In fact, Acis clearly was solvent at that time. Expert testimony will be required on this issue.

(2) Acis received reasonably equivalent value for the modifications, in that the rates had been maintained at artificially low levels during Mr. Terry's tenure, and as modified represented reasonably equivalent value for the services rendered thereunder. In fact, the revised rates are similar to what Brigade is currently charging Acis.

(3) The modifications, which were made prior to the commencement of litigation and which had a legitimate purpose and justification, were not undertaken to hinder or defraud creditors.

(4) Acis has not alleged damages. The modifications gave rise to, at most, an avoidable *obligation*, not a *transfer*, and the obligation potentially subject to avoidance was rejected by

the Acis trustee and approved by an order of the Court. To the extent that Acis alleges that payments made at the modified rates were fraudulent transfers, the Debtor maintains, as alleged above, that the rates as modified constituted reasonably equivalent value for the services rendered.

(5) The Debtor will have a claim in the Acis Case under Bankruptcy Code § 502(h) with respect to any property recovered on account of this claim.

F. Claims 9-24: Acis Has Not Alleged Facts Sufficient to Show That the Debtor is the Entity for Whose Benefit the Transfers Were Made

49. Acis claims that with respect to each alleged avoidable transfer, the Debtor was either the initial transferee or the entity for whose benefit it was made, from which the property transferred or its value may be recovered under federal or state law.[13]

50. Acis concedes, as it must, that ***the Debtor was not the initial transferee of the transfers alleged in Claims 9 through 24***. As to those claims, Acis has failed to allege facts sufficient to establish, if proven, that the Debtor was "the entity for whose benefit such transfer was made." This defense can be summarily adjudicated at this time.

[13] Section 550(a) provides that with respect to a transfer that is avoided under sections 544, 545, 547, 548, 549, 553(b), or 724(a), "the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—(1) ***the initial transferee of such transfer or the entity for whose benefit such transfer was made***[.]" 11 U.S.C. § 550(a)(1). Texas law is similar. *See Citizens Nat'l Bank of Tex. v. NXS Constr., Inc.*, 387 S.W.2d 74, 79-80 (Tex. App. 2012) ("the creditor may obtain a monetary judgment against the transferee of the asset, the person for whose benefit the transfer was made, or subsequent transferees." (citing Tex. Bus. & Com. Code § 24.009(b)). Other than with respect to the sub-advisory agreement modifications, the Debtor is not alleged to have been either an immediate or subsequent transferee of any of the allegedly improper transfers, for purposes of Bankruptcy Code § 550(a) and Tex. Bus. & Com. Code § 24.009(b) (referencing the "first transferee" and "any subsequent transferee").

51. Specifically, Acis has not identified any specific, direct benefit to the Debtor from the fraudulent transfers alleged in Claims 9-24. It only alleges an indirect benefit to the Debtor from being part of the Highland corporate group. But any transaction by a corporate group member commonly has indirect benefits for other group members, which is why as a matter of law it is insufficient simply to allege an amorphous benefit for the Debtor to be deemed a beneficiary of the putative fraudulent transfers under § 550. *See, e.g., Faulkner v. Kornman (In re Heritage Org., LLC)*, 413 B.R. 438, 495-96 (Bankr. N.D. Tex. 2009) (Judge Houser) ("an unquantifiable advantage" is not a "benefit" for purposes of § 550(a); liability will not be imposed upon a party that allegedly benefitted from the fraudulent transfer just because defendant had controlled debtor-transferor and directed the transfer; "There is simply no showing that Kornman [who allegedly benefitted] received any benefit at all from the initial transfers."); *Peterson v. Hofmann (In re Delta Phones, Inc.)*, 2005 Bankr. LEXIS 2550, *16-*17 (Bankr. N.D. Ill. Dec. 23, 2005) ("That a shareholder holds some ownership interest in a corporation does not somehow mean that all transfers made to the corporation or by it are automatically made for the 'benefit' of the shareholder under § 550(a)(1). The 'entity' under § 550(a)(1) must benefit from the transfer 'directly,' not indirectly…. Taken to its logical conclusion, Peterson's position would put average investors on the hook for all kinds of corporate transactions any time a public company sought bankruptcy protection."); *see also In re Peregrine Fin. Group, Inc*., 589 B.R. 360 (Bankr. N.D. Ill. 2018) ("the [defendant] cannot be the transfer beneficiary if it will get the benefit of the funds sometime later"; "[T]he [defendant] received no direct benefit at the

time the transfer was made. It had only the right to benefit from the funds in the future after [certain fees were deducted, other requirements were met, and funds were still available].").

52. Accordingly, Reorganized Acis has not alleged facts sufficient to establish, even if proven, that the Debtor was "the entity for whose benefit such transfer was made" with respect to the transfers alleged in Claims 9-24.

G. Claims 9-12: Fraudulent Transfer Claims - ALF PMA Transfer

53. Acis alleges that its rights to direct and effectuate an optional redemption and otherwise control the assets of Acis Loan Funding Ltd. ("ALF"), pursuant to a Portfolio Services Agreement dated August 10, 2015, and a Portfolio Management Agreement dated December 22, 2016, by and between Acis and ALF (together, the "ALF PMA"), had value and were transferred for no value to Highland HCF Advisor in October 2017. The corresponding claims for relief are: (9) actual fraudulent transfer under section 548; (10) actual fraudulent transfer under section 544(b) and Texas law; (11) constructive fraudulent transfer under section 548; and (12) constructive fraudulent transfer under section 544(b) and Texas law. Acis seeks to avoid the transfer and recover unspecified damages.

54. ***Acis fails to address the fact that it has been exercising the rights that it alleges were transferred and has been deriving earnings under the ALF PMA since the preliminary and plan injunctions were issued in the Acis Case, in an amount sufficient to satisfy all claims against it***. That is, the alleged transfers had no economic effect as Acis retained all rights under the contracts. Accordingly, the Debtor objects on the following bases to Claims 9-12:

a. As set forth above, Acis is not entitled to any recovery beyond that required to satisfy obligations under the Acis Plan. The Debtor believes this issue can be summarily adjudicated at this time.

b. As set forth above, the Debtor was not the transferee of the ALF PMA Transfer and an insufficient factual basis is alleged to conclude that it was the entity for whose benefit the transfer was made. The Debtor believes this issue can be summarily adjudicated at this time.

c. In addition, the Debtor objects to these claims on the following grounds, which are not subject to summary adjudication at this time:

(1) Acis cannot meet its burden of proving insolvency at the time of the transfer. Expert testimony will be required on this issue.

(2) Acis received reasonably equivalent value for the transfer.

(3) The transfer had a legitimate purpose and justification, and was not undertaken to hinder or defraud creditors.

(4) Acis has not alleged damages. In fact, Acis has continued to exercise rights and derive earnings under the ALF PMA pursuant to injunctive relief granted in the Acis Case.

(5) The Debtor will have a claim in the Acis Case under Bankruptcy Code § 502(h) with respect to any property recovered on account of this claim.

H. Claims 13-16: Fraudulent Transfer Claims - ALF Share Transfer

55. Acis alleges that on October 24, 2017, Acis and CLO Holdco Ltd. entered into a resolution whereby Acis sold its equity interest in ALF (the "ALF Share Transfer") to Highland Funding for $991,000. The 13th through 16th claims for relief are: (13) actual fraudulent transfer under section 548; (14) actual fraudulent transfer under section 544(b) and Texas law; (15) constructive fraudulent transfer under section 548; and (16) constructive fraudulent transfer under section 544(b) and Texas law. Acis seeks to avoid the ALF Share Transfer and recover unspecified damages.

56. The Debtor submits that there are numerous bases for disallowance of Claims 13-16 in the entirety:

a. As set forth above, Acis is not entitled to any recovery beyond that required to satisfy obligations under the Acis Plan. The Debtor believes this issue can be summarily adjudicated at this time.

b. As set forth above, the Debtor was not the transferee and an insufficient factual basis is alleged to conclude that it was the entity for whose benefit the transfer was made. The Debtor believes this issue can be summarily adjudicated at this time.

c. In addition, the Debtor objects to these claims on the following grounds, which are not subject to summary adjudication at this time:

(1) Acis cannot meet its burden of proving insolvency at the time of the transfer. Expert testimony will be required on this issue.

(2) Acis received reasonably equivalent value for the transfer, as the repurchase price was at their net asset value.

(3) The transfer had a legitimate purpose and justification, and was not undertaken to hinder or defraud creditors.

(4) Acis has not alleged damages. In fact, Acis has continued to control and derive earnings from these assets by means of the ALF PMA pursuant to injunctive relief granted in the Acis Case.

(5) The Debtor will have a claim in the Acis Case under Bankruptcy Code § 502(h) with respect to any property recovered on account of this claim.

I. Claims 17-20: Fraudulent Transfer Claims – Note Transfer

57. Acis alleges that on November 3, 2017, Acis LP, the Debtor, and Highland Management (a Debtor affiliate) entered into an *Agreement for Assignment and Transfer of Promissory Note* (the "Note Transfer Agreement"), by which Acis transferred a $9.5 million promissory note owed by the Debtor to Acis (the "Note") to Highland CLO Management for no material value. Based thereon it pleads the 17th through 20th claims for relief: (17) actual fraudulent transfer under section 548; (18) actual fraudulent transfer under section 544(b) and Texas law; (19) constructive fraudulent transfer under section 548; and (20) constructive fraudulent transfer under section 544(b) and Texas law. Acis seeks to avoid the transfer and recover unspecified damages.

58. Not only did the Debtor not receive the Note, it remains liable! For this and other reasons, the Debtor objects to Claims 17-20 on the following bases:

a. Since the Debtor did not receive the Note, and indeed remains liable on the Note, it is certainly not the entity for whose benefit it was made. This issue can be summarily adjudicated at this time.

b. As set forth above, Acis is not entitled to any recovery beyond that required to satisfy obligations under the Acis Plan. This issue can be summarily adjudicated at this time.

c. In addition, the Debtor objects to these claims on the following grounds, which are not subject to summary adjudication at this time:

(1) Acis cannot meet its burden of proving insolvency at the time of the transfer. Expert testimony will be required on this issue.

(2) Acis received reasonably equivalent value for the transfer.

(3) The transfer had a legitimate purpose and justification, and was not undertaken to hinder or defraud creditors.

(4) Acis has not alleged damages.

(5) The Debtor will have a claim in the Acis Case under Bankruptcy Code § 502(h) with respect to any property recovered on account of this claim.

J. Claims 21-24: Fraudulent Transfer Claims – Acis CLO 2017-7 Agreement

59. Acis alleges that on December 19, 2017, it entered into an *Agreement for Assignment and Transfer* (the "CLO 2017-7 Agreement") by which it transferred its interests in sub-advisory and services agreements relating to Acis CLO 2017-7, by which it derived fees, to

Highland CLO Holdings (a Debtor affiliate) for no consideration, and also its indirect equity interests in the underlying CLO (the "2017-7 Equity") in exchange for the forgiveness of $2.8 million payable owed by Acis to the Debtor. Based thereon Acis pleads the 21st through 24th claims for relief: (21) actual fraudulent transfer under section 548; (22) actual fraudulent transfer under section 544(b) and Texas law; (23) constructive fraudulent transfer under section 548; and (24) constructive fraudulent transfer under section 544(b) and Texas law. Acis seeks to avoid the transfer and recover unspecified damages.

60. The Debtor submits that Claims 21-24 can and should be disallowed on the following bases:

a. As set forth above, Acis is not entitled to any recovery beyond that required to satisfy obligations under the Acis Plan. This issue can be summarily adjudicated at this time.

b. As set forth above, the Debtor was not the transferee and an insufficient factual basis is alleged for a conclusion that it was the entity for whose benefit the transfer was made. This issue can be summarily adjudicated at this time.

c. The claims are barred by the *Bangor Punta* doctrine, which can be summarily adjudicated at this time.

d. In addition, the Debtor objects to these claims on the following grounds, which are not subject to summary adjudication at this time:

(1) Acis cannot meet its burden of proving insolvency at the time of the transfer. Expert testimony will be required on this issue.

(2) The Debtor did not receive any benefit from the transfer and so is not the entity for whose benefit the transfer was made.

(3) Acis received reasonably equivalent value for the transfer.

(4) The transfer had a legitimate purpose and justification, and was not undertaken to hinder or defraud creditors.

(5) Acis has not alleged damages.

(6) The Debtor will have a claim in the Acis Case under Bankruptcy Code § 502(h) with respect to any property recovered on account of this claim.

K. Claim 25: Preferences

61. Acis alleges that within one year of the Petition Date, the Debtor received payments of totaling $16,113,790.14 from Acis on account of purported debt claims owed by Acis, comprised of approximately $7.3 million pursuant to the Shared Services Agreement and Sub-Advisory Agreement (the "Service Payments"), over $5 million pursuant to an October 2016 Participation Purchase Agreement (the "Participation Payments"), approximately $3.3 million in promissory note repayments (the "Note Payments"), and approximately $118,000 for miscellaneous expense reimbursements ("Expenses").

62. Acis's 25th claim for relief alleges that if such transfers are not otherwise recoverable, they may be avoided and recovered as preferences under Bankruptcy Code § 547 and Texas Business and Commerce Code §§ 24.006(b) and recovered under Bankruptcy Code § 550. Acis also alleges that the 2017-7 Equity Transfer and the Note Transfer, to the extent they satisfied legitimate obligations, are avoidable as preferences.

63. Setting aside the many statutory defenses to these claims set forth below, the fact that Acis creditors are being paid in full is fatal to the preference claim. Acis tries to sidestep one consequence by asserting that whether a creditor would receive more in liquidation is measured as of the petition date. But there are at least two other consequences. One, as discussed, is that Acis cannot recover damages for its own benefit, once creditors are paid. The other is that the Debtor would receive on account of any preference recovery a general unsecured claim under the Acis Plan under Bankruptcy Code § 502(h), which would offset any liability ***in full***. The Debtor objects to Claim 25 on those bases and others, as follows:

a. As set forth above, Acis is not entitled to any recovery under section 550(a) on the alleged preferences beyond that required to satisfy obligations under the Acis Plan. This issue can be summarily adjudicated at this time.

b. The claims are barred by the *Bangor Punta* doctrine, which can be summarily adjudicated at this time.

c. Acis has not alleged a factual basis for its allegation that it was insolvent at the time of the transfers. This is a pleading requirement.

d. Acis has not alleged the existence of antecedent debts, also a pleading requirement.

e. In addition, the Debtor objects to this claim on the following grounds, which are not subject to summary adjudication at this time:

(1) Acis cannot meet its burden of proving insolvency at the time of the transfers. Expert testimony will be required on this issue.

(2) Acis cannot meet its burden of proving that each transfer enabled the Debtor to receive more than it would have received in a hypothetical chapter 7 liquidation.

(3) The Debtor will have a claim in the Acis Case under Bankruptcy Code § 502(h) with respect to any property recovered on account of this claim.

(4) Within the meaning of section 547(c)(1), each alleged transfer was intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and was in fact a substantially contemporaneous exchange, including without limitation all Service Payments and Expenses.

(5) Within the meaning of section 547(c)(2), each alleged transfer was made in the ordinary course of business or financial affairs of the debtor and the transferee; or made according to ordinary business terms, including without

limitation all Service Payments, all payments under Participation Payments, all Note Payments, and all Expenses.

(6) Within the meaning of section 547(c)(4), each alleged transfer was made to or for the benefit of a creditor, to the extent that, after each such transfer, such creditor gave new value to or for the benefit of the debtor—(A) not secured by an otherwise unavoidable security interest; and (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor, including without limitation all Service Payments, Participation Payments, and Expenses.

(7) Participation Payments were received as a mere conduit.

(8) Any recovery on account of the alleged preferences would be offset by a corresponding general unsecured claim under the Acis Plan under Bankruptcy Code § 502(h).

L. Claim 26: Liability Under Section 550(a)

64. Acis alleges that the Debtor is the initial transferee within the meaning of Bankruptcy Code § 550(a) of all transfers sought to be avoided in Counts 5 – 8 and 25, and that it is the entity for whose benefit the transfers were made with respect to the transfers sought to be avoided in Counts 9-24.

a. Claim 26 can and should be disallowed in its entirety, on a summary basis. First, by operation of the statute, there is no liability under section 550 if no

transfers are avoided. Second, as discussed in Section E above, Acis concedes the Debtor was not the initial transferee of the transfers alleged in Claims 9 through 24, and it has not alleged facts sufficient to establish, if proven, that the Debtor was "the entity for whose benefit such transfer was made." Specifically, it has not identified any specific, direct benefit to the Debtor from the fraudulent transfers alleged in Claims 9-24. It only posits an indirect benefit from being part of the Highland corporate group, which is inadequate to establish that an entity is the entity for whose benefit a transfer was made. Finally, all claims other than Claims 9-20 are barred by the *Bangor Punta* doctrine.

M. Claim 27: Civil Conspiracy to Commit Fraud, Including Fraudulent Transfers

65. Acis alleges that the Debtor, Highland Advisor, Highland Management, and Highland Holdings formed a conspiracy to "engage in a series of fraudulent transfers and other fraudulent schemes, including the ALF PMA Transfer, the ALF Share Transfer, the Note Transfer, the 2017-7 Equity transfer, the 2017-7 Agreements transfer and the thwarted Universal/BVK Agreement transfer in order to denude Acis's assets and take over Acis LP's valuable business." Acis Claim, ¶ 246.

66. This claim fails as a matter of law, and can be adjudicated at this time. It is an impermissible end-around section 550's remedial provisions, and the inconvenient fact that the Debtor did not receive a cognizable benefit thereunder with respect to most of the fraudulent transfer claims. Section 550 provides the exclusive remedy for fraudulent transfers. Partly for that reason, there is simply no substantive legal basis for the sinister allegations of "unlawful, overt acts" to "take over Acis LP's valuable business" upon which the "conspiracy" is

predicated. As discussed above, the law is crystal clear that Acis's equity holders had no duty to Acis ***not*** to 'take over its valuable business' and nobody had a duty to stop them from doing so, as the Southern District of Texas court discussed thoroughly in *Tow v. Amegy Bank N.A.*, *supra*, 976 F. Supp. 2d at 906-07. They owned all of it! The only thing they could not do is transfer assets without adequate consideration if Acis were insolvent. For that, there are statutory remedies prescribed by sections 548 and 550.

67. That is why no claim for conspiracy to commit an actual or constructive fraudulent transfer (or for "aiding and abetting") exists under Texas or federal law. *Tow v. Bulmahn*, No. 15-3141, 2016 U.S. Dist. LEXIS 57396, at *91 (E.D. La. Apr. 29, 2016). *See Mack v. Newton*, 737 F.2d 1343, 1357 (5th Cir. 1984) ("[T]he general rule under the Bankruptcy Act is that one who did not actually receive any of the property fraudulently transferred (or any part of a 'preference') will not be liable for its value, even though he may have participated or conspired in the making of the fraudulent transfer (or preference)."); *Schlossberg v. Abell (In re Abell)*, 549 B.R. 631, 667 (Bankr. D. Md. 2016). A party may not be liable for more than it actually received. *D.A.N. Joint Venture III, L.P. v. Touris*, No. 18-cv-349, 2020 U.S. Dist. LEXIS 51407, at *25-26 (N.D. Ill. Mar. 25, 2020) ("Numerous courts have held that the bankruptcy court cannot invoke state law remedies to circumvent or undermine the remedy legislated by Congress for the avoidance of a fraudulent transfer . . . . [T]he trustee's remedy for an avoided transfer [is] provided for in § 550, and that provision only allows a trustee to recover up to the amount of the transfer.") (citations omitted). Allowing a trustee to recover more than the amount of the transfer would "lead to a result that expands the remedies [for a fraudulent

transfer] beyond §550." *Sherman v. FSC Realty LLC (In re Brentwood-Lexford Partners, LLC*), 292 B.R. 255, 275 (Bankr. N.D. Tex. 2003).

68. This Court recognized but distinguished *Mack* in *Milbank v. Holmes (In re TOCFHBI, Inc.)*, 413 B.R. 523, 535 (Bankr. N.D. Tex. 2009):

> [W]hile it is perfectly true that "the general rule under [the Bankruptcy Code or the old Act] is that one who did not actually receive any of the property fraudulently transferred (or any part of a 'preference') will not be liable for its value, even though he may have participated or conspired in the making of the fraudulent transfer (or preference)," (*Mack v. Newton,* 737 F.2d at 1357), the Chapter 7 Trustee, in this case, is not moving under the fraudulent transfer statute and arguing something amazingly similar such as "conversion" and "conspiracy" regarding the same acts--and, in the process, joining Defendants who would not normally have liability under the relevant fraudulent transfer statutes.

Id. at 535-36. "). The Court recognized that "liability [under most states' uniform fraudulent transfer acts] cannot be imposed on non-transferees under aiding and abetting or conspiracy theories[.]" *Id*. (citation omitted). Accordingly, the claim should be disallowed.

69. Further, this claim is barred by the *in pari delicto* defense, as discussed below in the discussion of the Thirtieth Claim for Breach of Fiduciary Duty. Acis was by its own allegations an instrumentality of Dondero, who allegedly used it to perpetrate the "scheme" characterized in the Acis Complaint. The trustee was, and Reorganized Acis is, subject to all defenses that existed against Acis. Any claim by Acis against its alleged co-conspirators would be barred by *in pari delicto*, as Acis was at least equally culpable in all of the conduct it alleges.

70. Finally, the claim is barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry, the acts occurred prior to Mr. Terry's acquisition of

the company, and this claim was not asserted in the Acis trustee's counterclaim that was pending when Mr. Terry acquired the company.

N. Claim 28: Tortious Interference with the Universal/BVK Agreement

71. Acis alleges that the Debtor tortiously interfered with its rights by seeking to replace it as manager under the Agreement for the Outsourcing of Asset Management between Acis LP and Universal-Investment-Luxembourg S.A. by which Acis provided sub-advisory services for a German fund (the "Universal/BVK agreement"), before and after the Debtor's sub-advisory services were terminated on August 1, 2018.

72. Claim 28 can and should be summarily disallowed, as there is no factual dispute on several critical issues: (1) this was an at-will contract; (2) the Debtor had no duty not to compete; and (3) no damages were sustained, as the contract was not terminated and all attorneys' fees have been paid, in fact, with money diverted from the Debtor.

73. Under Texas law, a claim for tortious interference with contract has four elements: (1) a contract subject to the alleged interference exists; (2) the alleged act of interference was willful and intentional; (3) the willful and intentional act proximately caused damage; and (4) actual damage or loss occurred. *Victoria Bank & Trust Co. v. Brady*, 811 S.W.2d 931, 939 (Tex.1991). Those requirements are not met on the undisputed facts.

74. The Universal/BVK agreement was an at-will contract. "Ordinarily, merely inducing a contract obligor to do what it has a right to do is not actionable interference." *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997). A defendant cannot tortiously interfere with a contract that permits the non-plaintiff contracting party to terminate

the agreement, where the defendant's actions constitute justifiable competition. *See, e.g., C.E. Servs. Inc. v. Control Data Corp*., 759 F.2d 1241, 1248 (5th Cir. 1985); *West Tex. Gas v. 297 Gas Co*., 864 S.W.2d 681, 686 (Tex. App. 1993) (competitor had legal right to persuade company to exercise its right to terminate at-will natural gas sale/purchase agreement with plaintiff). "[A] legal justification or excuse, which is treated as a type of privilege, is an affirmative defense to a claim of tortious interference…. Interference with a contractual relationship is privileged where it results from the bona fide exercise of a party's own rights."; "North Texas had the legal right to persuade or attempt to persuade 297 to exercise its right to terminate the 1988 agreement and to contract with it." *Id*.

75. Once again, until displaced, Acis's owners had every right to do as they wished with the Universal/BVK Agreement, subject to creditor rights but not subject to any duty *to Acis* to refrain from doing so, and the Debtor had no duty to say otherwise. After the Debtor was terminated, it had a right as a competitor to attempt to win back its business. The contention that it should have stopped after the Acis bankruptcy petition is the subject of a different claim. Further, "[t]he alleged interference generally must have induced a breach of the contract to be actionable." *Official Brands, Inc. v. Roc Nation Sports, LLC*, 2015 U.S. Dist. LEXIS 167320, at *7 (N.D. Tex. Dec. 15, 2015). Here, that is not even alleged to have occurred.

76. Further, no damages were sustained. The contract was not terminated, and to the extent the alleged damages are administrative expenses incurred in the Acis case, not only have they been paid, they have been paid by the Debtor by virtue of the earnings derived from the enjoined putative transfer of the ALF PMA.

77. Finally, the claim is barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and all acts occurred prior to Mr. Terry's acquisition of the company.

78. Accordingly, no claim for tortious interference has been stated, and the claim is barred in any event, and so it should be disallowed.

O. Claim 29: Breach of the Sub-Advisory Agreement and Shared Services Agreement

79. Acis claims that the Debtor breached these agreements by failing to purchase and attempting only to sell loans for the CLOs, in order to liquidate Acis for the benefit of the Debtor and the detriment of Acis. This claim should be dismissed.

80. The Debtor met its standard of care but, moreover, there is a more fundamental fallacy that is instantly fatal to this claim. As discussed, here and throughout the Acis Claim, Acis sets up a fictional jurisprudential world in which it, by virtue of its existence as a legal entity, had interests that contracting parties or managers or professionals were required to identify and protect, rather than acting as instructed by Acis's owners. It did not and they did not. The Debtor was entitled to take directions from Acis's owners. Put differently, there is no allegation whatsoever that Acis did not want the Debtor to do exactly what it did. *Ipso facto*, the Debtor did not breach the contract. The claim must be dismissed.

81. Finally, the claim is barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and all acts occurred prior to Mr. Terry's acquisition of the company.

P. Claim 30: Breach of Fiduciary Duty

82. Acis claims that the Debtor owed it a fiduciary duty pursuant to the Sub-Advisory Agreement as its investment adviser, and that it breached that fiduciary duty by acting in a manner detrimental to Acis by increasing its fees under the Sub-Advisory Agreement, charging over-market rates in excess of the compensation limits of the Acis LPA, and being the "ringleader" and ultimate beneficiary of schemes to render Acis judgment-proof by transferring the ALF PMA, the ALF Shares, the Note, the 2017-7 Equity and the 2017-7 Agreements. Acis makes no damage allegations but seeks punitive damages.

83. This claim can and should be summarily disallowed. ***First, the duty to Acis was contractual, not fiduciary***. The Debtor as portfolio manager had fiduciary duties ***to investors*** in the CLOs, but its duties to Acis were governed by the Shared Services Agreement which, construed with the Sub-Advisory Agreement, provides that the Debtor was an independent contractor with only a contractual obligation to act with reasonable care and no other obligations or duties.

84. ***Second, regardless***, even if the Debtor had a fiduciary duty to Acis, it could not and did not violate that fiduciary duty by following directions from Acis's sole owners. As discussed in the authorities and analysis above, such a claim is a legal impossibility. At all relevant times, Acis was by its allegations controlled and principally owned by Dondero and Okada, along with all of the other Highland related entities. It is hornbook law that sole owners do not have a fiduciary duty to their company; they could transfer away its assets without violating any duty to their company. How, then, would advisors and employees and

professionals go about protecting the interests of an entity such as Acis against the "ravages" of an owner such as Dondero, who had no such duty? The owners had a right, subject to fraudulent transfer laws, to direct Acis and transfer assets as desired. Acis did not, simply by virtue of its existence alone, have interests distinct from its owners' interests that its fiduciaries were obligated to somehow identify and protect against the designs of its sole owners. No duty *to Acis* could be or was breached by following its owners' directions.

85. ***Third, any fiduciary duty claim is barred by the in pari delicto defense***:

> The equitable defense of *in pari delicto*, which means 'in equal fault,' is based on the common law notion that a plaintiff's recovery may be barred by his own wrongful conduct." *Howard v. Fidelity and Deposit Co. of Maryland, (In re Royale Airlines, Inc.)*, 98 F.3d 852, 855 (5th Cir. 1996). "Two fundamental premises underlie this defense: (1) that courts should not lend their good offices to mediating disputes among wrongdoers; and (2) that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality." *Murray v. Royal Alliance Assocs*., 375 B.R. 208, 213 (M.D. La. 2007).

Milbank v. Holmes (In re TOCFHBI, Inc.), 413 B.R. 523, 536-37 (Bankr. N.D. Tex. 2009). While this Court denied summary judgment on the defense in *Milbank* (*id.* at 537), the defense can be applied on the face of the pleadings when it is apparent that it applies. *Brickley v. ScanTech Identification Beams Sys., LLC*, 566 B.R. 815, 842-43 (W.D. Tex. 2017) ("In sum, because applicability of the *in pari delicto* defense to parts of the trustee's breach of fiduciary duty claim is apparent on the face of the Complaint, the Court will dismiss … the claims that the Stolzar defendants breached their fiduciary duties by assisting Barra and Vitale in their efforts to fraudulently obtain shareholder capital and debt financing, by counseling and providing legal

services assisting Barra, Vitale, and Shaw in the usurpation of corporate assets and corporate opportunities, and by aiding in the execution of the fraudulent loan agreement.").

86. Here, it is apparent from the face of the Acis Claim that to the extent that the "scheme" of which Acis complains was orchestrated by Dondero in violation of fiduciary duties, Acis had every bit as much culpability as the Debtor or any of the other commonly controlled entities; after all, according to Acis, the same person was making the decisions for all of them. Acis is simply assuming the Court will not hold the *delicto* of "old Acis" against Reorganized Acis.

87. While the assertion of *in pari delicto* against a trustee or reorganized debtor is not a settled issue in the Fifth Circuit, it is in most others. In *Milbank*, in 2009, this Court stated: "Some courts have found that the defense may be asserted against a bankruptcy trustee, as he stands in the shoes of a debtor who may have, through its officers and directors, perpetrated bad acts. The Fifth Circuit has not addressed this issue." The Court determined that it should "consider how the facts and equities of the individual case interact with the policy in pari delicto was designed to serve," which it found presented factual issues that could not be resolved on summary judgment. *Milbank*, 413 B.R. at 537 (internal citations omitted).

88. Subsequently, however, in 2012, in refusing to apply *in pari delicto* to a receiver, the Fifth Circuit specified that cases under the Bankruptcy Code were distinguishable because of federal law (Bankruptcy Code § 541) subjecting a trustee to whatever defenses existed against the debtor as of the petition date.

> These cases, however, are plainly distinguishable because they rely upon Section 541(a) of the Bankruptcy Code, which limits the debtor estate to interests of the debtor "as of the commencement of the case." 11 U.S.C. § 541(a)(1); *see, e.g., Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1150 (11th Cir. 2006) ("If a claim of [debtor] would have been subject to the defense of in pari delicto at the commencement of the bankruptcy, then the same claim, when asserted by the trustee, is subject to the same affirmative defense.") (internal quotation marks and citations omitted); *Official Comm. of Unsecured Creditors of R.F. Lafferty & Co., v. R.F. Lafferty & Co., Inc*., 267 F.3d 340, 356 (3d Cir. 2001) ("[T]he application of the in pari delicto doctrine is affected by the rules governing bankruptcies. . . . [T]he explicit language of section 541 directs courts to evaluate defenses as they existed at the commencement of the bankruptcy."); *Matter of Pernie Bailey Drilling Co., Inc*., 993 F.2d 67, 70 (5th Cir. 1993) (noting that bankruptcy trustee stood in pari delicto); *see also In re Hedged-Invs. Assocs., Inc*., 84 F.3d 1281, 1285 (10th Cir. 1996) ("Though the Seventh Circuit's reasoning in Scholes enjoys a certain appeal, both from doctrinal and public policy perspectives, we cannot adopt it in this case. Put most simply, Mr. Sender is a bankruptcy trustee acting under 11 U.S.C. § 541, and bankruptcy law, apparently unlike the law of receivership, expressly prohibits [application of Scholes]."). We therefore are not persuaded by Wells Fargo's analogy to bankruptcy trustees.

Jones v. Wells Fargo Bank, N.A., 666 F.3d 955, 967-68 (5th Cir. 2012).

89. So although the Fifth Circuit has not addressed the issue directly, courts have predicted it will follow the majority rule, and ruled accordingly, as in this 2019 Western District of Texas decision:

> It is an open question in the Fifth Circuit whether *in pari delicto* can be asserted as a defense to claims made by a trustee in a bankruptcy case. *In re Today's Destiny, Inc*., 888 B.R. 737, 747 (Bankr. S.D. Tex. 2008). The majority of sister Circuits do apply the *in pari delicto defense* to claims made by trustees, however, and this Court has no reason to believe that the Fifth Circuit would depart from that majority. *See, e.g., Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1151 (11th Cir. 2006) ("If a claim . . . would have been subject to the defense of in pari delicto at the commencement of the bankruptcy, then the same

> claim, when asserted by the trustee, is subject to the same affirmative defense.") (*citing Grassmueck v. Am. Shorthorn Ass'n*., 402 F.3d 833, 837 (8th Cir. 2005); *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co*., 267 F.3d 340, 356-57 (3rd Cir. 2001); *Terlecky v. Hurd (In re Dublin Sec. Inc.*), 133 F.3d 377, 381 (6th Cir. 1997); *Sender v. Buchanan (In re Hedged— [*17] Inv. Assocs*.), 84 F.3d 1281, 1285 (10th Cir. 1996); *Official Comm. of Unsecured Creditors of Color Tile v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158-66 (2nd Cir. 2003)). Accordingly, the Court will consider the in pari delicto defense raised by Broadway.

Osherow v. York, No. 5:17-CV-483-DAE, 2019 U.S. Dist. LEXIS 200382, at *16-17 (W.D. Tex. Aug. 5, 2019).

90. Even if, as in *Milbank*, the Court were to consider the particular facts and equities of this case, as in *Milbank*, *supra*, there should be only one possible conclusion on the facts of this case, and there are no additional facts that could change it: the equities favor the Debtor's creditors over a windfall to Mr. Terry, who paid $1 million presumably on the basis of expected earnings and not tens of millions of dollars of litigation recoveries (or even if the latter, Acis (Mr. Terry) is still not entitled to a speculator's ransom at the expense of innocent creditors). No amount of factual development can or will change that conclusion.

91. Finally, no duty can be bootstrapped from the rights of Acis's (former) creditors, who will not only be paid in full but who had no such right: ***under Delaware law, creditors of a limited partnership cannot sue third parties for breach of fiduciary duty, even derivatively, nor can a trustee sue for them***. "The claim for breach of fiduciary duties owed to the creditors fails because the Trustee does not allege that the creditors are assignees or members of the Debtors' LLCs. The creditors of the Debtors' LLC thus lack standing to sue the LLC or its members and directors for breaches of fiduciary duties. ***The Trustee does not have standing to***

sue on behalf of the creditors who themselves have no standing." *Beskrone v. OpenGate Capital Grp. (In re Pennysaver USA Publ'g, LLC)*, 587 B.R. 445, 467 (Bankr. D. Del. 2018) (emphasis added). The analysis and result is the same for limited partnerships. *Gavin/Solmonese LLC v. Citadel Energy Partners, LLC (In re Citadel Watford City Disposal Partners, L.P.),* 603 B.R. 897, 905 (Bankr. D. Del. 2019) ("Given the similarity of the relevant statutory language of the Delaware Limited Liability Company Act to that of the Delaware LP Act, the result here should be no different for limited partnerships.").

92. Finally, the claim is barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and all acts occurred prior to Mr. Terry's acquisition of the company.

Q. Claim 31: Punitive Damages

93. Acis seeks punitive damages to the extent permitted by law. But, to start, there is no right to recover punitive damages under either federal or state fraudulent transfer laws:

> Section 550 does not provide for the recovery of exemplary damages. The trustee has recovered under Texas fraudulent conveyance laws. Under Texas law, exemplary damages are available if the plaintiff has in fact sustained actual loss or injury. *Mack v. Newton,* 737 F.2d 1343, 1367 (5th Cir. 1984). However, as concluded above, the court cannot invoke state law remedies to circumvent or undermine the specific remedy legislated by Congress for the avoidance of a fraudulent transfer.

Sherman v. FSC Realty LLC (In re Brentwood-Lexford Partners, LLC), 292 B.R. 255, 275 (Bankr. N.D. Tex. 2003). *See also Schlossberg v. Abell (In re Abell)*, 549 B.R. 631, 667 (Bankr.

D. Md. 2016); *Hyundai Translead, Inc. v. Jackson Truck & Trailer Repair Inc.*, 419 B.R. 749, 760 (M.D. Tenn. 2009); *In re Lexington Oil and Gas Ltd., Co.*, 423 B.R. 353, 376 (Bankr. E.D. Okla. 2010); *Tronox Inc. v. Anadarko Petroleum Corp. (In re Tronox Inc.)*, 429 B.R. 73, 111 (Bankr. S.D.N.Y. 2010) ("Persuasive authority holds that § 550 bars punitive damages notwithstanding their possible availability under state law.").

94. As set forth herein, Acis's state law claims can and should be summarily disallowed, which ends any issue concerning punitive damages.

95. Texas law permits punitive damages only if the plaintiff has in fact sustained actual loss on its substantive counts. *See, e.g., Sherman*, 292 B.R. at 255 (plaintiff could not recover exemplary damages since he did not recover any judgment for breach of fiduciary duty or other applicable cause of action).[14] The claimant must prove by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud[15]; (2) malice[16]; or (3) gross negligence.[17] Tex. Civ. Prac. & Rem. Code § 41.003(a). Acis cannot sustain this burden, nor would such an award be supported under the relevant factors.[18]

[14] Texas law caps punitive damages at the greater of (1) two times economic damages plus an amount equal to noncompensatory damages found by a jury not in excess of $750,000, or (2) $200,000. Tex. Civ. Prac. & Rem. Code § 41.008(b).
[15] Constructive fraud does not count. Tex. Civ. Prac. & Rem. Code § 41.001(6).
[16] "Malice" means "a specific intent by the defendant to cause substantial injury or harm to the claimant." Tex. Civ. Prac. & Rem. Code § 41.001(7).
[17] "Gross negligence" means "an act or omission: (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others." Tex. Civ. Prac. & Rem. Code § 41.001(11).
[18] "The Court weighs the following six factors in determining the reasonableness of an award: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant." *In re Galaz,* 2015 Bankr. LEXIS 229, at *30 (Bankr. W.D. Tex. Jan. 23, 2015) (citing Tex. Civ. Prac. & Rem. Code § 41.011(a)).

96. Finally, any claim for punitive damages is barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and was not asserted prior to Mr. Terry's acquisition of the company.

R. Claim 32: Alter Ego Liability

97. Acis does not adequately allege a claim for alter ego, even if it was a "claim," which it is not; it is only a means of imposing liability for an underlying cause of action. *NMRO Holdings, LLC v. Williams*, 2017 Tex. App. LEXIS 9939, *6 (Tex. App. Oct. 24, 2017). Its allegations of common control by Mr. Dondero are insufficient as a matter of pleading and substantively.

98. Acis alleges that the Debtor, Highland Funding, Highland Adviser, Highland Management, and Highland Holdings (the "Alter Egos") are all controlled by Mr. Dondero, and "[e]ach of the Alter Egos should be held liable for any damages awarded under any Count in this Second Amended Complaint, as each is the alter ego of the others." It also requests that the ALF PMA Transfer, the ALF Share Transfer, the Note Transfer, and the transfer of the 2017-7 Equity and the 2017-7 Agreements be "collapsed" and treated as a scheme by which the Debtor would take over Acis's business. Although it is unclear, Acis appears to also assert under this rubric a claim for unjust enrichment, and requests that "[e]ach of the Highlands, and in particular Highland Capital and Highland Funding, benefitted from the ALF PMA Transfer, the ALF Share Transfer, the Note Transfer, and the transfer of the 2017-7 Equity and the 2017-7 Agreements even if they were not the direct transferee. Each of the Highlands should

be held liable for benefits unjustly received and make restitution to the Debtors and their estates for those benefits." Acis Claim ¶ 280.

99. Texas law applies the alter ego rules of the state of incorporation or formation. *See, e.g., In re The Heritage Org., LLC*, 413 B.R. 438, 510 (Bankr. N.D. Tex. 2009); *The Richards Group, Inc. v. Brock*, 2008 U.S. Dist. LEXIS 55139 (N.D. Tex. July 18, 2008). The analyses are often similar. *See, e.g., Sell v. Universal Surveillance Sys., LLC*, 2017 U.S. Dist. LEXIS 219898, at *5 (W.D. Tex. July 6, 2017) (observing that the analyses undertaken by Texas courts, federal courts, and Delaware courts are similar and focus on whether the defendant abused the corporate form).

100. What Acis is essentially alleging is "single enterprise" liability based on common control by Mr. Dondero. Delaware has never recognized the "single business enterprise" theory of alter ego liability, and it was rejected under Texas law by the Texas Supreme Court in *SSP Partners v. Gladstone Invs. Corp.*, 275 S.W.3d 444, 452-54 (Tex. 2008).

101. *SSP Partners* is instructive in rejecting allegations of common control as sufficient to support alter ego liability without the use or abuse of the corporate form to perpetrate a wrong.

> We disregard the corporate fiction, even though corporate formalities have been observed and corporate and individual property have been kept separately, when the corporate form has been used as part of a basically unfair device to achieve an inequitable result. Specifically, we disregard the corporate fiction:
>
> > (1) when the fiction is used as a means of perpetrating fraud;

> (2) where a corporation is organized and operated as a mere tool or business conduit of another corporation;
>
> (3) where the corporate fiction is resorted to as a means of evading an existing legal obligation;
>
> (4) where the corporate fiction is employed to achieve or perpetrate monopoly;
>
> (5) where the corporate fiction is used to circumvent a statute; and
>
> (6) where the corporate fiction is relied upon as a protection of crime or to justify wrong.
>
> Each example involved an element of abuse of the corporate structure. . .
>
> Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace. We have never held corporations liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances. There must also be evidence of abuse.

Id. That is not what Acis does or can allege, *i.e*., even if, *arguendo*, it could establish that assets were wrongfully transferred, the "wrong" did not involve any abuse of the *form* of the entities involved. They are simply a family of commonly controlled entities. As the Fifth Circuit explained in *Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106 (5th Cir. 1988):

> "The focus of alter ego proper is on the legal adequacy of the corporation's existence, and the relationship between the corporation and its controlling corporation or individual. Many wholly-owned subsidiary and closely-held corporations are not factually distinct from their owners; many are in fact controlled and operated in close concert with the interests of the owners, and do not have a distinct factual existence-- separate employees, separate offices, separate properties, etc. That is perfectly natural and proper. *See, e.g., Edwards Co. v. Monogram Industries*, 730 F.2d 977 (5th Cir. 1984) (en banc) ('shell' subsidiary was formally distinct and creditor was not misled; corporate disregard under Texas law was therefore improper). The problem arises when such

> a corporation is not treated as *legally* distinct, when, in other words, the owners neglect to maintain the *formal* existence of the corporation as required by law."

Id. at 1131.

102. Indeed, the absence of a wrong by this Debtor involving the corporate form led the Southern District of New York district court to reject alter ego liability in *Highland CDO Opportunity Master Fund, L.P. v. Citibank, N.A.*, 270 F. Supp. 3d 716 (S.D.N.Y. 2017). Citibank had identified three acts that it asserted constituted fraudulent or wrongful conduct, for which it contended the Debtor had alter ego liability: (i) the Debtor stripped cash and assets from Highland CDO Opportunity Master Fund, L.P. ("CDO Fund") that would have otherwise been available to satisfy the obligations to Citibank; (ii) the Debtor diverted cash distributions on certain notes (the "HFP Notes") that would otherwise have been available to CDO Fund to meet its obligations to Citibank; and (iii) the Debtor fraudulently misrepresented the value of the HFP Notes that CDO Fund pledged to Citibank as collateral. *Id*. at 729-33. The district court held that the first prong of New York's alter ego test – the Debtor's control and domination of its affiliates – was satisfied, but that Citibank failed to demonstrate the second prong – a "wrong or fraud" for veil piercing purposes – and so dismissed the alter ego claims seeking to hold the Debtor liable for CDO Fund's obligations. *Id*. at 729-33.

103. Here, the allegations are insufficient even as a matter of pleading. *See Capmark Fin. Grp. Inc. v. Goldman Sachs Credit L.P.*, 491 B.R. 335, 349 (S.D.N.Y. 2013). The pleading here is particularly inadequate because, absent "single enterprise" liability (which is unavailable), Acis would actually need to pierce the veil of each entity between the Debtor and

any entity found to bear liability. *Id*. ("[Plaintiff] fails to present facts to adequately allege the "double-pierce" required to lump together two "sister" subsidiaries, the Goldman Lenders and the PIA Funds, even under the liberal notice pleading standard."). *See Outokumpu Eng'g Enters., Inc v. Kvaerner Enviropower, Inc*., 685 A.2d 724, 729 (Del. Super. 1996) (stating that in order to disregard corporate formalities separating "sister" subsidiaries, a plaintiff must first pierce the veil separating one subsidiary from its corporate parent, and then surmount "another barrier" by piercing the veil separating the corporate parent from the second subsidiary).

104. Any claim for punitive damages is also barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and was not asserted prior to Mr. Terry's acquisition of the company.

105. Finally, to the extent that Acis is alleging in this action that Dondero is liable as an alter ego for any liability of the Debtor herein (as it does explicitly in its other newly commenced lawsuits), Acis is violating the automatic stay in this case, as any such rights is property of the bankruptcy estate.

S. Claim 33: Willful Violation of the Automatic Stay

106. Acis alleges that the Debtor and Highland Funding violated the Acis automatic stay by sending the Acis trustee Optional Redemption Notices requesting that the trustee effectuate optional redemptions, and by "demanding" that the trustee take actions to effectuate the optional redemption by the next day. Acis seeks damages, attorneys' fees and costs, and punitive damages.

107. The claim should be disallowed. The Acis trustee declined to effectuate the redemptions. HCLOF, the equity holder of the CLO entities, took the position that the automatic stay was inapplicable, and the Debtor did not believe that it applied. In addition, the claim is untimely and/or has been waived.

108. The claim is also barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and the acts occurred prior to Mr. Terry's acquisition of the company.

T. Claim 34: Payment of Attorneys' Fees and Costs, Including all Allowed Professionals' Fees and Expenses in the Bankruptcy Cases

109. Acis requests that the Court award attorneys' fees in the adversary proceeding under Texas Business and Commerce Code § 24.013, Civil Practice and Remedies Code § 38.001, TUFTA, and all fees in the entire Acis Case from the Debtor based on the Debtor's alleged breach of fiduciary duty. There is no basis in fact or law for such an award, and the Debtor reserves all defenses thereto.

110. Furthermore, the Debtor and/or affiliates *already* bore the fees of which "reimbursement" is sought: as they were paid by income derived from transferred assets that as a result of the injunction were utilized for the benefit of Acis rather than by the transferees.

111. Finally, the claim is also barred by the *Bangor Punta* doctrine, as the claim is being brought for the benefit of Mr. Terry and the acts occurred prior to Mr. Terry's acquisition of the company.

U. Reservation of Rights

112. The Debtor reserves its right to supplement or modify this Objection and to assert such further objections, defenses or arguments as may later become available or apparent.

WHEREFORE, the Debtor respectfully requests that the Acis Claim be disallowed in its entirety, and such other and further relief as this Court may deem just and proper.

Dated: June 23, 2020

PACHULSKI STANG ZIEHL & JONES LLP

/s/ Jeffrey N. Pomerantz

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Debtor in Possession

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been served electronically via the Court' s CM/ECF system upon all parties appearing on the attached service list.

/s/ Jeffrey N. Pomerantz
Jeffrey N. Pomerantz

In re Highland Capital Management, L.P.
Case No. 19-34054-sgj11

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Appendix Exhibit 35

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Counsel for the Debtor and Debtor-in-Possession

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

Response Deadline: July 10, 2020 at 5:00 p.m.
Hearing Date: July 14, 2020 at 1:30 p.m.

DEBTOR'S MOTION UNDER BANKRUPTCY CODE SECTIONS 105(a) AND 363(b) FOR AUTHORIZATION TO RETAIN JAMES P. SEERY, JR., AS CHIEF EXECUTIVE OFFICER, CHIEF RESTRUCTURING OFFICER AND FOREIGN REPRESENTATIVE *NUNC PRO TUNC* TO MARCH 15, 2020

The above-captioned debtor and debtor in possession (the "Debtor") hereby moves (the "Motion") pursuant to sections 105(a) and 363(b) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code") for the entry of an order, substantially in the form attached hereto as Exhibit A (the "Proposed Order"), authorizing the Debtor (a) (i) to retain James P. Seery, Jr. as the chief executive officer and chief restructuring officer of the Debtor, pursuant to the terms of the letter attached as Exhibit 1 to the Proposed Order (the "Agreement") *nunc pro tunc* to March 15, 2020, and (ii) for Mr. Seery to replace the Debtor's current chief restructuring officer as the Debtor's foreign representative pursuant to 11 U.S.C. § 1505, and (b) granting related relief. In support of the Motion, the Debtor respectfully represents as follows:

Jurisdiction

1. The United States Bankruptcy Court for the Northern District of Texas (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. The bases for the relief requested herein are sections 105 and 363 of the Bankruptcy Code.

Background

3. 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 Bankruptcy Court").

4. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in the Delaware Court. On December 4, 2019,

the Delaware Bankruptcy Court entered an order transferring venue of the Debtor's chapter 11 case to this Court [Docket No. 186].[1]

5. 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.

6. On December 4, 2019, the Debtor filed in the Delaware Bankruptcy Court its *Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) To Retain Development Specialists, Inc. to Provide a Chief Restructuring Officer, Additional Personnel, and Financial Advisory and Restructuring-Related Services, Nunc Pro Tunc, as of the Petition Date* [Docket No. 74] (the "CRO Motion"). The CRO Motion sought, among other things, to appoint Bradley Sharp as the Debtor's chief restructuring officer and for DSI to provide financial advisory services to the Debtor in support of Mr. Sharp.

7. 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"). The Settlement Motion sought approval of the settlement between the Debtor and the Committee and provided for, among other things, the creation of a new independent board of directors of Strand Advisors, Inc.[2] (the "New Board") consisting of

[1] All docket numbers refer to the docket maintained by this Court.

[2] Strand Advisors, Inc. ("Strand") is the general partner of the Debtor.

James P. Seery, Jr., John S. Dubel, and Russell Nelms (collectively, the "Independent Directors").

8. The order granting the Settlement Motion authorized the Debtor to guarantee Strand's obligations to indemnify each Independent Director pursuant to the terms of any indemnification agreements entered into by Strand with each of the Independent Directors (the "Indemnification Agreements").

9. The Court entered orders approving the Settlement Motion on January 9, 2020[3] and the DSI Approval Order on January 10, 2020.

10. The Settlement Order approved, among other things, a term sheet setting forth the agreement between the Debtor and the Committee. The final term sheet was attached to the *Notice of Final Term Sheet* filed in the Court on January 14, 2020 [Docket No. 354] (the "Final Term Sheet"). The Settlement Order also provided that no entity could commence or pursue a claim or cause of action against any Independent Director and/or his respective advisors and agents relating in any way to his role as an independent director of Strand unless authorized by this Court pursuant to the criteria set forth in the Settlement Order.[4]

11. The Settlement Motion and Final Term each provided that "[a]s soon as practicable after their appointments, the Independent Directors shall, in consultation with the

[3] *See Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and the Procedures for Operations in the Ordinary Course* [Docket No. 339] (the "Settlement Order").

[4] Specifically, paragraph 10 of the Settlement Order provides:

> 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.

Committee, determine whether a CEO should be appointed for the Debtor. If the Independent Directors determine that appointment of a CEO is appropriate, the Independent Directors shall appoint a CEO acceptable to the Committee as soon as possible, which may be one of the Independent Directors." Final Term Sheet, page 3; Settlement Motion, ¶ 13.

12. On February 18, 2020, the Court entered its *Order (I) Authorizing Bradley D. Sharp to Act as Foreign Representative Pursuant to 11 U.S.C. § 1505 and (II) Granting Related Relief* [Docket No. 461] (the "Foreign Representative Order"). The Foreign Representative Order authorized Mr. Sharp, as chief restructuring officer, to act as the Debtor's foreign representative pursuant to section 1515 of the Bankruptcy Code (the "Foreign Representative"). The Foreign Representative specifically appointed Mr. Sharp to act as the Debtor's foreign insolvency officeholder to seek appropriate relief in Bermuda pursuant to Bermudian common law (the "Bermuda Foreign Representative") and the Cayman Islands pursuant to Section 241(1) of the Companies Law (2019 Revision) with respect to that British overseas territory (the "Cayman Foreign Representative").

13. Since the appointment of the Independent Directors, it was apparent that it would be more efficient to have a traditional corporate management structure oversee the Debtor – i.e., a fully engaged chief executive officer supervised by the New Board – as contemplated by the Final Term Sheet. This need was driven by the complexity of the Debtor's organization and business operations and the need for daily management and oversight of the Debtor's personnel. The search for a chief executive officer, however, was delayed while the Independent Directors made initial efforts to learn the Debtor's business and its day-to-day operations. It was further delayed with the onset of the COVID-19 global pandemic, which both had a serious impact on

the Debtor's operations and assets and limited the Independent Directors' ability to search for an appropriate chief executive officer.

14. During this time, however, Mr. Seery integrated himself into the daily operations of the Debtor and became essential in stabilizing the Debtor's assets and trading accounts during the economic distress caused by COVID-19. While Mr. Dubel and Mr. Nelms were each spending on average approximately 140 hours a month addressing the operational issues facing the Debtor and certain of its fund entities, Mr. Seery's workload was at least 180 hours a month.

15. As such, it was readily apparent to the Independent Directors who would be the best fit for the role: Mr. Seery. Mr. Seery had the appropriate skill set, extensive relevant background, and was already carrying the responsibility of the role. Mr. Seery had been functionally operating as the Debtor's de facto chief executive officer since at least early March and was already overseeing the Debtor's ordinary course operations, including managing the Debtor's personnel and the daily interactions with the Debtor's bankruptcy professionals

16. The Independent Directors subsequently appointed a compensation committee consisting of Messrs. Dubel and Nelms (the "Compensation Committee") to negotiate the terms and conditions of the Agreement on behalf of the Debtor. And, on June 23, 2020, the Compensation Committee approved the appointment of Mr. Seery to serve as both the Debtor's chief executive officer and chief restructuring officer concurrently with his role as one of the Independent Directors pursuant to the terms of the Agreement. Because Mr. Seery has been fulfilling the role since March 2020, the Compensation Committee determined that it was appropriate to make Mr. Seery's appointment as the Debtor's chief executive officer and chief

restructuring officer effective as of March 15, 2020.[5] The Independent Directors also authorized the Debtor to file this Motion.

A. The Chief Executive Officer and Chief Restructuring Officer Positions

17. Mr. Seery has agreed to, among other things, provide daily leadership and direction to the Debtor's employees on business and restructuring matters relating to the Debtor's chapter 11 case. In that capacity, he will direct the Debtor's day-to-day ordinary course operations, oversee the Debtor's personnel, make management decisions with respect to the Debtor's trading operations, direct the Debtor's reorganization efforts, monetize the Debtor's assets, oversee the claims objection and resolution process, and lead the process toward the hopeful consensual confirmation of a plan in this chapter 11 case in the capacities as chief executive officer and chief restructuring officer positions. Mr. Seery would report directly to the New Board and would continue to serve as an Independent Director, as provided under the Settlement Order.

18. Mr. Seery has extensive management and restructuring experience. Mr. Seery recently served as a Senior Managing Director at Guggenheim Securities, LLC, where he was responsible for helping direct the development of a credit business. Prior to joining Guggenheim, Mr. Seery was the President and a senior investing partner of River Birch Capital, LLC, where he was responsible for originating, executing, and managing stressed and distressed credit investments. Mr. Seery is also a long-time attorney licensed to practice in New York who

[5] The Committee has also agreed to Mr. Seery's appointment as chief executive officer and chief restructuring officer and to the amount of Mr. Seery's Base Compensation (as defined below). The Committee has not agreed, however, as to the amount and timing of the payment of the Restructuring Fee (defined below) and are continuing to discuss payment of the Restructuring Fee with the Compensation Committee.

has run corporate reorganization groups and numerous restructuring matters. He also served as a Commissioner of the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11. Mr. Seery was also a Managing Director and the Global Head of Lehman Brothers' Fixed Income Loan business where he was responsible for managing the firm's investment grade and high yield loans business, including underwriting commitments, distribution, hedging, trading and sales (including CLO manager relationships), portfolio management and restructuring. From 2000 to 2004, Mr. Seery ran Lehman Brothers' restructuring and workout businesses with responsibility for the management of distressed corporate debt investments and was a key member of the small team that successfully sold Lehman Brothers to Barclays in 2008.

The Agreement

19. The Compensation Committee negotiated the Agreement with Mr. Seery at arm's length. The additional material economic terms of the Agreement are as follows:[6]

> (a) Term: Commencing retroactively to March 15, 2020.
>
> (b) Roles: Mr. Seery shall serve as the chief executive officer and chief restructuring officer of the Debtor and shall be responsible for the overall management of the business of the Debtor during its chapter 11 case, including: directing the Debtor's day-to-day ordinary course operations, overseeing the Debtor's personnel, making management decisions with respect to the Debtor's trading operations, directing the reorganization and restructuring of the Debtor, the monetization of the Debtor's assets, resolution of claims, the development and negotiation of a plan of reorganization or liquidation, and the implementation of such plan. Mr. Seery shall remain a full member of the New Board and shall be entitled to vote on matters other than on those in which he is conflicted. Mr. Seery shall devote as much time to the engagement as he determines is required to execute his responsibilities as chief executive officer and chief restructuring officer. Mr. Seery will have no specific on-site requirements in Dallas, Texas, but shall be

[6] What follows is by way of summary only and is qualified in its entirety by reference to the Agreement, which controls. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Agreement.

on site as much as he determines is necessary to execute his responsibilities as chief executive officer and chief restructuring officer, consistent with applicable COVID-19 orders, protocols and advice.

(c) Compensation for Services: Mr. Seery's compensation under the Agreement shall consist of the following:

(1) Base Compensation: $150,000 per month, which shall be due and payable at the start of each calendar month; plus

(2) Bonus Compensation; Restructuring Fee:

Subject to separate Bankruptcy Court approval, the Compensation Committee and Mr. Seery have reached agreement on the payment of a restructuring fee upon confirmation of either a Case Resolution Plan or a Monetization Vehicle Plan in each case as defined below (the "Restructuring Fee").[7] The Committee has not yet agreed to the amount, composition, and timing of the Restructuring Fee. The Compensation Committee and Mr. Seery have agreed to defer Court consideration of the Restructuring Fee until further development in the Case. The Restructuring Fee agreed to by Mr. Seery and the Compensation Committee is as follows:

Case Resolution Restructuring Plan

On confirmation of any plan or reorganization or liquidation based on resolution of a material amount of the outstanding claims and their respective treatment, even if such plan includes (x) a debtor/creditor trust or similar monetization and claims resolution vehicle, (y) post-confirmation litigation of certain of the claims, and (z) post-confirmation monetization of debtor assets (a "Case Resolution Plan"):

$1,000,000 on confirmation of the Case Resolution Plan;

$500,000 on the effective date of the Case Resolution Plan; and

[7] Although the Compensation Committee and Mr. Seery have agreed on the amount and timing of the Restructuring Fee, both the Compensation Committee and Mr. Seery understand that the Restructuring Fee is payable only upon order of this Court. The Compensation Committee is reserving the right to seek approval of the Restructuring Fee from this Court in connection with the confirmation hearing on a plan or as otherwise appropriate.

> $750,000 on completion of cash or property distributions to creditors as contemplated by the Case Resolution Plan.

Debtor/Creditor Monetization Vehicle Restructuring Fee:

On confirmation of any plan or reorganization or liquidation based on a debtor/creditor trust or similar asset monetization and claims resolution vehicle that does not include agreement among the debtor and creditors on a material amount of the outstanding claims and their respective treatment at confirmation (a "Monetization Vehicle Plan"):

> $500,000 on confirmation of the Monetization Vehicle Plan;
>
> $250,000 on the effective date of the Monetization Vehicle Plan; and
>
> A contingent restructuring fee to be determined by the board or oversight committee installed to oversee the implementation of any Monetization Vehicle Plan based on the CEO/CRO (or acting as trustee) based upon performance under the plan after all material distributions under the Monetization Vehicle Plan are made.

(e) Participation in Employee Benefit Plans: Mr. Seery shall act as an independent professional contractor and shall not be an employee of the Debtor. Mr. Seery will pay for his own benefits and will not participate under the Debtor's existing employee benefit plans.

(f) Expenses: Reimbursement of actual and reasonable out-of-pocket expenses in connection with the services provided under the Agreement. Expenses will be generally consistent with expenses incurred to date as a member of the New Board.

(g) Conflicts and Other Engagements. Mr. Seery is not aware of any potential conflicts of interest based on his understanding of the various parties involved in the Debtor's chapter 11 case to date. Mr. Seery shall not be precluded from representing or working with or for any other person or entity in matters not directly related to the services being provided to the Debtor under the Agreement. Mr. Seery shall not undertake any engagements directly adverse to the Debtor during the term of his engagement.

(h) Termination. The Agreement may be terminated at any time by either the Debtor or by Mr. Seery upon two weeks advance written notice given to the other party. The termination of the Agreement shall not affect Mr. Seery's right to receive, and the Debtor's obligation to pay, any and all Base Compensation and Expenses incurred (even if not billed) prior to the giving of any termination notice; *provided however*, that (1) if the Agreement is terminated by Mr. Seery, the amount of Base Compensation owed shall be calculated based on the actual number of days worked during the applicable month and Mr. Seery will return any Base Compensation received in excess of such amount, and (2) if the Agreement is terminated by the Debtor, Base Compensation shall be deemed fully earned as of the first day of any month. Bonus Compensation shall be earned by Mr. Seery immediately upon his termination by the Debtor; *provided however*, Mr. Seery shall not be entitled to Bonus Compensation if: (A) the Debtor's chapter 11 case is converted to chapter 7 or dismissed; (B) a chapter 11 trustee is appointed in the Debtor's chapter 11 case; (C) Mr. Seery is terminated by the Debtor for Cause;[8] or (D) Mr. Seery resigns prior to confirmation of a plan or court approval of a sale as described in the Fees and Expense/Compensation for Services section of the Agreement.

(j) Conditional Requirement to Seek Further Court Approval of Agreement. The Committee may, upon two weeks advance written notice to the Debtor, require the Debtor to file a motion with the Bankruptcy Court on normal notice seeking a continuation of the Agreement and if such motion is not filed, the Agreement will terminate at the expiration of such two week period. If the Debtor files such motion, Mr. Seery will be entitled to the Base Compensation through and including the date on which a final order is entered on such motion by this Court. Notwithstanding anything herein to the contrary, the Committee may not deliver such notice to the Debtor until a date which is more than ninety days following the date this Court enters an order approving the Agreement.

(j) Indemnification. the Debtor agrees (i) to indemnify and hold harmless Mr. Seery and any of his affiliates (the "Indemnified Party"), to the fullest extent lawful, from and against any and all

[8] For purposes of the Agreement, "Cause" means any of the following grounds for termination of Mr. Seery's engagement, in each case as reasonably determined by the New Board within 60 days of the New Board becoming aware of the existence of the event or circumstance: (A) fraud, embezzlement, or any act of moral turpitude or willful misconduct on the part of Mr. Seery; (B) conviction of or the entry of a plea of *nolo contendere* by Mr. Seery for any felony; (C) the willful breach by Mr. Seery of any material term of the Agreement; or (D) the willful failure or refusal by Mr. Seery to perform his duties to the Debtor, which, if capable of being cured, is not cured on or before fifteen (15) days after Mr. Seery's receipt of written notice from the Debtor.

losses, claims, costs, damages or liabilities (or actions in respect thereof), joint or several, arising out of or related to the Agreement, Mr. Seery's engagement under the Agreement, or any actions taken or omitted to be taken by Mr. Seery or the Debtor in connection with the Agreement and (ii) to reimburse the Indemnified Party for all expenses (including, without limitation, the reasonable fees and expenses of counsel) as they are incurred in connection with investigating, preparing, pursuing, defending, settling or compromising any action, suit, dispute, inquiry, investigation or proceeding, pending or threatened, brought by or against any person (including, without limitation, any shareholder or derivative action, or any fee dispute), arising out of or relating to the Agreement, or such engagement, or actions. However, the Debtor shall not be liable under the foregoing indemnity and reimbursement agreement for any loss, claim, damage or liability which is finally judicially determined by a court of competent jurisdiction to have resulted primarily from the willful misconduct or gross negligence of the Indemnified Party.

The Debtor has agreed to extend the indemnification and insurance currently covering Mr. Seery's role as a director to fully cover Mr. Seery in his roles as chief executive officer and chief restructuring officer. The Debtor is currently working to extend such coverage.

Mr. Seery is also entitled to any indemnification or other similar provisions under the Debtor's existing or future insurance policies, including any policy tails obtained (or which may be obtained in the future), by the Debtor.

Relief Requested

20. By this Motion, the Debtor seeks the entry of the Proposed Order authorizing the Debtor to retain Mr. Seery pursuant to the terms of the Agreement, *nunc pro tunc* to March 15, 2020. The Motion also seeks to amend the Foreign Representative Order to appoint Mr. Seery as the Debtor's Foreign Representative, Bermuda Foreign Representative and Cayman Foreign Representative in the stead of Mr. Sharp.

21. The Debtor believes that the Debtor's retention of a chief executive officer and chief restructuring officer constitutes an act in the ordinary course of business, and

consequently, is permissible under Bankruptcy Code section 363(c) without Court approval. However, out of an abundance of caution, the Debtor seeks this Court's approval of the Agreement under Bankruptcy Code section 363(b).

Basis For Relief

B. The Debtor's Entry Into the Agreement is a Valid Exercise of the Debtor's Business Judgment and the Proposed Compensation is Appropriate Under the Circumstances and Within the Range of Similar Market Transactions

22. The Compensation Committee's decision for the Debtor to retain Mr. Seery pursuant to the terms of the Agreement should be approved pursuant to sections 363(b) and 105(a) of the Bankruptcy Code. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part: "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). In addition, section 105(a) of the Bankruptcy Code provides that the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a).

23. The proposed use, sale, or lease of property of the estate may be approved under Bankruptcy Code section 363(b) if it is supported by sound business justification. *See In re Montgomery Ward*, 242 B.R. 147, 153 (D. Del. 1999) ("In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor to show that a sound business purpose justifies such actions"). Although established in the context of a proposed sale, the "business judgment" standard has been applied in non-sale situations. *See, e.g., Inst. Creditors of Cont'l Air Lines v. Cont'l Air Lines (In re Cont'l Air Lines)*, 780 F.2d 1223, 1226 (5th Cir. 1986) (applying the "business judgment" standard in context of proposed

"use" of estate property). Moreover, pursuant to section 105, this Court has expansive equitable powers to fashion any order or decree which is in the interest of preserving or protecting the value of a debtor's assets. 11 U.S.C. § 105(a).

24. It is well established that courts are unwilling to interfere with corporate decisions absent a showing of bad faith, self-interest, or gross negligence, and will uphold a board's decisions as long as they are attributable to "any rational business purpose." *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (citing *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)). Whether or not there are sufficient business reasons to justify the use of assets of the estate depends upon the facts and circumstances of each case. *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983). In this case, the Debtor has ample justification to retain Mr. Seery as the Debtor's chief executive officer and chief restructuring officer pursuant to the Agreement. The Final Term Sheet expressly contemplated that the New Board could appoint a chief executive officer and that the chief executive officer could also be one of the Independent Directors. Because Mr. Seery will also be serving as chief restructuring officer, it is not necessary to have two separate ranking chief restructuring officers, especially considering that Mr. Sharp (the current chief restructuring officer) and his firm has agreed to continue to provide financial advisory services on behalf of the Debtor.[9] Mr. Seery is well- qualified to serve as the Debtor's chief executive officer and chief restructuring officer.

[9] *See Amended Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) to Employ and Retain Development Specialists, Inc. to Provide Financial Advisory and Restructuring-Related Services, Nunc Pro Tunc, to March 15, 2020* filed concurrently herewith

25. The Compensation Committee negotiated the Agreement in good faith and at arm's length. The Compensation Committee also worked with the Debtor's compensation consultant, Mercer (US) Inc., to determine the appropriate compensation for Mr. Seery as chief executive officer and chief restructuring officer. The Compensation Committee, therefore, believes that the terms of the Agreement are reasonable, are consistent with the market within the Debtor's industry, and are entirely appropriate given the scope of Mr. Seery's duties. Accordingly, entry into the Agreement is a sound exercise of the Debtor's business judgment.

26. Finally, the Debtor requests that the Court apply the same criteria by which parties in interest must first petition the Court prior to asserting claims against the Independent Director approved in the Settlement Order be extended to Mr. Seery in his capacity as chief executive officer and chief restructuring officer contemplated by this Motion. *See* Settlement Order, ¶ 10. The rationale for the Court to first determine whether or not a colorable claim or cause of action can be maintained against the Mr. Seery, as one of the Independent Directors, is equally applicable to Mr. Seery in his capacity as chief executive officer and chief restructuring officer, will further aid in the implementation of the Settlement Order, and discourage frivolous litigation. As was true in the Settlement Order with respect to the Independent Directors, no parties will be prejudiced by having to first apply to this Court to determine the propriety of any hypothetical claim that may be asserted against Mr. Seery in his officer capacities of the Debtor.

C. The Debtor Has Satisfied Bankruptcy Code Section 503(c)(3)

27. Bankruptcy Code section 503(c)(3) provides that "transfers or obligations that are outside the ordinary course of business . . . including transfers made to . . . consultants

hired after the date of the filing of the petition" are not allowed if they are "not justified by the facts and circumstances of the case." 11 U.S.C. § 503(c)(3). Courts generally use a form of the "business judgment" and the "facts and circumstances" standard. *See In re Pilgrim's Pride Corp.*, 401 B.R. 229, 236-37 (Bankr. N.D. Tex. 2009) (citing *In re Dura Auto Sys., Inc.*, Case No. 06-11202 (Bankr. D. Del. June 29, 2007) and *In re Supplements LT, Inc.,* Case No. 08-10446 (KJC) (Bankr. D. Del. Apr. 14, 2008)). Specifically, the court examines first, whether the transaction meets the Debtor's business judgment standard, and second, whether the facts and circumstances justify the transaction. *See In re Pilgrim's Pride Corp.*, 401 B.R. at 237 (Bankr. N.D. Tex. 2009).

28. The Debtor submits that the proposed transaction is within the ordinary course of its business and thus that Bankruptcy Code section 503(c)(3) does not apply to the Agreement. Nevertheless, for the reasons stated above — the benefits from Mr. Seery's leadership skills and industry experience — even if this were outside the ordinary course of business, entry into the Agreement is well within the Debtor's business judgment as applied to the facts and circumstances of the Debtor. Further, the facts and circumstances of this case support entry into the relationship under the Agreement where the Debtor will benefit from the ability to retain Mr. Seery at a critical juncture to ongoing restructuring efforts.

29. For the reasons set forth above, the Debtor submits that the relief requested herein is in the best interest of the Debtor, its estate, creditors, stakeholders, and other parties in interest, and therefore, should be granted.

D. The Proposed Chief Executive Officer and Chief Restructuring Officer Should Also Serve as the Debtor's Foreign Representative

30. Bankruptcy Code section 1505 provides that:

> A trustee or another entity (including an examiner) may be authorized by the court to act in a foreign country on behalf of an estate created under section 541. An entity authorized to act under this section may act in any way permitted by the applicable foreign law.

11 U.S.C. § 1505.

31. The Debtor respectfully submits that Mr. Seery is qualified and capable of representing the Debtor's estate as the Foreign Representative. The Debtor believes it is appropriate for Mr. Seery, as an officer of the Debtor, to replace Mr. Sharp as Foreign Representative inasmuch as Mr. Sharp will no longer be an officer of the Debtor if the Motion is granted. In order to avoid any possible confusion or doubt regarding this authority and to comply with the requirements of Part XVII of the Cayman Law, the Debtor seeks entry of an order, pursuant to section 1505 of the Bankruptcy Code, explicitly substituting Mr. Seery in the place of Mr. Sharp as the Debtor's Foreign Representative, including specifically to serve as the Bermuda Foreign Representative and Cayman Foreign Representative.

32. For the reasons set forth in the Foreign Representative Motion, authorizing Mr. Seery to act as the Foreign Representative on behalf of the Debtor's estate in Bermuda, the Cayman Islands or any other foreign proceeding will allow coordination of this chapter 11 case and each of the foreign proceedings and provide an effective mechanism to protect and maximize the value of the Debtor's assets and estate. Courts have routinely granted relief similar to that requested herein in other large chapter 11 cases where a debtor has foreign assets or operations requiring a recognition proceeding. *See, e.g., In re CJ Holding Co.,* No. 16-33590 (Bankr. S.D.

Tex. July 21, 2016); ECF No. 59*; In re CHC Group Ltd.,* No. 16-31854 (Bankr. N.D. Tex. Sept. 20, 2016), ECF No. 884; *In re Ultra Petroleum Corp.,* No. 16-32202 (Bankr. S.D. Tex. May 3, 2016); *In re Digital Domain Media Grp., Inc.*, No. 12-12568 (BLS) (Bankr. D. Del. Sept. 12, 2012); ECF No. 82*; In re Probe Resources US Ltd., No*. 10-40395 (Bankr. S.D. Tex. Mar. 21, 2011); ECF N. 320*; In re Bigler LP,* No. 09-38188 (Bankr. S.D. Tex. Jan. 12, 2010), ECF No. 159; In *re Horsehead Holdings Corp.,* No. 16-10287 (CSS) (Bankr. D. Del. Feb. 4, 2016); *In re Colt Holding Co. LLC*, No. 15-11296 (LSS) (Bankr. D. Del. June 16, 2015). The Debtor believes it is appropriate for one of its officers to serve as the Foreign Representative. In several jurisdictions, an officer or someone acting in a similar capacity is a prerequisite to serve as a Foreign Representative.[10] As more fully explained in the Foreign Representative Motion, the Debtor has assets in jurisdictions other than the United States, including in Bermuda and the Cayman Islands. To the extent any disputes with respect to such assets arise, it is critical that the Foreign Representative be permitted to appear on behalf of the Debtor and it estate in any court in which a foreign proceeding may be pending.

Notice

33. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a)the Office of the United States Trustee; (b)the Office of the United States Attorney for the Northern District of Texas; (c)the Debtor's principal secured

[10] *See e.g*. Part XVII, Section 240o f the Companies Law (2018 Revision) of the Cayman Islands requiring that the foreign representative be "a trustee, liquidator or other official in respect of a debtor for the purposes of a foreign bankruptcy proceeding." In addition, and as more fully explained in the Foreign Representative Motion, Bermuda common law and conflict of laws principles will recognize the authority of a foreign insolvency officeholder appointed in proceedings in the jurisdiction of incorporation of a company (or, in the instant case, the jurisdiction of the establishment of a limited partnership) to act on behalf of and in the name of the company (or partnership) in Bermuda.

parties; (d)counsel to the Committee; and (e)parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

Conclusion

WHEREFORE, the Debtor respectfully requests that the Court enter an order, substantially in the form annexed hereto as **Exhibit A**, granting the relief requested in the Motion and such other and further relief as may be just and proper.

Dated: June 23, 2020

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*)
Gregory V. Demo (NY Bar No. 5371992)
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-and-

/s/ 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 the Debtor and Debtor-in-Possession

EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	**Case No. 19-34054**
	§	**Chapter 11**
	§	
Debtor.	§	**Re: Docket No. _____**
	§	

ORDER APPROVING 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

Upon the *Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020* (the "Motion"),[1] and the Court finding that: (i) this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157

[1] All terms not otherwise defined herein shall be given the meanings ascribed to them in the Motion.

and 1334; (ii) venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iv) due and sufficient notice of the Motion has been given; (v) entry into the Agreement was an exercise of the Debtor's sound business judgment; and (vi) it appearing that the relief requested in the Motion is necessary and in the best interests of the Debtor's estate and creditors; and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

1. The Motion is granted.

2. Pursuant to sections 363(b) and 105(a) of the Bankruptcy Code, the Agreement attached hereto as Exhibit 1 and all terms and conditions thereof are approved, *nunc pro tunc* to March 15, 2020.

3. The Debtor is hereby authorized to enter into and perform under the Agreement.

4. The Debtor is authorized to indemnify Mr. Seery pursuant to the terms of the Agreement. Mr. Seery is also entitled to any indemnification or other similar provisions under the Debtor's existing or future insurance policies, including any policy tails obtained (or which may be obtained in the future), by the Debtor. The Debtor and Strand are authorized to enter into any agreements necessary to execute or implement the transactions described in this paragraph. For avoidance of doubt and notwithstanding anything to the contrary in this Order, Mr. Seery shall be entitled to any state law indemnity protections to which he may be entitled under applicable law.

5. No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

6. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

7. This Court shall retain jurisdiction over any and all matters arising from or related to the interpretation and/or implementation of this Order.

8. The Foreign Representative Order is hereby amended to substitute James P. Seery, Jr., as the chief executive officer, in place of Bradley S. Sharp, as the Debtor's Foreign Representative, Bermuda Foreign Representative and Cayman Foreign Representative. All other provisions of the Foreign Representative Order shall remain in full force and effect.

 # # # END OF ORDER # # #

EXHIBIT A-1

Engagement Agreement

J.P. SEERY & CO., LLC
795 Columbus Ave., 12A
New York, New York 10025
631-804-2049
jpseeryjr@gmail.com

June 23, 2020

CONFIDENTIAL

The Board of Directors of Strand Advisors, Inc.
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201

Re: Highland Capital Management L.P. (the "Company")

Dear Fellow Board Members:

This letter agreement ("Agreement") sets forth the terms and conditions of the engagement of the undersigned James P. Seery, Jr. ("I", "me" or "my"), as Chief Executive Officer ("CEO") and Chief Restructuring Officer ("CRO"), effective as of March 15, 2020 (the "Commencement Date"), by the Company and its affiliates to perform financial advisory services as detailed below.

I appreciate the trust you have placed in me by asking me to assume these roles and thank you for the opportunity to continue to work with you to restructure the Company.

Roles:

I will serve as the CEO and CRO of the Company during its Chapter 11 bankruptcy case (the "Bankruptcy Case") currently pending in the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court").

In those roles, I will be responsible for overall management of the business of the Company in Chapter 11 including, directing the reorganization and restructuring of the Company, monetization of assets, resolution of claims, development and negotiation of a plan of reorganization or liquidation, and implementation of such a plan.

My direct reports will include the individuals at the Company that currently report to the Board of Directors of Strand Advisors, Inc. (the "Board") or such other individuals employed by the Company as I determine should report to directly to me. In the event that the Board determines to restructure the reporting lines or functions of the Company, my direct reports will be amended in accordance with the Board approved restructuring.

At all times, I will remain a full member of the Board entitled to vote on all matters other than those on which I am conflicted.

I will devote as much time to this engagement as I determine is required to execute my responsibilities as CEO and CRO. I will have no specific on-site requirements in Dallas, but will be on site as much as I determine is necessary to execute my responsibilities as CEO and CRO, consistent with Covid-19 orders applicable to Dallas and New York City.

Limitations on Services

My services under this engagement are limited to those specifically noted in this Agreement and do not include legal, accounting, or tax-related assistance or advisory services. For the avoidance of doubt, I am not providing any legal services in connection with this engagement and will have not any duties as a lawyer to the Company, the Board, or any of the Company's employees. The accuracy and completeness of all information submitted to me by the Company are the sole responsibility of the Company, and I will be entitled to rely on such information without independent investigation or verification.

In my role as CEO and CRO, I will act as an independent professional contractor to the Company and will not be an employee of the Company. I will provide and pay for my own benefits, including medical benefits, by J.P Seery & Co. LLC or otherwise.

Fees and Expenses:

In consideration of my acceptance of this engagement and performance of the services pursuant to this Agreement, the Company shall pay the following:

1. Compensation for Services:
    a. Base Compensation: As compensation for my services as CEO and CRO of the Company, the Company shall pay me $150,000.00 per calendar month ("Base Compensation"). Base Compensation shall be due and payable at the start of each calendar month. Consistent with current Board compensation practice, invoices rendered by me to the Company are due and payable by the Company on receipt. Payment of the Base Compensation will be retroactive to March 15, 2020.
    b. Bonus Compensation/Restructuring Fee:
        i. The Company has agreed to pay me a restructuring fee upon confirmation of either a Case Resolution Plan or a Monetization Vehicle Plan in each case as defined below (the "Restructuring Fee").
        ii. Case Resolution Restructuring Plan
            1. On confirmation of any plan or reorganization or liquidation based on resolution of a material amount of the outstanding claims and their respective treatment, even if such plan includes (x) a debtor/creditor trust or similar monetization and claims resolution vehicle, (y) post-confirmation litigation of certain of the claims, and (z) post-confirmation monetization of debtor assets (a "Case Resolution Plan"):
                a. $1,000,000 on confirmation of the Case Resolution Plan;
                b. $500,000 on the effective date of the Case Resolution Plan; and
                c. $750,000 on completion of cash or property distributions to creditors as contemplated by the Case Resolution Plan.

iii. Debtor/Creditor Monetization Vehicle Restructuring Fee:

1. On confirmation of any plan or reorganization or liquidation based on a debtor/creditor trust or similar asset monetization and claims resolution vehicle that does not include agreement among the debtor and creditors on a material amount of the outstanding claims and their respective treatment at confirmation (a "Monetization Vehicle Plan"):
    a. $500,000 on confirmation of the Monetization Vehicle Plan;
    b. $250,000 on the effective date of the Monetization Vehicle Plan; and
    c. A contingent restructuring fee to be determined by the board or oversight committee installed to oversee the implementation of any Monetization Vehicle Plan based on the CEO/CRO (or acting as trustee) based upon performance under the plan after all material distributions under the Monetization Vehicle Plan are made.

2. Out-of-Pocket Expenses: In addition to the Base and Bonus Compensation, I shall be entitled to reimbursement for actual and reasonable out-of-pocket expenses ("Expenses") incurred in connection with the provision of services hereunder. Expenses will be billed along with Base Compensation and shall be paid by the Company at the same time. Expenses will be generally consistent with expenses incurred to date as a member of the Board.

Bankruptcy Court Approval

Notwithstanding anything herein to the contrary, I understand that this Agreement is contingent, in all respects, on the approval of the Bankruptcy Court. I also understand that the Company will seek approval of this Agreement in stages and that the Company will first seek approval of my retention as CEO and CRO and the payment of the Base Compensation and will defer seeking Bankruptcy Court approval of the Restructuring Fee until there have been further developments in the Bankruptcy Case.

Conflicts and Other Engagements

I am not aware of any potential conflicts of interest based on my understanding of the various parties involved in this matter to date.

The Company is aware that this engagement is not an exclusive engagement of my time, and that I have and will continue to have other business engagements and investments unrelated to the Company. Nothing in this Agreement or otherwise precludes me from representing or working with or for any other person or entity in matters not directly related to the services being provided to the Company under this Agreement. However, I will not take on any engagements directly adverse to the Company during the term of this engagement.

Privilege

I understand that in the course of this engagement, I may become party to or my services may become part of work product of legal counsel to the Company (the Company's in-house and outside counsel are collectively referred to as "Counsel"), and all communications between Counsel and me relating to this engagement shall be protected from disclosure to third parties under the attorney work product doctrine and/or the attorney-client privilege, and, therefore, shall be treated by me as privileged and confidential. I further understand that the Company has the exclusive right to waive the attorney-client privilege, and Counsel has the exclusive right to waive the protections afforded under the attorney work-product doctrine.

Termination of Engagement

This Agreement may be terminated at any time by either the Company or by me upon two weeks advance written notice given to the other party. The termination of this Agreement shall not affect my right to receive, and the Company's obligation to pay, any and all Base Compensation and Expenses incurred (even if not billed) prior to the giving of the termination notice; provided, however, that (i) if this Agreement is terminated by me, the amount of Base Compensation owed shall be calculated based on the actual number of days worked during the applicable month and I will return any Base Compensation received in excess of such amount and (ii) if this Agreement is terminated by the Company, Base Compensation shall be deemed fully earned as of the first day of any month. Bonus Compensation shall be earned by me immediately upon termination of me by the Company; provided, however, I shall not be entitled to Bonus Compensation if (a) the Bankruptcy Case is converted to chapter 7 or dismissed; (b) a chapter 11 trustee is appointed in the Bankruptcy Case; (c) I am terminated by the Company for Cause; or (d) I resign prior to confirmation of a plan or court approval of a sale as described in the Fees and Expense/Compensation for Services section hereof. For purposes of this Agreement, "Cause" means any of the following grounds for termination of my engagement, in each case as reasonably determined by the Board within 60 days of the Board becoming aware of the existence of the event or circumstance: (A) fraud, embezzlement, or any act of moral turpitude or willful misconduct on my part; (B) conviction of or the entry of a plea of nolo contendere by me for any felony; (C) the willful breach by me of any material term of this Agreement; or (D) the willful failure or refusal by me to perform my duties to the Company, which, if capable of being cured, is not cured on or before fifteen (15) days after my receipt of written notice from the Company.

Conditional Requirement to Seek Further Bankruptcy Court Approval of Agreement

The official committee of unsecured creditors in the Bankruptcy Case (the "Committee") may, upon two weeks advance written notice to the Company, require the Company to file a motion with the Bankruptcy Court on normal notice seeking a continuation of this Agreement and if such motion is not filed, this Agreement will terminate at the expiration of such two week period. If the Company files such motion, I will be entitled to my Base Compensation through and including the date on which a final order is entered on such motion by the Bankruptcy Court. Notwithstanding anything herein to the contrary, the Committee may not deliver such notice to the Company until a date which is more than ninety days following the date the Bankruptcy Court enters an order approving this Agreement.

Indemnification

As a material part of the consideration to me under this Agreement, the Company agrees (i) to indemnify and hold harmless me and any of my affiliates (the "Indemnified Party"), to the fullest extent lawful, from and against any and all losses, claims, costs, damages or liabilities (or actions in respect thereof), joint or several, arising out of or related to this Agreement, my engagement under this Agreement, or any actions taken or omitted to be taken by me or the Company in connection with this Agreement and (ii) to reimburse the Indemnified Party for all expenses (including, without limitation, the reasonable fees and expenses of counsel) as they are incurred in connection with investigating, preparing, pursuing, defending, settling or compromising any action, suit, dispute, inquiry, investigation or proceeding, pending or threatened, brought by or against any person (including, without limitation, any shareholder or derivative action, or any fee dispute), arising out of or relating to this Agreement, or such engagement, or actions. However, the Company shall not be liable under the foregoing indemnity and reimbursement agreement for any loss, claim, damage or liability which is finally judicially determined by a court of competent jurisdiction to have resulted primarily from the willful misconduct or gross negligence of the Indemnified Party.

The indemnification and insurance currently covering my role as a director shall be extended to me and fully cover me as provided therein in my roles as CEO and CRO.

Miscellaneous

This Agreement (a) constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes any other communications, understandings or agreements among the parties with respect to the subject matter hereof, and (b) may be modified, amended or supplemented only by written agreement among all the parties hereto.

This Agreement is subject to approval by the Bankruptcy Court. As part of such approval the Company shall request that any such order approving this Agreement contain a provision extending the protections afforded to me as a Board Member pursuant to Paragraph 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 [Docket No. 339] to my role as CEO and CRO, which Order prohibits the commencement of any action against me without first obtaining Bankruptcy Court approval to initiate such action.

This Agreement and all controversies arising from or related to performance hereunder shall be governed by and construed in accordance with the laws of the State of New York. The parties hereby submit to the jurisdiction of and venue in the federal and state courts located in New York City and waive any right to trial by jury in connection with any dispute related to this Agreement.

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

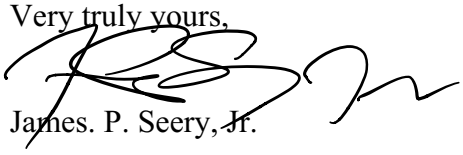
This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,



James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner

_____	_____
John Dubel Director Strand Advisors, Inc.	Russell Nelms Director Strand Advisors, Inc.

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

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Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,

James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner

John Dubel Director Strand Advisors, Inc.	Russell Nelms Director Strand Advisors, Inc.

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

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Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,

James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner

John Dubel Director Strand Advisors, Inc.	Russell Nelms Director Strand Advisors, Inc.

Appendix Exhibit 36

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Counsel for the Official Committee of Unsecured Creditors

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.	)	

OFFICIAL COMMITTEE OF UNSECURED CREDITORS'
EMERGENCY MOTION TO COMPEL PRODUCTION BY 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.

1. Pursuant to Rule 37 of the Federal Rules of Civil Procedure, made applicable by Rules 7037 and 9014 of the Federal Rules of Bankruptcy Procedure, and 11 U.S.C. § 105(a), the Official Committee of Unsecured Creditors (the "Committee") in the above-captioned bankruptcy case moves to compel production of certain electronic information by Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor").

2. Pursuant to the Final Term Sheet,[2] attached as Exhibit A to the *Notice of Final Term Sheet* [Dkt. No. 354-1], outlining the principal terms of a proposed settlement between the Debtor and the Committee, the Committee has sought discovery related to defined Estate Claims and other potential claims against third parties for the benefit of the Debtor's estate. For approximately eight months, the Committee has attempted to work cooperatively with Debtor to obtain documents and communications needed to investigate those claims, with the understanding that a turbulent market and pandemic have presented unique challenges. Despite the Committee's efforts, the Debtor has not yet provided the Committee with the electronically stored information ("ESI") it has requested.

3. Debtor's failure to produce email communications or other ESI has significantly hindered the Committee's ability properly to investigate the Estate Claims that it has explicit standing to investigate and pursue on behalf of the Debtor. In consideration of repeated failed negotiations, time constraints,[3] and a depletion of the Debtor's estate resources that is bound to continue without court intervention, the Committee moves to compel production of the Debtor's

[2] Capitalized terms not defined herein shall have the meanings ascribed to such terms in the Final Term Sheet.

[3] On June 30, 2020, this Court held a hearing related to CLO Holdco Ltd.'s ("CLO Holdco") motion to release certain funds held in the court registry. The Court held that the Committee must submit any complaint against CLO Holdco within 90 days of that ruling. Without access to the Debtor's documents, the Committee cannot properly investigate and bring any claims against CLO Holdco.

documents and communications of nine custodians pursuant to the protocol proposed by the Committee to the Debtor on June 25, 2020 (the "Proposed Protocol").[4]

ADDITIONAL BACKGROUND

4. On January 14, 2020, the Debtor and the Committee entered into the Final Term Sheet, which explicitly granted the Committee standing to pursue the Estate Claims, defined as "any and all estate claims and causes of actions against Mr. Dondero, Mr. Okada, other insiders of the Debtor, and each of the Related Entities,[5] including promissory notes held by any of the foregoing." (Dkt. 354-1, at 4.) The parties also agreed that the Committee would receive any privileged documents or communications that relate to the Estate Claims so that the Committee could bring those claims. In short, the Committee stands in Debtors' shoes with respect to the Estate Claims.

5. The Final Term Sheet deferred any disputes relating to documents' relevance or with regard to any attorney–client protection unrelated to the Estate Claims. (*See* Dkt. 354-1, at 48 ("Nothing in the Protocol shall require disclosure of irrelevant information or relevant information protected by the attorney-client privilege, work-product doctrine, or any other applicable privilege or immunity.").)

[4] The Proposed Protocol is fully defined *infra*, at Paragraph 10.

[5] The Final Term Sheet defines "Related Entities," as, collectively, "(i) any non-publicly traded third party in which Mr. Dondero, Mr. Okada, or Mr. Grant Scott, or Mr. John Honis . . . has any direct or indirect economic or ownership interest, including as a beneficiary of a trust; (ii) any entity controlled directly or indirectly by Mr. Dondero, Mr. Okada, Mr. Grant Scott, or Mr. John Honis . . . ; (iii) MGM Holdings, Inc.; (iv) any publicly traded company with respect to which the Debtor or any Related Entity has filed a Form 13D or Form 13G; (v) any relative . . . of Mr. Dondero or Mr. Okada each solely to the extent reasonably knowable by the Debtor; (vi) the Hunter Mountain Investment Trust and Dugaboy Investment Trust; (vii) any entity or person that is an insider of the Debtor under Section 101(31) the Bankruptcy Code, . . .; and (viii) to the extent not included in [the above], any entity included in the listing of related entities in **Schedule B** hereto (the "Related Entities Listing")." (Dkt. 354-1, at 52.) The Related Entities Listing lists thousands of entities related to the Debtor. CLO Holdco in a shareholder and limited partner of various entities on the Related Entities Listing.

6. Shortly after the Final Term Sheet was completed and entered by the Court, the Committee began requesting documents and communications from the Debtor necessary to investigate the Estate Claims.[6] In particular, the Committee has spent a considerable amount of time attempting to obtain any production of emails, chats, texts, or other ESI or communications from the Debtor. In November 2019, the Committee further provided the Debtor with search terms to run across various platforms, and provided an updated search term list on February 3, 2020, in an attempt to jump-start at least some production (the "Search Term Requests"). To date, the Committee has not received any documents responsive to the Search Term Requests.

7. Since November 2019, the Committee has attempted to work cooperatively with the Debtor to obtain communications that are necessary to investigate the Estate Claims. Indeed, on November 10, 2019, February 3, 2020, and February 24, 2020, the Committee served the Debtor with Requests for Production of Documents, including categories of documents related to certain Estate Claims. Unfortunately, despite the considerable time that has gone by and the number of communications the parties have had on the topic, no actual production of emails, chats, or other ESI has occurred. After months of discussion and negotiation, on June 2, 2020, the Debtor provided the Committee with a proposed review protocol for the Search Term Requests contemplating unduly stringent relevance and privilege reviews.

[6] On February 3, 2020, the Committee served the Debtor with the *Official Committee of Unsecured Creditors' Second Request for Production of Documents*, requesting documents related to various promissory notes held by and among the Debtor and Related Entities. On February 24, 2020, the Committee served the Debtor with the *Official Committee of Unsecured Creditors' Third Request for Production of Documents*, requesting certain ESI production related to the Estate Claims. The Committee has only received partial responses to the February 3 request and has not received any responses to the February 24 request, despite representations from the Debtor's counsel that production related to the February 24 requests would begin the week of April 6, 2020.

8. Under the Debtor's protocol, the Debtor would use continuous machine learning only on documents responsive to a list of specified search terms,[7] and then have contract attorneys, previously unfamiliar with the Debtor, this bankruptcy case, or the thousands of Related Entities, review those documents for "relevance." Then, if a document were determined to be relevant, it would be subject to a privilege review.

9. The Committee strongly believes that this type of relevance and privilege review significantly increases the likelihood that documents related to the Estate Claims will not be produced because relevance is not readily apparent from the face of the document, especially in light of the Debtor's deliberately convoluted affiliate structure and the complexity of its transactions. Moreover, it adds unnecessary time and expense to the review process by doubling the review of "relevant documents"—once by the Debtor and then by the Committee—and requires iterative discovery requests as the nature and focuses of the investigation shift with time.

10. Given its concerns about the risks of stonewalling and increased expense, on June 25, 2020, the Committee spoke with Debtor's counsel and also sent the Debtor the following Proposed Protocol to facilitate the Committee's investigation of the Estate Claims and preserve estate resources:

a. all custodial data for nine identified custodians[8] would be provided to the e-discovery vendor for inclusion in its repository workspace;

b. a set of mutually agreeable privilege terms (those likely to identify attorney-client privileged communications or attorney work product) would be run across that workspace, with any

[7] Ordinarily, continuous machine learning is applied to *all* custodial files such that anything the program determines is relevant for review would be queued for review even if it did not include a search term.

[8] These nine custodians are Patrick Boyce, Jim Dondero, Scott Ellington, David Klos, Isaac Leventon, Mark Okada, Trey Parker, Tom Surgent, and Frank Waterhouse. For avoidance of doubt, the Committee is requesting all ESI for the nine custodians, including without limitation, email, chat, text, Bloomberg messaging, or any other ESI attributable to the custodians.

disagreements regarding those terms to be determined by a special master or other third-party neutral;[9]

c. any document not including one of the agreed privilege terms would be produced to the Committee for review, subject to the Agreed Protective Order's provisions on "No Waiver" and "Claw Back of Inadvertently Produced Protected Materials" (Dkt. 382), thus protecting the Debtor from any inadvertent production or subject-matter waiver; and

d. all documents including any such privilege term would then be isolated for review by Debtor's contract attorneys.

(i) Non-privileged documents and privileged documents related to the Estate Claims would be produced to the Committee on a rolling basis.

(ii) Documents that are privileged and unrelated to the Estate Claims would be listed on a privilege log so that the Committee can probe those claims of privilege as needed.[10]

11. The Debtor did not respond to the Committee's proposal. On July 1, 2020, the Committee again requested a response, informing the Debtor it would file this motion to compel to seek the Court's assistance if the parties could not agree on review protocols in a timely fashion. On July 2, 2020, the Debtor informed the Committee that it would respond shortly and requested that the Committee not file a motion to compel until the parties could confer. On July 3, 2020, the Debtor responded with a proposal that would still limit any production of documents to those containing search terms. After discussion that day, the Debtor notified the Committee that it would consider production of all ESI for the agreed custodians and let the Committee know of its decision. On July 7, 2020, having heard nothing with regard to the open issues, the Committee once again let the Debtor know that time was of the essence and that it had no choice but to seek relief from the Court. Late on July 7, 2020, after repeated requests and indications that the

[9] This provision is consistent with the Final Term Sheet. (Dkt. 354-1, at 4).

[10] Pursuant to the Final Term Sheet, any disputes regarding withheld documents will be determined by a special master or other third-party neutral agreed to by the parties. (Dkt. 354-1, at 4).

Committee would seek relief from the Court, Debtor circulated a draft motion purporting to address amicably the issues raised in this Motion. Instead, that draft motion merely retained the so-called "relevance" review that the Committee believes will unnecessarily tax the remaining assets of the estate.

12. Time is running out. The Committee cannot keep waiting for the Debtor to provide it with the data that is required for the Committee to do its work. As a result, the Committee has brought this issue to the Court for resolution. The Committee strongly believes the Proposed Protocol is the most fair, efficient, and cost effective proposal, and allows the Committee the ability properly to investigate and pursue Estate Claims. Accordingly, the Committee respectfully requests that this Court compel the Debtor to produce documents pursuant to the Committee's Proposed Protocol.

ARGUMENT AND AUTHORITIES

13. The Committee respectfully submits that sufficient cause exists for the Court to compel the Debtor to produce documents pursuant to the Proposed Protocol so that the Committee can properly investigate potential Estate Claims. The Debtor previously agreed that the Estate Claims will be prosecuted by the Committee and that the Committee is entitled even to privileged documents related to those Estate Claims. The range of the Committee's investigation is necessarily broad in light of Debtor's structure and operations, as is the scope of potential Estate Claims that may be brought on Debtor's behalf. The Debtor's continued arguments regarding "relevance" are a red herring—the Committee stands in the Debtor's shoes with regard to the Estate Claims and is best able to determine whether a document is relevant to its investigation

given that it has no incentive to obfuscate or hide evidence of possible wrongdoing by current or former employees of the Debtor.[11]

I. The Court Should Compel Discovery Because the Documents Are Relevant to the Estate Claims Investigation.

14. Rule 37, made applicable by Bankruptcy Rule 7037, allows "[a] party seeking discovery [to] move for an order compelling . . . production. . . . [if] a party fails to produce documents . . . as requested under Rule 34." Fed. R. Civ. P. 37(a)(3)(B). "A party resisting discovery is swimming against a strong upstream policy current. The policy underlying the discovery rules encourages *more* rather than less discovery, and discourages obstructionist tactics." *In re Tex. Bumper Exch., Inc.*, 333 B.R. 135, 139–40 (Bankr. W.D. Tex. 2005) (emphasis in original). Rule 7037 ensures that this policy is enforced. *Id.* at 140.

15. Courts have "broad discretion in discovery matters." *Hamilton v. First Am. Title Ins. Co.*, No. 3:07-CV-1442-G, 2010 WL 791421, at *4 (N.D. Tex. Mar. 8, 2010) (quoting *Winfun v. Daimler Chrysler Corp.*, 255 F. App'x 772, 773 (5th Cir. 2007) (per curiam). Rule 26 of the Federal Rules of Civil Procedure, applicable through Bankruptcy Rule 7026, facilitates broad-ranging discovery, allowing discovery of any "nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the" investigation. Fed. R. Civ. P. 26(b)(1). Relevance "is broadly construed, especially in the context of discovery requests, which should be considered relevant if there is *any possibility* that the information sought may be relevant to the claim or defense." *In re Adkins Supply, Inc.*, 555 B.R. 579, 589 (Bankr. N.D. Tex. 2016) (emphasis in original). "Information sought only fails the relevance test if it is clear that it could have no possible bearing on the claim." *Id.* Indeed, "[i]nformation within this scope of discovery need not

[11] This is specifically a matter of concern given that one of the ESI custodians has himself been heavily involved in the discussions regarding the terms of the ESI production.

be admissible in evidence to be discoverable," and the party resisting discovery bears the burden of showing that the discovery sought is irrelevant or non-proportional. *See Orchestrate HR, Inc. v. Trombetta*, 178 F. Supp. 3d 476, 504–06 (N.D. Tex. 2016).

16. The documents sought from the nine custodians proposed under the Proposed Protocol are relevant to the Committee's investigation and potential Estate Claims. This investigation encompasses, among other claims and causes of action, potential fraudulent transfers, preferential transfers, breaches of fiduciary duties, usurpation of corporate opportunities, misappropriation of assets, and abuses of the corporate form by and among insiders—which include certain of the proposed custodians—and Related Entities. Their documents are therefore relevant to the subject matter of the Estate Claims. Fed. R. Civ. P. 26(b)(1).

17. Moreover, the Committee is not seeking privileged documents to which it is not already entitled under the Final Term Sheet. The Final Term Sheet explicitly grants the Committee access to privileged documents and communications in the Debtor's possession, custody, or control specifically related to the investigation and pursuit of the Estate Claims. (Dkt. 354-1, at 4.) The Committee's Proposed Protocol allows the Debtor to withhold documents responsive to agreed-upon privilege terms and review those presumptively privileged documents before turning them over to the Committee. The Proposed Protocol requires the Debtor produce only those documents that are non-privileged, or privileged and related to the Estate Claims, and provides that a third-party neutral will resolve any privilege disputes as originally agreed upon under the Final Term Sheet. There is therefore no issue regarding privilege waiver.[12]

[12] The Proposed Protocol also recognizes the Agreed Protective Order's "No Waiver" and "Claw Back of Inadvertently Produced Protected Materials" (Dkt. 382) provisions, which provide additional privilege protections to the Debtor.

II. The Proposed Protocol is Necessary to the Committee's Investigation of the Estate Claims.

18. Further, section 105(a) of the Bankruptcy Code empowers this Court to "issue an order . . . that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

19. Implementation of the Proposed Protocol is necessary for the Committee to fulfil its statutory mandates under section 1103(c) of the Bankruptcy Code. As fiduciary for all unsecured creditors, the Committee is granted broad statutory powers to, among other things, "investigate the acts, conduct, assets, and liabilities and financial condition of the debtor, . . . and any other matters relevant to the case or to the formulation of a plan." *Id.* at § 1103(c)(2); *see also* Dkt. 354-1, at 4 (granting the Committee standing to investigate and pursue Estate Claims on behalf of the Debtor). Ordering the Debtor to turn over all documents of the nine custodians, subject to a limited privilege review, is necessary for the Committee properly to carry out this mandate.

20. To date, the Debtor has not produced any documents or communications in response to the February 24 requests or the Search Term Requests, despite extended negotiations to facilitate such productions. This has impeded the Committee's ability to exercise its duty to investigate the acts and conduct of the Debtor. An order compelling production is therefore necessary for the Committee sufficiently to carry out its Estate Claim investigation.

21. The Proposed Protocol is the most cost effective and efficient way to obtain documents relevant to the Estate Claims, avoiding the cost, delay, and risk of false negatives associated with contract attorneys' relevance review. Rather than use estate resources to conduct a double relevance review proposed by the Debtor—reviewed once by the Debtor and again by the Committee—the Committee's Proposed Protocol calls for only one round of privilege review and

the targeted searches for relevant documents that the Committee will conduct as it carries out its investigation. The Proposed Protocol also obviates the need for additional document requests and repeated negotiations with the Debtor about additional collection and review for the specified custodians. The Committee's investigation will necessarily evolve, and the Proposed Protocol would allow the Committee to run search terms on data already collected and contained within the e-discovery vendor's repository with minimal additional cost. It further ensures that all documents will be preserved in the interim.

22. An order by this Court implementing the Proposed Protocol is necessary to "preserve a right elsewhere provided in the [Bankruptcy] Code." *See In re Royce Homes, LP*, No. 09-32467-H4-7, 2009 WL 3052439, at *4–5 (Bankr. S.D. Tex. Sept. 22, 2009) (compelling a debtor's production under 11 U.S.C. § 105(a) to allow the trustee to perform its duties under the Bankruptcy Code). The Proposed Protocol will allow the Committee access to documents and communications relevant to the Estate Claims without fear that the Debtor will withhold relevant documents pursuant to an unduly broad relevance review. Considering the circumstances of this case and the history of the Debtor, the Proposed Protocol is necessary for the Committee to fulfill its duty to investigate the Estate Claims.

CONCLUSION

23. For the reasons set forth above, the Committee respectfully requests that the Court enter an order, substantially in the form attached hereto as **Exhibit A,** (a) compelling the Debtor to produce documents under the Proposed Protocol, and (b) granting such other and further relief as the Court may deem just and proper.

[*Signature Page Follows*]

Dated: July 8, 2020
Dallas, Texas

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COUNSEL FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

Exhibit A

Proposed Order

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 COMPELLING THE DEBTOR TO PRODUCE DOCUMENTS

Upon the consideration of the *Official Committee of Unsecured Creditors' Emergency Motion to Compel Production by the Debtor* (the "Motion), it is hereby **ORDERED** that:

1. The Motion is GRANTED as set forth herein.

2. The Debtor must produce all ESI, without limitation, for the custodians Patrick Boyce, Jim Dondero, Scott Ellington, David Klos, Isaac Leventon, Mark Okada, Trey Parker, Tom Surgent, and Frank Waterhouse (collectively, the "Custodian Data") to the e-discovery vendor in this matter no later than seven days after the entry of this 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.

3. The Parties must meet and confer regarding a set of mutually agreeable privilege terms within 7 days of the date of this Order. Any disagreements regarding those terms will be determined by a special master or other third-party neutral within 21 days of the date of this order;

4. Within 7 days of the finalization of the privilege terms, any Custodian Data not including one of the agreed privilege terms will be produced to the Committee for review, subject to the Agreed Protective Order's provisions on "No Waiver" and "Claw Back of Inadvertently Produced Protected Materials" (Dkt. 382);

5. Any Custodian Data including any such privilege term will be reviewed by Debtor's contract attorneys.

a. Non-privileged documents and privileged documents related to the Estate Claims will be produced to the Committee on a rolling basis.

b. Documents that are privileged and unrelated to the Estate Claims will be listed on a privilege log provided to the committee within 45 days of this Order.

6. This Court shall retain exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

End of Order # #

CERTIFICATION OF GOOD FAITH CONFERENCE

The undersigned counsel to the Committee hereby certifies that the Committee's counsel has attempted in good faith to confer with the Debtor's counsel in an effort to resolve the dispute without court action.

/s/ *Paige Holden Montgomery*
Paige Holden Montgomery
SIDLEY AUSTIN LLP

Counsel for the Official Committee of Unsecured Creditors

CERTIFICATE OF SERVICE

I, Paige Holden Montgomery, hereby certify that on the 8th day of July 2020, a true and correct copy of the foregoing *Official Committee of Unsecured Creditors' Emergency Motion to Compel Production by the Debtor* was sent via electronic mail via the Court's ECF system to all parties authorized to receive electronic notice in this case, and by first-class mail to the Debtor, attention James Seery.

/s/ Paige Holden Montgomery
Paige Holden Montgomery
SIDLEY AUSTIN LLP

Counsel for the Official Committee of Unsecured Creditors

Appendix Exhibit 37

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ATTORNEYS FOR JAMES DONDERO

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

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

JAMES DONDERO'S (I) OBJECTION TO PROOF OF CLAIM OF ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC; AND (II) JOINDER IN SUPPORT OF HIGHLAND CAPITAL MANAGEMENT, L.P.'S OBJECTION TO PROOF OF CLAIM OF ACIS CAPITAL MANAGEMENT L.P. AND ACIS CAPITAL MANAGEMENT GP, LLC
[Relates to Claim No. 3 and Docket No. 771]

James Dondero ("Dondero"), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files this *(I) Objection to Proof of Claim of Acis Capital Management, L.P. and Acis Capital Management GP, LLC; and (II) Joinder in Support of Highland Capital Management, L.P.'s Objection to Proof of Claim of Acis Capital Management, L.P. and Acis Capital Management GP, LLC* and hereby objects to Proof of Claim No. 3 (the "Acis Claim")[1] filed by claimants Acis Capital Management, L.P. and Acis Capital

[1] The Acis Claim was assigned Claim No. 23 by the Debtor's claims' agent.

Management GP, LLC (collectively, "Acis") in the above-captioned chapter 11 case of Highland Capital Management, L.P. (the "Debtor"). In support thereof, Dondero respectfully represents as follows:

I. BACKGROUND

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

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

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

5. The Settlement Order approved, among other things, certain operating and reporting protocols [Docket Nos. 354, 466].

6. In connection with the Settlement Order, an independent board of directors was appointed on January 9, 2020, at the Debtor's general partner, Strand Advisors, Inc. (the "Independent Board").

7. The Acis Claim incorporates the complaint from litigation commenced by the trustee of the former estate in the Acis bankruptcy case (the "Acis Case") at a time when Acis had

unpaid creditors (the "Acis Complaint")[2].

8. On June 23, 2020, the Debtor filed its *Objection to Proof of Claim of Acis Capital Management L.P. and Acis Capital Management GP, LLC* [Docket No. 771] (the "Highland Objection"). The Highland Objection raises many issues that will potentially be litigated in connection with the Acis Complaint. The Highland Objection is set for hearing on August 6, 2020 at 9:30 a.m.

II. RELIEF REQUESTED

9. For the reasons set forth in the Highland Objection, Dondero believes that the Acis Claim should be disallowed in its entirety and therefore files this objection to the Acis Claim and joinder in support of the Highland Objection.

10. Terry, whose claim has been, or soon will be, satisfied in full under Acis's plan, should not be granted a $75 million (or more) windfall at the expense of this Debtor's creditors and its estate. As detailed at length in the Highland Objection, the Acis Claim attempts to circumvent established legal principles to obtain a recovery—exponentially larger than Acis's debt—not for the Acis estate (it no longer exists), not for Acis's creditors (they have all been paid or will be soon satisfied), but for Terry himself. Each of Acis's causes of action fails for a variety of independent reasons, many of which stem from the fact that Terry is ultimately seeking a personal recovery. The Court should see the Acis Claim for what it is—a vexatious attempt to obtain an undue personal windfall at the expense of the Debtor, its estate, and its creditors and equity owners. The Court should disallow the Acis Claim in full.

[2] Specifically, the Acis Claim incorporates the *Second Amended Complaint (Including Claim Objections and Objections to Administrative Expense Claims)* filed in Adversary No. 18-03078 in the Acis Case.

III. STANDING

11. Dondero, as a creditor, indirect equity security holder, and party in interest, has standing to file this claim objection and joinder pursuant to sections 502(a)-(b) and 1109(b) of the Bankruptcy Code and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

12. Section 502(a) of the Bankruptcy Code provides that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects." 11 U.S.C. § 502(a).

13. In the event an objection is filed by a party in interest, section 502(b) provides that the court, after notice and hearing, shall determine the allowance of such claim. 11 U.S.C. § 502(b).

14. While neither sections 101, 502, 1109 nor any other section in the Bankruptcy Code specifically define the term "party in interest," section 1109(b) provides a non-exclusive list of constituents that fall within the meaning of "party in interest" for the purposes of a chapter 11 proceeding. *See Kipp Flores Architects, L.L.C. v. Mid-Continent Cas. Co.*, 852 F.3d 405, 413 (5th Cir. 2017) ("The Bankruptcy Code does not provide an exclusive definition of a party in interest, but the Code broadly includes debtors, creditors, trustees, indenture trustees, and equity security holders among the parties entitled, *e.g.*, to notice of proceedings in the case.").

15. Specifically, section 1109(b) provides that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee may raise and may appear and be heard on any issue in a case under [Chapter 11]." 11 U.S.C. § 1109(b). This section "has been construed to create a broad right of participation in Chapter 11 cases." *In re Global Industrial Technologies,*

Inc., 645 F.3d 201, 210 (3d Cir. 2011) (quoting *In re Combustion Engineering, Inc.*, 391 F.3d 190, 214 n.21 (3d Cir. 2004)).

16. Parties in interest for the purpose of claims objections "include not only the debtor, but anyone who has a legally protected interest that could be affected by a bankruptcy proceeding." *Adair v. Sherman*, 230 F.3d 890, 894 n. 3 (7th Cir. 2000). "Any 'party in interest' may object to a proof of claim and request the court to determine its correct amount." *Kipp Flores Architects, L.L.C. v. Mid-Continent Cas. Co.*, 852 F.3d 405, 413 (5th Cir. 2017). *See also* 4 COLLIER ON BANKRUPTCY P 502.02 (16th ed. 2020) ("In the context of a chapter 11 case in particular, the term 'party in interest' expressly includes the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee.").

17. Here, Dondero has standing to be heard on any issue in this Chapter 11 case, including this claim objection proceeding, because he is (i) a creditor; (ii) an equity security holder; and (iii) a party in interest as those terms are interpreted under the Bankruptcy Code.

18. Dondero is a creditor of the Debtor because he has prepetition claims against the Debtor and its estate, including, without limitation, those asserted through proofs of claim numbers 141, 142, and 145 filed by Dondero on April 8, 2020.

19. Dondero is also an equity security holder through his role as the President and sole shareholder of Debtor's General Partner, Strand Advisors, Inc. ("Strand"). As the Debtor's General Partner, Strand maintains a 0.2508% partnership interest in the Debtor.

20. Accordingly, as both a creditor and equity security holder, Dondero qualifies as a "party in interest" under the Bankruptcy Code and has the right to file this claim objection and be heard on any other issue in this Chapter 11 case.

IV. LEGAL STANDARD

21. Section 502 of the Bankruptcy Code provides, in pertinent part, as follows: "[a] claim or interest, proof of which is filed under section 501 of [the Bankruptcy Code], is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502.

22. The Bankruptcy Code establishes a burden-shifting framework for proving the validity and amount of a claim. "A proof of claim executed and filed in accordance with the [Bankruptcy Rules] shall constitute *prima facie* evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f); *see also In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006). A proof of claim loses the presumption of *prima facie* validity under Bankruptcy Rule 3001(f) if an objecting party produces evidence sufficient to rebut at least one of the allegations that is essential to the claim's legal sufficiency. *See In re Fidelity Holding Co.*, Ltd., 837 F.2d 696, 698 (5th Cir. 1988); *McGee v. O'Connor (In re O'Connor)*, 153 F.3d 258, 260 (5th Cir. 1998). Once such allegations are rebutted, the burden shifts back to the claimant to prove its claim by a preponderance of the evidence. *In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006). Despite this shifting burden, "the ultimate burden of proof always lies with the claimant." *Id.* (citing *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15 (2000)).

V. OBJECTION AND JOINDER

23. For the reasons set forth in the Highland Objection, Dondero hereby objects to the Acis Claim and asserts it should be disallowed as articulated in the Highland Objection.

24. Dondero hereby joins in and adopts in full, and hereby incorporates by reference, the Highland Objection and the objections and supporting legal arguments asserted therein. Without limiting the generality of the foregoing, Dondero specifically objects to the Acis Claim on the following grounds:

a. The Acis Claim for breach of fiduciary duty should be disallowed because sole owners do not owe fiduciary duties to their company.

b. Even if fiduciary duties had been owed, this part of the Acis Claim should be disallowed because Acis cannot sue others for participating in a scheme in which it, as one of the entities it alleges was commonly owned and controlled, was equally culpable.

c. The fraudulent transfer claims should be disallowed because a debtor cannot recover avoidance claims for its own benefit under section 550(a) of the Bankruptcy Code.

d. All claims asserted by Acis on its own behalf against prior equity holders or third parties that were not pending when Mr. Terry purchased the company should be disallowed under the *Bangor Punta* doctrine.

VI. RESERVATION OF RIGHTS

25. Dondero reserves the right to amend and/or supplement this objection and joinder, including to assert additional claim objections and legal arguments. Dondero further reserves the right to participate in discovery respecting and the hearing on the Highland Objection, including to make argument, present evidence, and examine witnesses.

CONCLUSION

Dondero respectfully requests that the Court enter an order disallowing the Acis Claim and granting him and the Debtor such other and further relief to which they may be justly entitled.

Dated: July 13, 2020

Respectfully submitted,

/s/ D. Michael Lynn

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ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on July 13, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for Acis Capital Management, L.P. and Acis Capital Management GP, LLC, the Debtor, the Office of the U.S. Trustee, and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink
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Appendix Exhibit 38

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ATTORNEYS FOR JAMES DONDERO

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

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

RESPONSE OF JAMES DONDERO TO THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO COMPEL PRODUCTION BY THE DEBTOR
[Relates to Docket No. 808]

James Dondero ("Dondero"), a party in interest, hereby files this Response to the *Official Committee of Unsecured Creditors' Emergency Motion to Compel Production by the Debtor* [Docket No. 808] (the "Motion"). In support thereof, Dondero respectfully represents as follows:

BACKGROUND

1. Through the Motion, the Committee seeks the production by the Debtor of a wide variety of documents, including emails, to aid in its investigation of potential Estate Claims[1] and other potential causes of action against third parties, which includes "any and all estate claims and causes of action against Dondero, [Mark] Okada, other insiders of the Debtor, and each of the

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

Related Entities,[2] including promissory notes held by any of the foregoing." In accordance with the Final Term Sheet, the Committee also seeks "any privileged documents or communications that related to the Estate Claims."

2. The Final Term Sheet grants the Committee access to privileged documents and communications in the Debtor's possession, custody, or control specifically related to the investigation and pursuit of the Estate Claims. The term sheet provides that "solely with respect to the investigation and pursuit of Estate Claims, the document production protocol will acknowledge that the Committee will have access to the privileged documents and communications that are within the Debtor's possession, custody, or control ("Shared Privilege")."

3. Accordingly, the Proposed Protocol of the Committee seeks, among other things, documents, emails, and other electronically stored information (ESI) exchanged from or between nine different custodians, who include Dondero.[3] The Committee has requested all ESI for the nine custodians, including without limitation, email, chat, text, Bloomberg messaging, or any other ESI attributable to the custodians.

4. The Debtor's document production to the Committee in this case is subject to the terms and conditions of the Agreed Protective Order [Docket No. 382] entered into between the Committee and the Debtor on January 21, 2020. Under this protective order and the Committee's

[2] As described in the Motion, "[t]he Final Term Sheet defines "Related Entities," as, collectively, "(i) any non-publicly traded third party in which Mr. Dondero, Mr. Okada, or Mr. Grant Scott, or Mr. John Honis . . . has any direct or indirect economic or ownership interest, including as a beneficiary of a trust; (ii) any entity controlled directly or indirectly by Mr. Dondero, Mr. Okada, Mr. Grant Scott, or Mr. John Honis . . . ; (iii) MGM Holdings, Inc.; (iv) any publicly traded company with respect to which the Debtor or any Related Entity has filed a Form 13D or Form 13G; (v) any relative . . . of Mr. Dondero or Mr. Okada each solely to the extent reasonably knowable by the Debtor; (vi) the Hunter Mountain Investment Trust and Dugaboy Investment Trust; (vii) any entity or person that is an insider of the Debtor under Section 101(31) the Bankruptcy Code, . . .; and (viii) to the extent not included in [the above], any entity included in the listing of related entities in **Schedule B** hereto (the "Related Entities Listing")." (Dkt. 354-1, at 52.) The Related Entities Listing lists thousands of entities related to the Debtor. CLO Holdco i[s] a shareholder and limited partner of various entities on the Related Entities Listing."

[3] These nine custodians are Patrick Boyce, Jim Dondero, Scott Ellington, David Klos, Isaac Leventon, Mark Okada, Trey Parker, Tom Surgent ("Surgent"), and Frank Waterhouse.

Proposed Protocol, any document not including one of the agreed-upon set of privilege terms (that is, those likely to identify attorney-client privileged communications or attorney work product, but not those related to the Estate Claims) would be produced to the Committee for review, subject to the Agreed Protective Order's provisions on "No Waiver" and "Claw Back of Inadvertently Produced Protected Materials." Thereafter, after review by Debtor's contract attorneys, the Committee's Proposed Protocol suggests that non-privileged documents and "privileged documents related to the Estate Claims would be produced to the Committee on a rolling basis."

5. While the Agreed Protective Order provides these and other protections to the Debtor related to the production of documents and information in this proceeding, the order provides that it does not apply to any third-party beneficiaries. Specifically, the order states that it "precludes non-Debtor affiliates, and their Representatives, including any entity affiliated with, owned by, or controlled in any way, directly or indirectly, by James Dondero and his affiliates (the "Dondero Parties") from seeking to enforce or rely on this Order in any way, unless any of the Dondero Parties is asked (formally or informally) to produce or receive Discovery Materials thereby becoming a "Party" as defined herein."[4]

6. On July 9, 2020, Highland Capital Management, L.P. (the "Debtor" or "Highland") filed *Debtor's Motion for Entry of (I) A Protective Order, or, in the Alternative, (II) an Order Directing the Debtor to Comply with Certain Discovery Demands Tendered by the Official Committee of Unsecured Creditors, Pursuant to Federal Rules of Bankruptcy Procedure 7026 and 7034* [Docket No. 810].

7. Because the production of certain privileged information is implicated by the Committee's Motion, including as it relates to Dondero, both individually and in connection with

[4] *See* Agreed Protective Order [Docket No. 382], para. 17.

his affiliated entities, Dondero is a Party that may seek relief with this Court in connection with the Agreed Protective Order.

RESPONSE

8. While Dondero takes no position as to the relief requested by the Committee in the Motion, he files this Response to ensure his rights are protected in connection with the production of any confidential or privileged documents and other information sought by the Committee.

9. Under the Final Term Sheet, the Committee is entitled to "privileged documents and communications that are within the Debtor's possession, custody, or control" with respect to its investigation and pursuit of Estate Claims. In turn, members of the Committee will be entitled to access and review such information. Because of the broad scope of access granted to the Committee through the Final Term Sheet and the Shared Privilege, each of the committee members will have access to much more material than in the typical case.

10. One such member, Joshua Terry ("Terry"), along with his wholly-owned or controlled entities, Acis Capital Management GP, LLC, and Acis Capital Management, L.P. (collectively, "Acis"), would enjoy access to this privileged and confidential information. As the Court is aware, Terry and Acis have commenced a number of proceedings against Dondero, Highland, and various related parties, which are not intended to benefit Highland's creditors generally, but are meant to benefit primarily Terry himself. Because of these pending actions, if the Court grants the Motion, the Court should restrict Terry and Acis's access to the information sought by the Committee, especially that which is privileged or confidential.

11. While Dondero has found no case law directly on point, there is an analogous situation. Under Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Court may order the examination of any entity. Fed. R. Bankr. P. 2004. Rule 2004

further provides that the Court may order the examination and the production of documentary evidence concerning any matter that relates "to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or . . . any matter relevant to the case or the formulation of a plan." Fed. R. Bankr. P. 2004(b).

12. The scope of discovery under Rule 2004 is very broad. Courts have likened the examination to be in the nature of a "fishing expedition." *In re Countrywide Home Loans, Inc.*, 384 B.R. 373, 400 (Bankr. W.D. Pa. 2008).

13. Although discovery under Rule 2004 is extremely broad, "once an adversary proceeding or contested matter is commenced, discovery should be pursued under the Federal Rules of Civil Procedure and not by Rule 2004." *In re SunEdison, Inc.*, 572 B.R. 482, 490 (Bankr. S.D.N.Y. 2017); *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002) (citing *Snyder v. Soc'y Bank*, 181 B.R. 40, 42 (S.D. Tex. 1994), aff'd sub nom. *In re Snyder*, 52 F.3d 1067 (5th Cir. 1995)); *In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996) ("The well recognized rule is that once an adversary proceeding or contested matter has been commenced, discovery is made pursuant to the Fed. R. Bankr. P. 7026 *et seq.*, rather than by a [Rule] 2004 examination."). Because Rule 2004 is designed to provide the examining party with "broad power to investigate the estate, it does not provide the procedural safeguards offered by Fed. R. Bankr. P. 7026." *In re Bennett Funding Grp., Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996).

14. In this case, the Committee and the Debtor have, through the Final Term Sheet, agreed to allow the Committee to conduct broad discovery concerning the Debtor's assets and financial affairs (akin to a 2004 examination) to aid in the Committee's investigation and pursuit of potential Estate Claims and other causes of action. Thus, to the extent there are pending

proceedings to which the Committee or any of its members is a party, they may be affected by this discovery.

15. While the Committee itself has not commenced an adversary proceeding or contested matter against the Debtor, Dondero, or any related entities, Terry has done so. Terry, either on behalf of himself or his wholly-owned and controlled entity, Acis, has commenced a number of adversary proceedings and state court lawsuits against the Debtor, Dondero, a number of Debtor's employees, and certain related entities. These proceedings remain pending and discovery may (for the most part) be taken by the parties.

16. Specifically, the pending proceedings commenced by Terry are (i) by Terry, related to his 401(k), in state court against Dondero and Surgent; (ii) by Acis in state court against former Highland attorneys including in-house counsel; (iii) by Acis in this Court against Highland and its related parties (stayed by Highland's chapter 11 filing); (iv) by Acis against Dondero and certain Highland employees, recently commenced in this Court; and (v) the frivolous motion for contempt by Acis against Dondero, Highland, and certain Highland employees and others, if Acis ever gets around to actually filing it (it has been before the Court as an exhibit to the motion for relief from stay filed in connection with it).

17. If the Committee and each of its members is given access to the confidential and privileged information of Dondero and his affiliates related to the Estate Claims, Terry and by extension his wholly owned and controlled entity, Acis, Highland's competitor and litigation adversary, stand to gain an unfair advantage by accessing proprietary, confidential, or privileged information of Dondero and related parties for the purposes of pending litigation. Allowing Terry to participate in such discovery in Highland's bankruptcy case would circumvent the procedural

protections provided by Bankruptcy Rule 7026 and give Terry unprecedented access to sensitive information he may use to gain undue leverage in these various actions.

18. Moreover, with the existence of the multitude of the pending actions commenced by Terry and Acis against Dondero and Highland's employees, there is another significant problem posed by Terry's service on the Committee: now that Terry has sued (sometimes in a different case) not only Dondero but numerous other Highland employees, Terry's access to the Committee's privileged information in the Highland case may create significant problems for Dondero and Highland's employees in fulfilling their duties to Highland.

19. The successful operations of Highland, especially during this critical time, require the close attention and candid disclosures of its employees, including in-house counsel, to the Independent Board and the Committee. Dondero, for example, often exchanges views with the Independent Directors. In doing so he must be cognizant of the possibility that his words may prejudice him in pending litigation.

20. The foregoing concerns were first brought to the Court's attention by Dondero in his filed Comment[5] to the *Motion for Leave to File Redacted Quarterly Operating Reports* [Acis Docket No. 1161] (the "QOR Motion") filed by Acis in the Acis case, pursuant to which Acis seeks to conceal critical portions of its quarterly operating report from all creditors and interested parties in the Acis case while at the same time utilizing this Court's time and resources to pursue litigation against Dondero, Highland, its employees, and certain related parties. The QOR Motion remains pending. As discussed in the Comment to the QOR Motion, the advantages to Terry resulting from the Shared Privilege and access to information provided to the Committee are significant.

[5] *See* Docket No. 1168 filed in the Acis case.

21. The observations and concerns raised by Dondero in that Comment are even more striking and relevant in this contested matter. If Terry and Acis are allowed access to the privileged and confidential information being sought by the Committee, such information will undoubtedly be utilized by Terry and Acis in their pursuit of Dondero and Highland. Terry, either on behalf of himself or Acis, has litigation pending against (i) Highland; (ii) Highland's founder, Mr. Dondero; (iii) various Highland related entities; (iv) Highland's former attorneys; and (v) Highland's own employees. Given the extraordinary breadth of these actions, there is an existential threat of abuse by Terry of his access to the information available to the Committee, including through the Shared Privilege, to the detriment of Dondero, the Debtor-related parties, Debtor's employees, and the Debtor's estate.

CONCLUSION

For the reasons set forth above, in the event the Court grants the Motion, Dondero respectfully requests that the Court bar Terry's access to the information sought by the Committee in the Motion. The information sought may be used by Terry and Acis to circumvent the discovery protections under Bankruptcy Rule 7026 to gain an unfair advantage in the litigation Terry has commenced against Dondero, Highland, Highland's employees, and various related parties.

Dated: July 14, 2020

Respectfully submitted,

/s/ D. Michael Lynn

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ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on July 14, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Committee, the Debtor, and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink
Bryan C. Assink

Appendix Exhibit 39

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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)
Debtors.	)	(Jointly Administered)

LIMITED OBJECTION TO (A) OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO COMPEL PRODUCTION BY THE DEBTOR AND (B) DEBTOR'S MOTION FOR ENTRY OF (I) A PROTECTIVE

ORDER, OR, IN THE ALTERNATIVE, (II) AN ORDER DIRECTING THE DEBTOR TO COMPLY WITH CERTAIN DISCOVERY DEMANDS TENDERED BY THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS, PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 7026 AND 7034

Highland Capital Management Fund Advisors, L.P., 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, and NexPoint Real Estate Strategies Fund (each, a "**Fund**", and collectively, the "**Funds**", and together with the Fund Advisors, the "**Funds and Advisors**"), by and through their undersigned counsel, hereby object, on a limited basis (the "**Limited Objection**"), to the *Official Committee of Unsecured Creditors' Motion to Compel Production by the Debtor* (Docket No. 808) (the "**Committee's Motion**") and the *Debtor's Motion for Entry of (I) a Protective Order, or, in the Alternative, (II) an Order Directing the Debtor to Comply with Certain Discovery Demands Tendered by the Official Committee of Unsecured Creditors, Pursuant to Federal Rules of Bankruptcy Procedures 7026 and 7034* (Docket No. 810) (the "**Debtor's Motion**"). In support of this Limited Objection, the Funds and Advisors state as follows:

PRELIMINARY STATEMENT

1. The Funds and Advisors submit this limited objection to protect the attorney-client privilege and their confidential commercial information. The Committee's Motion and the Debtor's Motion concern a discovery dispute between the Debtor and the Committee upon which the Fund and Advisors take no position. However, the Committee is seeking in discovery

the production of documents by certain individuals who serve in roles, including fiduciary roles, at certain of the Funds and Advisors.

2. Those individuals, serving in roles for the Funds and Advisors, are parties to communications with counsel to the Funds and Advisors that are protected by the attorney-client privilege, a privilege held by the Funds and Advisors, as well as communications that contain or include protected attorney work product generated by counsel for the Funds and Advisors. Those individuals, also in their capacities for the Funds and Advisors, have highly-sensitive confidential commercial information about the Funds and Advisors, particularly concerning the Funds' investment holdings and strategies as well as legal and compliance matters related thereto.

3. Counsel for the Funds and Advisors have discussed these issues with counsel to the Committee and the Debtor. While we expect the parties may be able to reach a consensual resolution prior to a hearing on these matters, the Funds and Advisors have filed this Limited Objection due to the pending objection deadline.

BACKGROUND

4. Each Advisor is registered with the U.S. Securities and Exchange Commission ("**SEC**") as an investment advisor under the Investment Advisers Act of 1940 (as amended). Each Fund is a registered investment company or business development company under the Investment Company Act of 1940 (as amended, the "**1940 Act**") and is advised by one of the Advisors.

5. 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 the Advisor for the Fund. None of the Funds have employees.

Instead, they rely on the Advisors, acting pursuant to advisory agreements, to provide the services necessary to their operations.

6. The Funds are each managed by one of the two Advisors. Each Advisor has entered into a shared services agreement with the Debtor, Highland Capital Management, L.P. (the "**Debtor**" or "**HCMLP**"). Under the shares services agreements, HCMLP provides a variety of services, including operational, financial, human resources, information technology, tax, and compliance services to the Advisors.

7. Certain individuals employed or affiliated with the Debtor hold roles for the Advisors and/or Funds, including fiduciary roles. Some of these individuals are the same individuals for which the Committee is seeking the production of "all custodial data" in discovery. See Committee's Motion, ¶10. For example, Frank Waterhouse serves as the Treasurer of Highland Capital Management Fund Advisors, L.P. and as principal financial officer of each of the Funds, and David Klos serves as Assistant Treasurer of the Funds.

8. Counsel for the Funds and Advisors corresponds with and provides legal advice to these persons relative to their distinct roles on behalf of the Funds and Advisors. These persons are also, due to their capacities with the Funds and Advisors, privy to confidential commercial information about the Funds and Advisors, including data regarding the Funds' investment holdings and investment strategies.

LIMITED OBJECTION

9. The Funds and Advisors object to the production of communications or other documents by the Debtor or the nine custodians identified in the Committee's Motion[1] to the extent such communications or documents are protected by the attorney-client privilege, the work product doctrine, or any similar doctrine or privilege, as held by the Funds or the Advisors. See, e.g., Udoewa v. Plus4 Credit Union, 457 Fed. Appx. 391, 392-393 (5th Cir. 2012) (holding that the work product privilege, which applies to documents prepared in anticipation of litigation, protected investigatory reports and minutes from board of directors' meetings); In re E.E.O.C., 207 Fed. Appx. 426, 431-432 (5th Cir. 2006) (holding that the attorney client communications privilege and the work product doctrine protected general counsel reports and discussions regarding merits of the matter).

10. The Funds and Advisors employ different outside counsel firms than the Debtor. The Funds and Advisors accordingly anticipate it will be relatively easy to search for, identify, and segregate for privilege review documents involving these outside counsel firms. The Funds and Advisors also anticipate that the subject documents are a relatively small subset of the documents sought by the Creditors' Committee.

11. The Funds and Advisors also seek a protective order for their confidential commercial information. See 11 U.S.C. § 107(b)(1) ("On request of a party in interest, the bankruptcy court shall . . . protect an entity with respect to a trade secret or confidential research, development, or commercial information . . . ."). See also Fed. R. Bankr. P. 9018.

12. The Funds and Advisors have reviewed the *Agreed Protective Order* (Docket

[1] The nine custodians identified by the Creditors' Committee are "Patrick Boyce, Jim Dondero, Scott Ellington, David Klos, Isaac Leventon, Mark Okada, Trey Parker, Tom Surgent, and Frank Waterhouse." See Committee's Motion, fn. 8.

No. 382) between the Debtor and the Creditors' Committee. The Funds and Advisors propose that they be designated a "Party" under the Agreed Protective Order such that information of the Funds and Advisors is protected as "Confidential Information" as defined therein.

CONCLUSION

13. For the reasons set forth above, the Funds and Advisors respectfully request that the Court (1) require an appropriate review process for documents protected by the attorney-client privilege, work product doctrine, or other similar privilege or doctrine held by the Funds or the Advisors and (2) extend by Court order the protections of the Protective Order to the Funds and Advisors as proposed herein. The Funds and Advisors reserve their right to be heard on all issues set forth herein.

Dated: July 15, 2020

K&L GATES LLP

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2020, I caused the foregoing document to be served via first class United States mail, postage prepaid and/or electronic email through the Court's CM/ECF system to the parties that consented to such service, as each are listed in the debtor's service list filed at docket entry 823, Exhibits A and B.

This the 15th day of July, 2020

/s/ Artoush Varshosaz
Artoush Varshosaz

Appendix Exhibit 40

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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]	)	Case No. 19-34054-sgj11
Debtor.	)	

DEBTOR'S OBJECTION TO OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO COMPEL PRODUCTION BY THE DEBTOR

Highland Capital Management, L.P. (the "Debtor"), the debtor and debtor-in-possession in the above-captioned chapter 11 bankruptcy case (the "Case"), files this *Objection* (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.

"Objection") to the *Official Committee of Unsecured Creditors' Emergency Motion to Compel Production by the Debtor* [Docket No. 808] (the "Motion") filed on July 8, 2020. In support of the Objection, the Debtor respectfully represents as follows:

I. PRELIMINARY STATEMENT

1. By its Motion, the Official Committee of Unsecured Creditors (the "Committee") seeks to compel the Debtor to comply with some of the most sweeping discovery requests possible—made for the first time about two weeks before the Motion was filed.

2. Specifically, on June 25, 2020, the Committee demanded all "electronically stored information" ("ESI") from nine (9) custodians—three of whom are lawyers—going back five years prior to the commencement of this Case (the "Demands"). The Demands are not limited to Estate Claims; are not focused on any particular transaction; and, at first glance, appear to yield almost 8,000,000 e-mails and attachments alone.

3. Perhaps more troublesome than the breadth and scope of the Demands, the Committee also insists that the Debtor ignore its confidentiality obligations to shared service partners and other interested parties and proposes a "privilege review" that is designed to quickly get the Committee its massive dump of information at the expense of the Debtor's and third parties' rights to protect privileged and confidential information.

4. This was all unnecessary. The Debtor has worked diligently and in good faith to respond to all of the Committee's discovery requests – which is why this is the very first discovery motion in this Case. Indeed, the Debtor completed the production of all non-ESI documents in April, a production totaling more than [20,000] pages of information.

5. Admittedly, production of ESI has been more difficult but that was not for lack of trying. The Committee's initial ESI requests made in February were only slightly less broad that its current Demands. It took time to run, and re-run, and re-run the Committee's

search terms until the number of "hits" was reduced from over 2,000,000 to approximately 800,000 (the "Original E-Mails"). By mid-May, the Debtor delivered all of the Original E-Mails to Meta-E, a data service provider and a Committee member. In the first half of June, the Debtor provided the Committee with a Document Review Memorandum to govern the review of the Original E-Mails and retained a vendor to provide contract attorneys to undertake the review. On June 16, the Debtor provided the Committee with a plain vanilla stipulation that would enable the Debtor to retain the vendor – the last step before the review and production of the Original E-Mails could begin. Had the Committee agreed to the stipulation, the Debtor would be weeks into the review and production of the Original E-mails as of now.

6. Instead, the Committee abruptly shifted gears, made the Demands on June 26, and filed the Motion on the heels of a Court-imposed deadline to bring certain claims.

7. The Debtor is extremely concerned that compliance with the Demands will necessarily (a) cause privileged and personal information to be disclosed, (b) arguably cause the Debtor to violate confidentiality obligations, and (c) create unmanageable costs as the Committee sifts through millions and millions of e-mails and other communications.

8. Nevertheless, the Debtor is not intransigent. As previously conveyed to the Committee, the Debtor is prepared to go down the Committee's chosen path provided that (a) the Court rules on the Debtor's discovery motion[2], (b) appropriate safeguards are put in place to protect privileged information, (c) adversaries are not provided with "free discovery" just because they are a committee member, and (d) the rights of third parties are respected.

[2] *See Debtor's Motion for the Entry of (I) a Protective Order, or, in the Alternative (II) an Order Directing the Debtor to Comply with Certain of the Discovery Demands Tendered by the Official Committee of Unsecured Creditors, Pursuant to Federal Rules of Bankruptcy Procedure 7026 and 7034*, dated July 9, 2020, and filed at Docket No. 810 (the "Debtor's Motion").

II. BACKGROUND

A. The Debtor and the Committee Agree on a Document Production Protocol

9. In January, as part of the parties' corporate governance agreement, the Debtor and the Committee agreed, among other things, that the Committee would have standing and other rights relating to "Estate Claims," and that the production of documents and ESI would be made pursuant to specified guidelines. These agreements were embodied in a term sheet, the final version of which was filed with the Court on January 14, 2020, at Docket No. 354-1 (the "Term Sheet").

10. As pertinent here, the Term Sheet provided that (a) the Committee was granted standing to pursue Estate Claims; (b) the Committee would be entitled to privileged communications concerning Estate Claims; and (c) that the Debtor's document management, preservation, and production would be governed by an agreed-upon set of "Document Production Protocols" (the "Protocols").

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

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

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

B. The Committee Seeks Broad Discovery of E-mails

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

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

15. On or around March 5, 2020, the Debtor timely served its written responses and objections to the Committee's Requests. Morris Ex. A. [3] With respect to the E-mail Requests, the Debtor proffered the following response and objection:

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

[3] The Debtor incorporates by reference the *Declaration of John A. Morris in Support of Debtor's Motion for the Entry of (I) a Protective Order, or, in the Alternative (II) an Order Directing the Debtor to Comply with Certain of the Discovery Demands Tendered by the Official Committee of Unsecured Creditors, Pursuant to Federal Rules of Bankruptcy Procedure 7026 and 7034*, dated July 9, 2020, and filed at Docket No. 811 ("Morris Dec."), and the exhibits annexed thereto.

> No. 19), even though Request No. 19 does not appear to be related to any Estate Claim for which the Committee has standing to pursue. Nevertheless, the Debtor has informed the Committee that it will (a) create searches for transactions identified as potential Estate Claims, and (b) use historic data to identify asset transfers to or from the Debtor to or from James Dondero, Mark Okada or any Related Entity during the last five years as potential Estate Claims

Morris Ex. A, General Objection No. 5.

16. The Committee has never taken issue with this objection or asked for the targeted e-mails searches related to Estate Claims that the Debtor offered to provide. In addition, the Committee never proposed any targeted searches limited to Estate Claims despite the Debtor's requests. Instead, over time, the parties worked together on various versions of the search terms and time periods until the number of "hits" approached approximately 800,000 in early May, thus yielding the Original E-Mails.

17. Notably, for the first time on July 8, the Committee identified specific transactions, the CLO Holdco transaction and the Hunter Mountain transaction, as the subject of discovery. The Debtor will be able to rapidly develop email searches and produce documents related to these specifically identified transactions. The Debtor believes the Committee should be able to identify other specific transactions which may constitute Estate Claims given that the Committee has for months had the Debtor's general ledger, non-email transactional documents, and audited financials with specific footnotes regarding material, related party transactions.

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

C. The Debtor's Confidentiality Obligations

19. As set forth in the Debtor's Motion, the Debtor is a service provider and in that capacity has entered into various agreements that, among other things, obligate it to maintain certain information in confidence or otherwise concern the ownership of documents and information (collectively, the "Shared Services Agreements"). Certain of the Shared Services Agreements were identified and described in the Debtor's Motion, but others exist. Debtor's Motion ¶ 21. Based on communications received to date, numerous third parties have expressed an interest in these matters beyond those identified in the Debtor's Motion, irrespective of whether they are party to a Shared Services Agreement.

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

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

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

22. The Debtor has been cooperative and has put extensive effort towards negotiating an agreed email search and production protocol with the Committee.[4] The proposals

[4] While the Committee suggests that they have waited months to receive the requested documents, the facts are different and include the following (a) the Committee often took weeks, and in one case an entire month, to respond

exchanged from February through June 25 were premised on the ideas that the Debtor (a) would gather emails from its server based on key word searches provided by the Committee, (b) review the resulting email "hits" for relevance and privilege, and (c) then produce the responsive, non-privileged emails. The Committee's June 25 proposal was the first time that Committee sought blanket access, subject only to privilege review, for the nine custodian's entire email files. Just as the Committee and the Debtor were on the precipice of finalizing a deal on email discovery, the Committee completely changed the proposed terms.

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

24. As of mid-March, the momentum on discovery negotiations slowed. On March 17, the Committee responded to the Debtor's March 5 communication. Notably, this included the Committee stating that it understood the Debtor would produce documents "found

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to the Debtor's proposed email production logistics; (b) without the ESI logistical concerns, the Debtor quickly and without complaint produced all non-email documents by April; (c) the Committee unilaterally walked away from all that had been accomplished and, on June 25, proposed entirely new and sweeping demands; and (d) but-for the Committee's newly proposed process, the email review and production would be well underway by now.

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

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

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

27. While soliciting the vendors, and again with the Committee's knowledge and understanding, the Debtor was also working on a memorandum (the "Document Review Memorandum") that would be used by the contract attorneys to identify the relevant players (including the "Related Parties" who would be subject to "Estate Claims," as those terms are defined in the Protocols) and issues concerning confidentiality and privilege. The Document Review Memorandum was intended to (a) assist the contract attorneys in their review of documents, (b) provide a mechanism for the Debtor to comply with its confidentiality obligations under the Shared Services Agreements (the confidentiality review), and (c) to complete the review and production of the e-mails, whether or not they concerned "Estate Claims," as quickly and efficiently as possible.

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

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

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

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

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

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

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

33. However, on June 25, the Committee informed the Debtor that it wanted to take a different approach to the review and production of e-mails. Morris Ex. G. The most problematic demand was that the Debtor forego the confidentiality review described in the Document Review Memorandum. On July 3, 2020, the Debtor explained to the Committee why it could not comply with this demand. The Committee declined to address the Debtor's concerns thereby necessitating the filing of the Debtor's Motion.

III. OBJECTION

34. The following is a review of the Committee's Demands, and the Debtor's response to each.

A. Demand No. 1

35. **The Demand**. The Committee seeks to have "all custodial data for nine identified custodians" placed in a "repository workspace." Motion ¶ 10(a).

36. **The Debtor's response**. Giving the Committee unfettered access (subject only to a privilege review, discussed below) to the ESI of nine individuals covering a five-year period violates Rule 26 of the Federal Rules of Civil Procedure, ignores the provisions of the Protocols, and is simply unfair to the individuals.

37. Federal Rule of Civil Procedure 26 expressly limits discovery to non-privileged matters that are "relevant to any party's claim or defense and proportional to the needs of the case." FED. R. CIV. P. 26(b)(1). The initial Demand is not even a "fishing expedition" in

the context of discovery under Bankruptcy Rule 2004; instead, it is a demand for the entire ocean. The Committee's initial demand is unprecedented and cannot be reconciled with the boundaries established under Rule 26.

38. Moreover, the initial Demand also ignores the parties' agreement as embodied in the Term Sheet and Protocols. While the Committee has standing to bring Estate Claims, those claims have boundaries which will clearly be breached by the Demands. Further, the Demands trample on the Debtor's specifically-reserved rights to review the ESI for confidentiality and responsiveness. *See supra* ¶ 11.

39. The Debtor has proposed a reasonable alternative to the Committee's efforts to review almost 8 million documents. As noted above, over a month ago, the Debtor provided the proposed review memorandum to the Committee. *See* Morris 7/15 Dec. Ex. A (Document Review Memorandum).[6] The Memorandum was to serve as Debtor's document review instructions to RHL review attorneys. Memorandum §V lays out a proposed scope of relevance. The Debtor urges the Court to adopt the Memorandum's proposed email review process instead of the unwieldy alternative process proposed by the Committee, and to allow the Debtor to begin the review of the Original E-Mails.

40. The Debtor believes the Motion should be denied on these bases alone. However, if the Court entertains the initial Demand at all, the Debtor respectfully requests the following process be followed: (a) the ESI shall be securely delivered to Meta-E and held in custody and in strict confidence; (b) if the Committee wants to search the ESI, it shall simultaneously provide search terms to Meta-E and the Debtor; (c) the Debtor shall have three

[6] "Morris 7/15 Dec." refers to the *Declaration of John A. Morris in Support of the Debtor's Objection to the Official Committee of Unsecured Creditors' Motion to Compel Production by Debtor*, dated July 15, 2020, and the exhibit annexed thereto.

business days to assert an objection; (d) if the Debtor does not timely object, then the results of the search shall be culled for a privilege review; (e) if the Debtor timely objects, the parties shall confer and if they cannot resolve their differences, then the issue(s) will be presented to the Special Master.

B. Demand No. 2

41. **The Demand**. The Committee proposes that the parties work on "a set of mutually agreeable search terms (those likely to identify attorney-client privileged communications or attorney work product)" and then run those terms over the entirety of the ESI, with any disagreements over the search terms submitted to a Special Master. Motion ¶ 10(b).

42. **The Debtor's Response**. This step is required only because the Committee has chosen to seek broad discovery rather than focusing on Estate Claims (where they share the privilege). But the Debtor has two concerns regarding the proposal.

43. First, three of the nine custodians are lawyers. Given the high likelihood that many of their communications are privileged, no search terms can adequately protect the privilege and their ESI should be reviewed by the Debtor in the first instance.[7]

44. Second, while the Debtor understands that (under the Demands) disputes over the privilege search terms will be resolved by the Special Master, the Debtor is compelled to point out that (a) there are third parties who likely hold the privilege in certain circumstances, and (b) the initial search terms proposed by the Committee are woefully inadequate.

45. Thus, with respect to Demand No. 2, the Debtor believes that the three lawyers' ESI should be subject to a whole-scale review, and the search terms to be employed

[7] Even under the Debtor's Demands, the time and expense of creating a privilege log covering five years' worth of e-mails sent to or from three different lawyers is going to be astronomical. These three attorneys alone have approximately 1.7 million documents that would need to be manually reviewed.

must be crafted to actually protect the privilege and not pay lip-service to it on the theory that the "claw back" provisions of the Protective Order are an adequate substitute.

C. Demand No. 3

46. **The Demand**. The Committee proposes that any document not captured by the privilege review be produced to the Committee, subject only to the "claw back" provisions of the Protective Order. Motion ¶ 10(c).

47. **The Debtor's Response**. This Demand is flawed for the same reasons as Demand No. 1. First, on its face, it violates Federal Rule of Civil Procedure 26, ignores the provisions of the Protocols and is simply unfair to the individuals. Second, unless the Committee affirmatively identifies the inadvertently produced privileged document, the Debtor will never even know that it was produced. This means that the Committee already would have reviewed the privileged contents of the document, and then should be obligated to scrub from their own minds the privileged content. That is clearly impossible. *See Arconic, Inc. v. Novelis, Inc.*, CA No. 17-14344, 2019 WL 911417, at *3 (W.D. Pa. February 26, 2019) (with respect to a clawed-back document, "once it is produced, the opposing party knows its contents. That information cannot be unlearned.") Third, if the Committee reviews a document that questionably could be privileged, but the Committee does not identify the document to the Debtor, then Debtor will never have an opportunity to contest if it is privileged or not.

48. The Committee would place discretion on determining Debtor's privilege, and the privilege of non-Debtor affiliated parties, solely in the hands of the Committee. That is clearly not right and the Committee's reliance on the "claw back" provision is misplaced. A claw-back provision is used to resolve a producing party's *inadvertently* produced privileged materials; it is not a tool to give the requesting party sole discretion in deciding what documents fall with scope of the producing party's privilege.

49. The Sedona Conference, the leading legal conference on the production of ESI which has been widely cited by federal courts across the country,[8] has expressly rejected the approach advocated by the Committee. Commenting on Fed. R. Evid. 502(d), the rule governing claw-back agreements, the Sedona Conference stated:

> Rule 502 contains no provision that grants the court the authority to compel a "quick peek" production or other disclosure of privileged information absent a finding of waiver. Indeed, Rule 502 was designed to protect producing parties, not to be used as a weapon impeding a producing parties' right to protect privileged material. Compelled disclosure of privileged information, even with a right to later clawback the information, forces a producing party to ring a bell that cannot be un-rung. As one court recognized, "regardless of how painstaking the precautions, there is no order . . . which erases from defendant's counsel's knowledge what has been disclosed. There is no remedy which can remedy what has occurred, regardless of whether or not the precautions were sufficient."
>
> The court's analysis is directly on point here. There are many ways in which a producing party may be prejudiced by compelled disclosure of privileged information. For instance, after viewing privileged material, a party may submit a request for admission to elicit the material or tailor a deposition question to do the same. Or a party may adjust its settlement position in light of its review of the privileged information. These concerns would inevitably erode the goal of the attorney-client privilege, which is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."
>
> Courts also should not employ Rule 502(d) indirectly to compel a result that is not permitted directly under the rule. For example, some courts have separately entered 502(d) orders protecting parties from claims of waiver by the production of privileged documents as well as Rule 16(b) scheduling orders with aggressive document production deadlines that do not provide the parties with a reasonable period of time to review the documents for privilege. In these instances, the courts caution the parties that there will be dire consequences for missing the deadline and they, therefore, should consider all means available to achieve a timely document production, including the use of a "quick peek" or "make available" production. In essence, the courts are attempting to indirectly compel a result that it is not directly permitted under Rule 502(d)—a result that was never intended by

[8] *See Romero v. Allstate Ins., Inc.*, 271 F.R.D. 96, 106 (E.D. Pa. 2010) (citing decisions adopting Sedona from the Sixth Circuit and the district courts of New York and New Jersey) ("To resolve disputes regarding the production of metadata, many courts have turned to the Sedona Principles and Sedona Commentaries thereto, which are "the leading authorities on electronic document retrieval and production."); *see also Race Tires Am. Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 160 (3d Cir. 2012) (adopting Sedona); *Al Otro Lado, inc. v. Nielsen*, 328 F.R.D. 408, 417 (S.D. Cal. 2018) (same).

the rule.[9]

50. There is no law or rule that enables the Committee to have unfettered access to the ESI. ESI should only be produced if, among other things, it is identified through search terms crafted in good faith to obtain information "relevant to any party's claim or defense."

51. Moreover, any search must be subject to the Court's determination of the Debtor's Motion.

52. Finally, as a reasonable additional layer of protection under the circumstances, any documents produced must be designated as "Highly Confidential" on the Court-ordered Protective Order.

D. Demand No. 4

53. **The Demand**. As its final demand, the Committee requests that (a) all non-privileged documents and privileged documents relating to Estate Claims be immediately produced, and (b) privileged documents unrelated to Estate Claims be logged

54. **The Debtor's Response**. Subject to its specific responses to Demands 1-3, the Debtor has no objection to Demand No. 4.

IV. PRAYER

WHEREFORE, the Debtor respectfully requests that the Motion be (a) denied, and that the parties be directed to proceed with the review and production of the Original E-Mails, subject only to the resolution of the Debtor's Motion or, in the alternative, (b) granted, subject to the specific responses set forth herein.

[9] *See The Sedona Conference Commentary on Protection of Privileged ESI*, 17 Sedona Conf. J. 95, 140 (2016) (internal citations omitted).

Dated: July15, 2020.

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

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

CLO HOLDCO, LTD.'S LIMITED OBJECTION TO OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO COMPEL PRODUCTION BY THE DEBTOR

[Relates to Docket No. 808]

TO THE HONORABLE STACEY G. JERNIGAN, U.S. BANKRUPTCY JUDGE:

CLO Holdco, Ltd. ("**CLO**") files this *Limited Objection* (the "**Limited Objection**") to the Official Committee of Unsecured Creditors' (the "**Committee**") *Motion to Compel Production by the Debtor* [Dkt. #808] (the "**Motion**"),[1] which seeks production of certain information, documents, and/or communications (collectively, "**ESI**") from Highland Capital Management, L.P. (the "**Debtor**") pursuant to the Final Term Sheet and the Committee's Proposed Protocol dated June 25, 2020. This Limited Objection seeks only to ensure the protection of CLO's attorney-client and work product privileges. In support of this Limited Objection, CLO states as follows:

[1] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion or the "Final Term Sheet" [Dkt. #354-1] referenced therein, as applicable.

PRELIMINARY STATEMENT

1. The Committee served CLO with its First Request for Production of Documents on July 13, 2020. CLO intends to cooperate with the Committee's discovery efforts in all respects and has already engaged in correspondence with Committee's counsel in an effort to address this Limited Objection and to streamline the discovery process. While CLO is fully committed to working with the Committee, CLO is not agreeing to waive privileges or to produce privileged documents or ESI at this time. The purpose of this Limited Objection is solely to preserve CLO's rights pursuant to the attorney-client privilege and work product doctrine (hereinafter collectively referred to as "**Privilege(s)**").

2. The Debtor possesses ESI that is subject only to CLO's Privilege, which may not be waived by the Debtor. The Debtor's in-house attorneys provide routine legal services to CLO pursuant to that certain *Second Amended and Restated Service Agreement* dated January 1, 2017 (the "**Shared Services Agreement**" or "**Agreement**").[2] CLO pays the Debtor annually for these legal services, in addition to financial, accounting, tax, and trading services. In exchange for payment, the Debtor provides legal services to CLO independently of the legal services performed on the Debtor's own behalf.

3. Importantly, the Shared Services Agreement exclusively governs CLO's relationship to the Debtor. Pursuant to that Agreement, all books and records, including ESI, kept and maintained by the Debtor on behalf of CLO constitute CLO's sole property, which the Debtor maintains for the benefit of CLO. *See* Shared Services Agreement, § 4.02. Accordingly, the Debtor's production of all ESI would necessarily involve the Debtor's production of CLO's sole property, including privileged ESI.

[2] A true and correct copy of the Shared Services Agreement is attached hereto as **Exhibit A** and incorporated herein by reference.

4. The Committee correctly points out that it stands in the Debtor's shoes for purposes of prosecuting the Estate Claims—but it does not stand in CLO's shoes. The Committee's access to ESI, as well as the Debtor's production of the same, is in all respects subject to CLO's Privilege and should be subject to CLO's prior consent considering that the Debtor is, in pertinent part, simply a custodian of CLO's property.

RELIEF REQUESTED

5. CLO requests the opportunity to obtain from the Debtor, review, and assert privileges to all ESI concerning CLO-related legal services provided by the Debtor before the ESI is produced to the Committee. That will allow CLO to conduct analyses for Privileges and confidentiality in accordance with the Agreed Protective Order [Dkt. #382] before CLO's records—held in the possession of the Debtor—are produced to the Committee.

ARGUMENTS & AUTHORITIES

6. The Final Term Sheet provides the Committee with standing to pursue the Estate Claims. In that regard, the Final Term Sheet purports to allow the Committee access to "privileged documents and communications that are within the Debtor's possession, custody, or control." However, CLO is not a party to the Final Term Sheet, nor is CLO an "affiliate" of the Debtor within the meaning of Bankruptcy Code § 101(2). The Debtor has no authority to grant any party access to CLO's privileged or confidential information. The Final Term Sheet cannot form the basis for the Committee's access to, or the Debtor's production of, any such information.

7. The fact that the Debtor provided legal services for itself as well as other parties does nothing to diminish the Privilege of any party. The attorney-client privilege applies the same in joint-client representations as it does in a single-client representation:

> When co-clients and their common attorneys communicate with one another, those communications are "in confidence" for privilege purposes. Hence the privilege protects those communications from compelled disclosure to persons outside the joint representation.

In re Teleglobe Communications Corp., 493 F.3d 345, 363 (3d Cir. 2007), as amended (Oct. 12, 2007). The privilege among co-clients likewise applies when the attorneys are in-house counsel. *Id.*, at 369 ("While there is much debate over how corporate counsel should go about promoting compliance with law …, both sides of the debate seem to see in-house counsel as the 'front lines' of the battle to ensure that compliance while preserving confidential communications.").

8. The exception to the rule of co-client privilege arises when the co-clients later become adverse to one another in litigation arising from the common interest representation. *In re Mirant Corp.*, 326 B.R. 646, 649 (Bankr. N.D. Tex. 2005); *Teleglobe*, 493 F.3d at 366-68. This Privilege exception—often called the "co-client exception"—forms the only conceivable basis for the Committee's access to ESI concerning CLO.

9. The co-client exception to privilege provides that where two parties share the same legal counsel, one party may not invoke privilege against the other in litigation between them arising from the matter in which they were jointly represented. *Mirant*, 326 B.R. at 649. Two key elements must therefore be present in order for this exception to apply: (i) the co-clients must become adverse in subsequent litigation; and (ii) the subsequent litigation must stem from the *same matter on which they shared counsel*. *Id.* The cases of *Mirant* and *Teleglobe* illustrate CLO's Privileges in this case.[3]

A. *In re Mirant Corp.*

10. In *Mirant*, the debtors were part of the "TSC" corporate family. Mirant was the parent of other affiliated debtors. TSC planned to divest itself of Mirant via public offering of 20% of Mirant's stock, and hired a third party outside law firm (Troutman) to represent both TSC and Mirant in the divestiture. Thereafter, having encountered financial troubles, Mirant and its subsidiaries filed for Chapter 11 relief. Mirant sought production from Troutman related to the

[3] These cases are somewhat distinguishable in that both involved parents and subsidiaries (affiliates), whereas CLO is not an affiliate of the Debtor. Therefore, the analysis of privilege in the context of duties between a parent and subsidiary are not relevant to CLO and the Debtor.

TSC-Mirant transactions prior to and during the divestiture, which Troutman and TSC opposed based on TSC's attorney-client privilege with Troutman.

11. Troutman and TSC advanced multiple separate arguments in defense of TSC's privilege, with those asserted by TSC being most relevant to the instant case.[4] The first of TSC's arguments was that Troutman's representation of TSC and Mirant in the divestiture did not constitute a joint representation. *Mirant*, 326 B.R. at 653. The Court made specific findings contrary to this assertion, specifically that the memorandum of TSC's general counsel directed that Troutman would "provide objective legal advice" for both parties and "document agreements reached between executives." *Id.* CLO asserts that any application of the co-client exception to its Privileges in this case must likewise be predicated on a finding that the Debtor and CLO were jointly represented in specific matters that gave rise to the responsive ESI.

12. Additionally, Mirant asserted that no attorney client privilege existed because TSC and Mirant had certain common directors, thus meaning that knowledge gained by those TSC directors through dealings with Troutman was imparted to Mirant. *Mirant*, 326 B.R. at 653. TSC refuted this argument with numerous cases holding that directors sitting on the boards of both a parent and subsidiary represent the entities separately. Although the Court found those cases distinguishable, the argument has at least some merit evidenced by the fact that the Court appeared

[4] Troutman argued that because a subsidiary (Mirant) must act for the benefit of its parent (TSC), there could be no lawful or permissible adverse interest between Mirant and TSC. *Mirant*, 326 B.R. at 650-51. This argument is irrelevant in the case at bar because, as previously noted, there is no affiliate or parent-subsidiary relationship between CLO and the Debtor.

Troutman further argued that the "Protocol" between TSC and Mirant limited each party's access to confidential information of the other. *Mirant*, 326 B.R. at 652. The Shared Services Agreement between CLO and the Debtor does not include such confidentiality provisions. That fact is irrelevant, however, as the Court nonetheless held that the Protocol "[did] not provide Mirant or TSC with any privilege beyond that which exists in an ordinary joint representation." *Id.*

to deny TSC's position based largely on public policy.[5] *Id.* at 654. In ruling for Mirant on this issue, the Court reiterated certain policy considerations worthy of note:

> It is black-letter law that the attorney-client privilege is meant to foster open communications between attorney and client. … Neither Troutman nor TSC can show any reasonable basis for supposing enforcement of TSC's privilege in the case at bar would advance that goal. In a bankruptcy case, the need for investigation is far more acute than is any concern for attorney-client communications.

Mirant, 326 B.R. at 654 (internal citations omitted).

13. In bringing this Limited Objection, CLO fully acknowledges that thorough investigations are vital to the bankruptcy process and the interest of creditors. CLO does not assert that creditors in this case are entitled to anything less than a thorough investigation of the Estate Claims. CLO reiterates that it intends to fully cooperate in discovery, but wishes to preserve all applicable privileges.

14. *Mirant* does not stand for the proposition that privilege is disposed of altogether once bankruptcy comes into play. Rather, *Mirant* upholds the well-established rule that the co-client exception to privilege applies only to litigation arising from a specific matter on which the parties were jointly represented.[6] The Court progressed to discussions of policy only to rebut TSC's argument that directors may "wear two hats" without waiving privilege in joint-client situations.

15. CLO asserts that it is nonetheless entitled to the traditional protections afforded under the law regarding Privileges. *Mirant* supports CLO's Privileges as to all ESI concerning matters in which the Debtor's in-house counsel represented CLO independently of the Debtor.

B. *In re Teleglobe Communications Corp.*

[5] As discussed below, the Third Circuit in *Teleglobe* disagreed with the *Mirant* court on this issue.

[6] *Mirant*, 326 B.R. at 649 ("It is well established that, in a case of a joint representation of two clients by an attorney, one client may not invoke the privilege against the other client in litigation between them arising from the matter in which they were jointly represented.").

16. Like *Mirant*, the case of *Teleglobe* involved a privilege dispute among parent and subsidiary corporations. The debtors were subsidiaries of Teleglobe, which was a wholly-owned subsidiary of BCE. The debtors brought an adversary proceeding against BCE for its decision to withdraw funding from Teleglobe, effectively causing the debtors' bankruptcy. The disputes at issue related to matters for which BCE's in-house counsel and/or outside counsel jointly represented the debtors, Teleglobe, and BCE. The appeal to the Third Circuit raised "core questions about the proper operation of a corporate family's centralized in-house legal department." *Teleglobe*, 493 F.3d at 359. In a lengthy opinion, the Third Circuit analyzed, *inter alia*, the co-client privilege and the "adverse litigation" exception.[7]

17. *Teleglobe* elaborates on the co-client exception principles espoused in *Mirant*. Among other things, the Third Circuit notes that a finding of joint representation requires that both parties *intended* to be jointly represented. *Teleglobe*, 493 F.3d at 362.

> What the Court takes exception to is [the plaintiff's] effort to ... argue, in effect, that a joint representation of Party A and Party B may somehow arise through the expectations of Party B alone, despite Party A's views to the contrary. This position is untenable, because it would ... allow the mistaken (albeit reasonable) belief by one party that it was represented by an attorney ... to serve to infiltrate the protections and privileges afforded to another client.

Id. (quoting *Neighborhood Dev. Collaborative v. Murphy*, 233 F.R.D. 436, 441-42 (D.Md.2005)). The court went on to note that:

> [C]lients of the same lawyer who share a common interest are not necessarily co-clients. Whether individuals have jointly consulted a lawyer or have merely entered concurrent but separate representations is determined by the understanding of the parties and the lawyer in light of the circumstances.

Id. (quoting Restatement (Third) of the Law Governing Lawyers § 75 cmt. c). Accordingly, application of the co-client exception to CLO's Privileges requires a finding that CLO and the

[7] The "adverse litigation" exception discussed by the Third Circuit is referred to herein as the co-client exception to privilege.

Debtor intended to be jointly represented on the underlying matter. "The keys to deciding the scope of a joint representation are the parties' intent and expectations, and so a district court should consider carefully … any testimony from the parties and their attorneys on those areas." *Id.* at 363.

18. It is also worth noting that the Debtor cannot unilaterally waive CLO's Privileges, as a waiver of the co-client privilege requires the consent of all parties:

> [W]aiving the joint-client privilege requires the consent of all joint clients. … [A] client may unilaterally waive the privilege as to its own communications with a joint attorney, so long as those communications concern only the waiving client; it may not, however, unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients.

Teleglobe, 493 F.3d at 363 (citations omitted).

19. The Third Circuit ultimately remanded the case for a determination of whether BCE and the debtors were jointly represented on a matter of common interest—if so, documents within the scope of that joint representation would have been discoverable. *Id.* at 383. The ultimate holding in *Teleglobe* aligns with the co-client exception rule espoused in *Mirant*:

> We hold that the District Court may only compel BCE to produce disputed documents because of the adverse-litigation exception to the co-client privilege if it finds that BCE and the Debtors were jointly represented by the same attorneys on a matter of common interest that is the subject-matter of those documents. Finding that BCE and Teleglobe were jointly represented is not enough, as Teleglobe cannot unilaterally waive the co-client privilege that attaches to documents that involve BCE and were created in the course of the joint representation.

Teleglobe, 493 F.3d at 386–87. Accordingly, the Debtor cannot waive CLO's privileges and produce all ESI in its possession—including ESI held as a custodian on CLO's behalf—because CLO has not waived any privileges or consented to production.

CONCLUSION

20. For the reasons set forth herein, the Debtor cannot be compelled to produce any ESI related to CLO matters in which the Debtor was not a jointly represented party. Absent joint representation with an interest common to both CLO and the Debtor, all CLO-related ESI is subject to CLO's Privilege, even while in the Debtor's hands. CLO's Privilege applies unequivocally to all ESI in the absence of specific findings that:

(1) the ESI is specifically related to the Estate Claims (the subsequent adverse litigation in this case);

(2) the ESI is related to matters on which CLO and the Debtor were jointly represented in furtherance of a common interest held by both parties; and

(3) both parties intended to be jointly represented on the matter at issue.

The fact that the ESI is in the Debtor's possession is irrelevant, as the custodian(s) possess such information and records solely in their capacity as a custodian for the benefit of CLO (*i.e.*, while wearing their "CLO hat").

WHEREFORE, CLO respectfully requests that this Limited Objection be sustained and that the Court enter an order (a) requiring that CLO be afforded the opportunity to review all ESI concerning CLO-related legal services before any such ESI is produced to the Committee, and (b) granting CLO such other and further relief to which it may be justly entitled.

DATED: July 15, 2020

Respectfully submitted,

KANE RUSSELL COLEMAN LOGAN PC

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ATTORNEYS FOR CLO HOLDCO, LTD.

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2020, a true and correct copy of the foregoing Limited Objection was served via the Court's electronic case filing (ECF) system upon all parties receiving such service in this bankruptcy case; and via e-mail upon the following parties:

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Exhibit A

Shared Services Agreement

SECOND AMENDED AND RESTATED SERVICE AGREEMENT

THIS SECOND AMENDED AND RESTATED SERVICE AGREEMENT (this "***Agreement***") entered into to be effective from the 1st day of January, 2017 (the "***Effective Date***") by and among Highland Capital Management, L.P., a Delaware limited partnership ("***HCMLP***"), Charitable DAF Fund, L.P., a Cayman Islands exempted limited partnership (the "***Fund***"), Charitable DAF GP, LLC, a Delaware limited liability company (the "***General Partner***"), and any affiliate of the General Partner that becomes a party hereto. Each of the signatories hereto is individually a "***Party***" and collectively, the "***Parties***".

RECITALS

A. HCMLP, the Fund and the General Partner entered into that certain Shared Services Agreement dated January 1, 2012 (the "***Original Agreement***");

B. The Parties amended and restated the Original Agreement in its entirety on the terms as set forth in that certain Amended and Restated Agreement effective as of July 1, 2014 (the "***Existing Agreement***");

C. The Parties desire to amend and restated the Existing Agreement in its entirety on the terms set forth herein;

C. Since the inception of the Fund, the Parties have intended that the Fund and the General Partner would incur reasonable arm's-length fees in connection with the operation of the Fund and management and reporting activities with respect to Fund assets;

D. HCMLP has incurred and will continue to incur substantial expenses on behalf of the Fund and the General Partner in performing the Services (as defined below);

E. The Parties agree that it is in their mutual best interests for HCMLP to continue to provide the Services to the General Partner, the Fund and other Recipients (as defined below) and for HCMLP to be provided sufficient financial incentives to continue to provide the Services;

F. The General Partner and the Fund desire to provide HCMLP sufficient compensation for performing the Services and to reimburse HCMLP for expenses incurred on their behalf;

G. During the Term (as defined below), HCMLP will provide to the General Partner, on behalf of the Fund and/or its subsidiaries, certain services as more fully described herein, subject to the terms and conditions set forth herein.

AGREEMENT

In consideration of the foregoing recitals and the mutual covenants and conditions contained herein, the Parties agree, intending to be legally bound, and the Existing Agreement is hereby amended and restated in its entirety as follows:

ARTICLE I
DEFINITIONS

"***Advisory Agreement***" means that certain Second Amended and Restated Investment Advisory Agreement, dated effect as of the Effective Date, by and among the Parties, as amended, restated, modified and supplemented from time to time.

"***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.

"***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.

"***Dispute***" has the meaning set forth in Section 7.14.

"***Effective Date***" has the meaning set forth in the preamble.

"***Enforcement Court***" has the meaning set forth in Section 7.14.

"***Existing Agreement***" has the meaning set forth in the recitals.

"***Fund***" has the meaning set forth in the preamble.

"***General Partner***" 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.

"***HCMLP***" has the meaning set forth in the preamble.

"***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.

"***Management Fee***" has the meaning set forth in the Advisory Agreement.

"***New Service***" has the meaning set forth in Section 2.03.

"***Original Agreement***" has the meaning set forth in the recitals. "***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.

"***Recipient***" means the General Partner, the Fund, and any of the Fund's direct or indirect Subsidiaries or managed funds or accounts in their capacity as a recipient of the Services.

"***Service Provider***" means any of HCMLP and its direct or indirect Subsidiaries in its capacity as a provider of Services.

"***Service Standards***" has the meaning set forth in Section 4.01.

"***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 Services; and (ii) tax-related surcharges or fees that are related to the Services identified and authorized by applicable tariffs.

"***Term***" has the meaning set forth in Section 5.01.

ARTICLE II
SERVICES

Section 2.01 Services. During the Term, Service Provider will provide Recipient with Services, each as requested by Recipient and as described more fully on **Annex A** attached hereto (the "***Services***").

Section 2.02 Changes to the Services.

(a) During the Term, the Parties may agree to modify the terms and conditions of a Service Provider's performance of any Service in order to reflect new procedures, processes or other methods of providing such Service, including modifying the applicable fees for such 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 Service to Recipient.

(b) The Party requesting a Change will deliver a description of the Change requested (a "***Change Request***").

(c) Notwithstanding any provision of this Agreement to the contrary, a Service Provider may make: (i) Changes to the process of performing a particular Service that do not adversely affect the benefits to Recipient of Service Provider's provision or quality of such Service in any material respect or increase Recipient's cost for such Service; (ii) emergency Changes on a temporary and short-term basis; and/or (iii) Changes to a particular 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 Services. The Parties may, from time to time during the Term of this Agreement, negotiate in good faith for Services not otherwise specifically listed in Section 2.01 (a "***New Service***"). Any agreement between the Parties on the terms for a New Service must be in accordance with the provisions of Article III and Article IV hereof, will be deemed to be an amendment to this Agreement and such New Service will then be a "***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 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
PAYMENT OF FEES; TAXES

Section 3.01 Management Fee. The Fund shall pay the Service Provider the Management Fee in accordance with the terms and subject to the conditions set forth in the Advisory Agreement.

Section 3.02 Taxes.

(a) Recipient is responsible for and will pay all Taxes applicable to the Services 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 Services 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 Services, 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 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 3.02 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 IV
SERVICE PROVIDER RESPONSIBILITIES

Section 4.01 Service Provider General Obligations. Service Provider will provide the Services to Recipient, subject to the requirements under Sections 3.01 and 3.02 herein and subject to reimbursement of permitted expenses in accordance with the Investment Advisory Agreement entered into concurrently herewith, on a non-discriminatory basis and will provide the Services in the same manner as if it were providing such services 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 4.02 Books and Records; Access to Information. Service Provider will keep and maintain books and records with respect to the Services 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 Services, 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 4.03 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 V
TERM AND TERMINATION

Section 5.01 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 7.02. The Term shall automatically renew for successive one year periods unless sooner terminated under Section 5.02.

Section 5.02 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 VI
LIMITED WARRANTY

Section 6.01 Limited Warranty. Service Provider will perform the 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 Services under this Agreement, including any warranty of merchantability, fitness, quality, non-infringement of third party rights, suitability or adequacy of the Services 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 Service, and will (at Recipient's expense) assist Recipient with any warranty claims related thereto.

ARTICLE VII
MISCELLANEOUS

Section 7.01 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 Recipient or their respective successors or assigns. The Parties understand and agree that this Agreement does not make any of them an agent or legal representative of the other for any purpose whatsoever. 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 Services.

Section 7.02 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 7.03 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 7.04 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 7.05 Governing Law. Subject to Section 7.14, 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 7.06 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 7.07 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 7.08 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 7.09 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 7.10 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: Chief Legal Officer
Fax: (972) 628-4147

If to the General Partner or the Fund, addressed to:

Charitable DAF GP, LLC
4140 Park Lake Avenue, Suite 600
Raleigh, North Carolina 27612
Attention: Grant Scott
Fax: (919) 854-1401

Section 7.11 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 7.12 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 7.13 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 7.14 Jurisdiction; Venue; Waiver of Jury Trial. The Parties hereby agree that any action, claim, litigation, or proceeding of any kind whatsoever against any other Party in any way arising from or relating to this Agreement and all contemplated transactions, including claims sounding in contract, equity, tort, fraud and statute ("***Dispute***") shall be submitted exclusively to the U.S. District Court for the Northern District of Texas or, if such court does not have subject matter jurisdiction, the courts of the State of Texas sitting in Dallas County, and any appellate court thereof ("***Enforcement Court***"). Each Party irrevocably and unconditionally submits to the exclusive personal and subject matter jurisdiction of the Enforcement Court for any Dispute and agrees to bring any Dispute only in the Enforcement Court. Each Party further agrees it shall not commence any Dispute in any forum, including administrative, arbitration, or litigation, other than the Enforcement Court. Each Party agrees that a final judgment in any such action, litigation, or proceeding is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

EACH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL ACTION, PROCEEDING, CAUSE OF ACTION OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING ANY EXHIBITS, SCHEDULES, AND APPENDICES ATTACHED TO THIS AGREEMENT, OR THE TRANSACTIONS CONTEMPLATED HEREBY. EACH PARTY CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE OF THE OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT THE OTHER PARTY WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF A LEGAL ACTION, (B) IT HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (C) IT MAKES THIS WAIVER KNOWINGLY AND VOLUNTARILY, AND (D) IT HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

Section 7.15 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 to be effective from the Effective Date.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By:_____
Name: James Dondero
Title: President
Date: 6/21/17

CHARITABLE DAF GP, LLC

By:_____
Name: Grant J. Scott
Title: Managing Member
Date:

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general partner

By:_____
Name: Grant J. Scott
Title: Managing Member
Date:

IN WITNESS HEREOF, each of the Parties has caused this Agreement to be executed by its duly authorized officers to be effective from the Effective Date.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By:_____
Name: James Dondero
Title: President
Date:

CHARITABLE DAF GP, LLC

By:_____
Name: Grant J. Scott
Title: Managing Member
Date: 6/21/2017

CHARITABLE DAF FUND, L.P.

By: Charitable DAF GP, LLC, its general partner

By:_____
Name: Grant J. Scott
Title: Managing Member
Date: 6/21/2017

Annex A

Services

Finance & Accounting

- Book keeping
- Cash management
- Cash forecasting
- Financial reporting
- Accounts payable
- Accounts receivable
- Expense reimbursement
- Vendor management
- Valuation

Tax

- Tax audit support
- Tax planning
- Tax prep and filing

Legal

- Document review and preparation

Trading

- Trade execution
- Risk management
- Trade settlement
- General operations

Facilities

Public Relations Support

Information Technology Infrastructure Support

Appendix Exhibit 42

Jason M. Rudd
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jason.rudd@wickphillips.com
Lauren K. Drawhorn
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WICK PHILLIPS GOULD & MARTIN, LLP
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Dallas, Texas 75204
Telephone: (214) 692-6200
Fax: (214) 692-6255

COUNSEL FOR NEXPOINT

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'S OBJECTION TO OFFICIAL COMMITTEE OF UNSECURED CREDITORS' EMERGENCY MOTION TO COMPEL PRODUCTION BY THE DEBTOR AND REQUEST FOR PROTECTIVE ORDER

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 any of the foregoing[1] (collectively "NexPoint") file this Objection

[1] This Objection and Request for Protective Order is being filed on behalf of these entities and their subsidiaries.

to Official Committee of Unsecured Creditors' Emergency Motion to Compel Production by the Debtor and Request for Protective Order ("Objection and Request for Protective Order") and, in support thereof, respectfully state as follows:

I. INTRODUCTION AND SUMMARY

1. NexPoint is an alternative investment platform comprised of a group of investment advisors and sponsors, a broker-dealer, and a suite of related investment vehicles. NexPoint is not a debtor in the above-referenced bankruptcy case (the "Bankruptcy Case"). However, NexPoint is party to a Shared Services Agreement with Highland Capital Management, L.P ("Highland") dated effective as of January 1, 2013 and Amended and Restated dated effective as of January 1, 2018 (as modified, amended, and restated from time to time, the "Shared Services Agreement"). Under the Shared Services Agreement, NexPoint retained Highland to provide certain back- and middle-office support and administrative, infrastructure and other services. As a result, NexPoint utilized Highland's server and infrastructure for its emails and other business information. In addition, under the Shared Services Agreement, Highland provides NexPoint utilization of certain individuals employed by Highland to perform various portfolio selection and asset management functions for NexPoint.

2. Despite sharing certain services, NexPoint is a separate entity, with separate and independent operations, and separate ownership from Highland. Thus, when NexPoint utilizes the Highland server to send emails and documents, those communications and business information are specific to NexPoint – independent of Highland and its operations. Similarly, when NexPoint utilizes certain individuals employed by Highland, those services are performed solely on behalf of NexPoint and the issues solely related to NexPoint. Only in limited instances do NexPoint and Highland communications and business issues overlap. The vast majority of NexPoint

communications and business information is unrelated to Highland's business operations and, but for owning the server and infrastructure, Highland would not have access to such information.

3. On July 8, 2020, the Committee filed their Emergency Motion to Compel Production by the Debtor, specifically seeking all custodial data for nine identified custodians, including without limitation, email, chat, text, Bloomberg messaging, or other ESI attributable to the custodians (the "Requested Information"). [ECF No. 808]. Upon information and believe, such custodial data exceeds eight million emails (8,000,000) and attachments. The Committee does not propose any means or terms to narrow, limit, or otherwise restrict the Requested Information. The Committee makes no effort to focus the requests on information relevant to the Estate Claims. The Committee fails to propose any means to limit the request to produce a reasonable volume of responsive information to facilitate an organized review process. Finally, the Requested Information is not even restricted to Highland documents (as opposed to non-debtor information), or otherwise proportional to the needs of the case.

4. In response, the Debtor filed its Motion for Entry of (i) Protective Order or, in the Alternative, (ii) an Order Directing the Debtor to Comply with Certain Discovery Demands Tendered by the Committee ("Motion for Protective Order"). [ECF No. 810]. The Motion for Protective Order requests the entry of a protective order authorizing the Debtor to (a) engage in a confidentiality review, as set forth in its Document Review Memorandum, and (b) effectuate a Compliance Process, whereby if the Debtor identified a responsive, non-privileged document that was subject to a Confidentiality Obligation under a Shared Service Agreement, it would give written notice to the counter-party of the Debtor's intent to produce the document absent the counter-party's objection (the "Debtor Proposed Protective Order"). [ECF No. 810, ¶ 39].

5. On July 13, 2020, the Debtor and Committee entered a Stipulation whereby they agreed any objections to the Motion to Compel or Motion for Protective Order shall be filed by July 15, 2020 at 5:00 p.m., any reply in support of the Motion to Compel or Motion for Protective Order shall be filed by July 17, 2020 at 5:00 p.m., and requesting the Court set a hearing on the discovery motions after July 17, 2020. [ECF No. 826].

6. As a counter-party to a Shared Services Agreement with Highland, the Committee's broad request for **all** custodial data, necessarily includes NexPoint's communications, documents, and information – information that is not relevant to the Estate Claims and that contains NexPoint's proprietary and confidential information. Many, if not all, of the nine custodians provided support to NexPoint and, thus, may have NexPoint's confidential and proprietary business information. Further, three of the nine custodians are attorneys and, at some point, may have provided legal services to NexPoint – which information would be protected by NexPoint's attorney-client privilege. Accordingly, NexPoint files this Objection to the Committee's Motion to Compel and requests the Court enter a protective order, protecting NexPoint from the Committee's overly broad, unduly burdensome, and non-relevant discovery requests.

II. ARGUMENT AND AUTHORITIES

A. The discovery sought is unduly burdensome and not proportional to the needs of the case because it requires disclosure of non-relevant, privileged, and other protected matters from nonparties.

7. Federal Rule of Civil Procedure 26, made applicable to this Bankruptcy Proceeding by Federal Rule of Bankruptcy Procedure 7026, allows parties to obtain discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." FED. R. CIV. P. 26(b)(1), FED. R. BANKR. P. 7026. The Court determines whether requested discovery is proportional to the needs of the case by considering "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant

information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expenses of the proposed discovery outweighs its likely benefits." FED. R. CIV. P. 26(b)(1), FED. R. BANKR. P. 7026. The Court must limit discovery if the requested information is outside the scope permitted by Rule 26(b)(1). FED. R. CIV. P. 26(b)(3)(iii); FED. R. BANKR. P. 7026.

8. In addition, a party or attorney seeking discovery must certify that each discovery request is "not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" and is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." FED. R. CIV. P. 26(g)(1)(B)(ii), (iii). The party and/or attorney seeking discovery may be subject to sanctions, including reasonable expenses and attorney's fees, if the certification of a discovery requests violates this rule. FED. R. CIV. P. 26(g)(3); FED. R. BANKR. P. 7026. Here, the Committee does not provide any search terms or other means by which to restrict or limit the Requested Information to information relevant to the Estate Claims. Instead the Motion to Compel proposes discovery that will harass non-debtors, such as NexPoint, needlessly increase the cost of litigation, is not reasonable, and is unduly burdensome and expensive – as clearly indicated by the sheer volume of documents responsive to such a broad request (over eight million). The Requested Information is outside the scope of discovery and does not comply with the requirements and certifications under Rule 26.

9. As a result of the Committee's overly broad and unfocused request, the Requested Information necessarily contains non-debtor information, including NexPoint's confidential and proprietary business information as well as information protected by the attorney-client privilege. However, the Shared Services Agreement does not give Highland unfettered access to NexPoint's

confidential and proprietary business information and the mere fact that NexPoint utilizes Highland's servers and back- and middle office services and infrastructure does not change the character of such information. Again, but for the Shared Services Agreement, Highland would not have access to NexPoint's communications and information, except in limited situations. If a party served document requests on a third-party service provider, the party would not be entitled to all custodial data held by that third-party service provider. Instead, the request must be narrowly tailored, relevant to the claims and defenses at issue, and proportional to the needs of the case. The Committee should be held to the same reasonable standard.

10. The Committee neither tailored the Requested Information to discover information relevant to the Estate Claims nor to be proportional to the needs of the case and, as such, is outside the scope of discovery under Rule 26(b)(1). To allow the Committee such broad, unrestricted, and unlimited, access to the Requested Information – with no search terms or other means of narrowing the request – is contrary to both the scope of discovery and certifications required under Rule 26. Accordingly, the Court should deny the Motion to Compel and require that the Committee submit proposed search terms or other means to tailor the Requested Information to the specific Estate Claims at issue.

B. If the Court allows the requested discovery, a protective order is required to protect NexPoint from undue burden and expense.

11. If the Court requires Highland produce the Requested Information (in its entirety or properly narrowed under Rule 26), the Court should enter a protective order in connection with such production. A court may, for good cause, protect a person or party from annoyance, embarrassment, oppression, or undue burden or expense. FED. R. CIV. P. 26(c)(1); FED. R. BANKR. P. 7026. A party seeking a protective order must show good cause and a specific need for protection. *Samsung Elecs. Amer. Inc. v. Yang Kun "Michael" Chung*, 325 F.R.D. 578, 592 (N.D.

Tex. 2017). "Good cause" exists when justice requires the protection of "a party or person from any annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c); *Skyport Global Comms., Inc. v. Intelsat Corp.* (*In re Skyport Global Comms., Inc.*), 408 B.R. 687, 691 (Bankr. S.D. Tex. 2009). The purpose of a protective order is to "carefully balance the competing interests existing between…need to discover 'relevant and necessary' information against the…need to protect the proprietary information upon which [a party's] business relies." *Packet Intelligence LLC v. Ericsson Inc.*, Civ. Action No. 2:18-CV-00381-JRG, 2019 WL 8137142, *2 (E.D. Tex. Jan. 10, 2019); *Williams ex rel. Williams v. Greenlee*, 210 F.R.D. 577, 579 (N.D. Tex. 2002) ("The court must balance the competing interests of allowing discovery and protecting the parties and deponents from undue burdens.").

12. As discussed above, the Requested Information necessarily includes NexPoint's confidential and proprietary business information as well as privileged legal communications. In addition, certain of NexPoint's subsidiaries and affiliates are publicly traded companies – and the disclosure of their confidential and proprietary business information is not only unduly burdensome to NexPoint but also potentially subject to regulatory constraints. NexPoint, Highland, and the Court must prevent any disclosure of non-public information regarding NexPoint's publicly traded funds and related investments.

13. The undue burden and expense NexPoint will incur if its confidential and proprietary business information is disclosed to the public, including the Committee and Highland's creditors, is substantial. On the other hand, as discussed above, NexPoint's business information is unrelated to and separate from Highland's business operations and is neither relevant to the Estate Claims nor proportional to the needs of the case.

14. In sum, good cause exists to protect NexPoint and significantly restrict and limit the disclosure of NexPoint's information. Accordingly, NexPoint requests that the Court enter a protective order ("NexPoint Proposed Protective Order") requiring (a) a relevance and confidentiality review, as set forth in a Document Review Memorandum, with NexPoint's input as to NexPoint information; (b) provide any NexPoint documents to NexPoint before production; (c) allow NexPoint a reasonable amount of time to review and confirm such document is (i) responsive, (ii) relevant; (iii) non-privileged, and (iv) correctly designated as Confidential or Highly Confidential under the Agreed Protective Order [ECF No. 382] in this Bankruptcy Case ("NexPoint Review Process"); and (d) make NexPoint a party to the Agreed Protective Order [ECF No. 382].

C. The Requested Information requires the Debtor to directly violate the confidentiality provisions of the Shared Services Agreement.

15. As noted in Highland's Motion for Protective Order, the Shared Services Agreement contains confidentiality provisions requiring Highland keep any NexPoint information obtained in connection with the Shared Services Agreement confidential. The Court should uphold such provisions by entering a protective order in connection with the Requested Information. NexPoint does not oppose the Debtor Proposed Protective Order, provided that the protective order authorizes NexPoint to participate in the Document Review Memorandum (as it relates to NexPoint information) and have final review of NexPoint information before production.

III. CONCLUSION

Accordingly, NexPoint respectfully requests that the Court (i) enter an order requiring the Committee submit proposed search terms to tailor the Requested Information to the specific Estate Claims at issue; (ii) enter the NexPoint Proposed Protective Order or, in the alternative, enter the Debtor Proposed Protective Order modified to allow NexPoint to participate in the Document

Review Memorandum and final review of NexPoint Information; and (iii) grant NexPoint such other relief to which it may be entitled at law or in equity.

Respectfully submitted,

/s/ Lauren K. Drawhorn

Jason M. Rudd
Texas Bar No. 24028786
Lauren K. Drawhorn
Texas Bar No. 24074528
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lauren.drawhorn@wickphillips.com

COUNSEL FOR NEXPOINT

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served on July 15, 2020 by the Court's ECF noticing system on all parties that consent to such service via electronic filing.

/s/ Lauren K. Drawhorn
Lauren K. Drawhorn

Appendix 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 16, 2020

United States Bankruptcy Judge

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**
	§	**Re: Docket No. 774**
Debtor.	§	

ORDER APPROVING 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

Upon the *Debtor's Motion under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020* (the "Motion"),[1] and the

[1] All terms not otherwise defined herein shall be given the meanings ascribed to them in the Motion.

Court finding that: (i) this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; (ii) venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409; (iii) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iv) due and sufficient notice of the Motion has been given; (v) entry into the Agreement was an exercise of the Debtor's sound business judgment; and (vi) it appearing that the relief requested in the Motion is necessary and in the best interests of the Debtor's estate and creditors; and good and sufficient cause appearing therefor, it is hereby

ORDERED, ADJUDGED, and DECREED that:

1. The Motion is **GRANTED**.

2. Pursuant to sections 363(b) and 105(a) of the Bankruptcy Code, the Agreement attached hereto as **Exhibit 1** and all terms and conditions thereof are approved, *nunc pro tunc* to March 15, 2020.

3. The Debtor is hereby authorized to enter into and perform under the Agreement.

4. The Debtor is authorized to indemnify Mr. Seery pursuant to the terms of the Agreement. Mr. Seery is also entitled to any indemnification or other similar provisions under the Debtor's existing or future insurance policies, including any policy tails obtained (or which may be obtained in the future), by the Debtor. The Debtor and Strand are authorized to enter into any agreements necessary to execute or implement the transactions described in this paragraph. For avoidance of doubt and notwithstanding anything to the contrary in this Order, Mr. Seery shall be entitled to any state law indemnity protections to which he may be entitled under applicable law.

5. No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

6. Notwithstanding anything in the Motion, the Agreement or the Order to the contrary, the Agreement shall be deemed terminated upon the effective date of a confirmed plan of reorganization unless such plan provides otherwise.

7. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

8. This Court shall retain jurisdiction over any and all matters arising from or related to the interpretation and/or implementation of this Order.

9. The Foreign Representative Order is hereby amended to substitute James P. Seery, Jr., as the chief executive officer, in place of Bradley S. Sharp, as the Debtor's Foreign Representative, Bermuda Foreign Representative and Cayman Foreign Representative. All other provisions of the Foreign Representative Order shall remain in full force and effect.

###END OF ORDER###

EXHIBIT 1

Engagement Agreement

J.P. SEERY & CO. LLC

[redacted]

June 23, 2020

CONFIDENTIAL

The Board of Directors of Strand Advisors, Inc.
c/o Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201

Re: Highland Capital Management L.P. (the "Company")

Dear Fellow Board Members:

This letter agreement ("Agreement") sets forth the terms and conditions of the engagement of the undersigned James P. Seery, Jr. ("I", "me" or "my"), as Chief Executive Officer ("CEO") and Chief Restructuring Officer ("CRO"), effective as of March 15, 2020 (the "Commencement Date"), by the Company and its affiliates to perform financial advisory services as detailed below.

I appreciate the trust you have placed in me by asking me to assume these roles and thank you for the opportunity to continue to work with you to restructure the Company.

Roles:

I will serve as the CEO and CRO of the Company during its Chapter 11 bankruptcy case (the "Bankruptcy Case") currently pending in the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court").

In those roles, I will be responsible for overall management of the business of the Company in Chapter 11 including, directing the reorganization and restructuring of the Company, monetization of assets, resolution of claims, development and negotiation of a plan of reorganization or liquidation, and implementation of such a plan.

My direct reports will include the individuals at the Company that currently report to the Board of Directors of Strand Advisors, Inc. (the "Board") or such other individuals employed by the Company as I determine should report to directly to me. In the event that the Board determines to restructure the reporting lines or functions of the Company, my direct reports will be amended in accordance with the Board approved restructuring.

At all times, I will remain a full member of the Board entitled to vote on all matters other than those on which I am conflicted.

I will devote as much time to this engagement as I determine is required to execute my responsibilities as CEO and CRO. I will have no specific on-site requirements in Dallas, but will be on site as much as I determine is necessary to execute my responsibilities as CEO and CRO, consistent with Covid-19 orders applicable to Dallas and New York City.

Limitations on Services

My services under this engagement are limited to those specifically noted in this Agreement and do not include legal, accounting, or tax-related assistance or advisory services. For the avoidance of doubt, I am not providing any legal services in connection with this engagement and will have not any duties as a lawyer to the Company, the Board, or any of the Company's employees. The accuracy and completeness of all information submitted to me by the Company are the sole responsibility of the Company, and I will be entitled to rely on such information without independent investigation or verification.

In my role as CEO and CRO, I will act as an independent professional contractor to the Company and will not be an employee of the Company. I will provide and pay for my own benefits, including medical benefits, by J.P Seery & Co. LLC or otherwise.

Fees and Expenses:

In consideration of my acceptance of this engagement and performance of the services pursuant to this Agreement, the Company shall pay the following:

1. Compensation for Services:
    a. Base Compensation: As compensation for my services as CEO and CRO of the Company, the Company shall pay me $150,000.00 per calendar month ("Base Compensation"). Base Compensation shall be due and payable at the start of each calendar month. Consistent with current Board compensation practice, invoices rendered by me to the Company are due and payable by the Company on receipt. Payment of the Base Compensation will be retroactive to March 15, 2020.
    b. Bonus Compensation/Restructuring Fee:
        i. The Company has agreed to pay me a restructuring fee upon confirmation of either a Case Resolution Plan or a Monetization Vehicle Plan in each case as defined below (the "Restructuring Fee").
        ii. Case Resolution Restructuring Plan
            1. On confirmation of any plan or reorganization or liquidation based on resolution of a material amount of the outstanding claims and their respective treatment, even if such plan includes (x) a debtor/creditor trust or similar monetization and claims resolution vehicle, (y) post-confirmation litigation of certain of the claims, and (z) post-confirmation monetization of debtor assets (a "Case Resolution Plan"):
                a. $1,000,000 on confirmation of the Case Resolution Plan;
                b. $500,000 on the effective date of the Case Resolution Plan; and
                c. $750,000 on completion of cash or property distributions to creditors as contemplated by the Case Resolution Plan.

iii. Debtor/Creditor Monetization Vehicle Restructuring Fee:

1. On confirmation of any plan or reorganization or liquidation based on a debtor/creditor trust or similar asset monetization and claims resolution vehicle that does not include agreement among the debtor and creditors on a material amount of the outstanding claims and their respective treatment at confirmation (a "Monetization Vehicle Plan"):
    a. $500,000 on confirmation of the Monetization Vehicle Plan;
    b. $250,000 on the effective date of the Monetization Vehicle Plan; and
    c. A contingent restructuring fee to be determined by the board or oversight committee installed to oversee the implementation of any Monetization Vehicle Plan based on the CEO/CRO (or acting as trustee) based upon performance under the plan after all material distributions under the Monetization Vehicle Plan are made.

2. Out-of-Pocket Expenses: In addition to the Base and Bonus Compensation, I shall be entitled to reimbursement for actual and reasonable out-of-pocket expenses ("Expenses") incurred in connection with the provision of services hereunder. Expenses will be billed along with Base Compensation and shall be paid by the Company at the same time. Expenses will be generally consistent with expenses incurred to date as a member of the Board.

Bankruptcy Court Approval

Notwithstanding anything herein to the contrary, I understand that this Agreement is contingent, in all respects, on the approval of the Bankruptcy Court. I also understand that the Company will seek approval of this Agreement in stages and that the Company will first seek approval of my retention as CEO and CRO and the payment of the Base Compensation and will defer seeking Bankruptcy Court approval of the Restructuring Fee until there have been further developments in the Bankruptcy Case.

Conflicts and Other Engagements

I am not aware of any potential conflicts of interest based on my understanding of the various parties involved in this matter to date.

The Company is aware that this engagement is not an exclusive engagement of my time, and that I have and will continue to have other business engagements and investments unrelated to the Company. Nothing in this Agreement or otherwise precludes me from representing or working with or for any other person or entity in matters not directly related to the services being provided to the Company under this Agreement. However, I will not take on any engagements directly adverse to the Company during the term of this engagement.

Privilege

I understand that in the course of this engagement, I may become party to or my services may become part of work product of legal counsel to the Company (the Company's in-house and outside counsel are collectively referred to as "Counsel"), and all communications between Counsel and me relating to this engagement shall be protected from disclosure to third parties under the attorney work product doctrine and/or the attorney-client privilege, and, therefore, shall be treated by me as privileged and confidential. I further understand that the Company has the exclusive right to waive the attorney-client privilege, and Counsel has the exclusive right to waive the protections afforded under the attorney work-product doctrine.

Termination of Engagement

This Agreement may be terminated at any time by either the Company or by me upon two weeks advance written notice given to the other party. The termination of this Agreement shall not affect my right to receive, and the Company's obligation to pay, any and all Base Compensation and Expenses incurred (even if not billed) prior to the giving of the termination notice; provided, however, that (i) if this Agreement is terminated by me, the amount of Base Compensation owed shall be calculated based on the actual number of days worked during the applicable month and I will return any Base Compensation received in excess of such amount and (ii) if this Agreement is terminated by the Company, Base Compensation shall be deemed fully earned as of the first day of any month. Bonus Compensation shall be earned by me immediately upon termination of me by the Company; provided, however, I shall not be entitled to Bonus Compensation if (a) the Bankruptcy Case is converted to chapter 7 or dismissed; (b) a chapter 11 trustee is appointed in the Bankruptcy Case; (c) I am terminated by the Company for Cause; or (d) I resign prior to confirmation of a plan or court approval of a sale as described in the Fees and Expense/Compensation for Services section hereof. For purposes of this Agreement, "Cause" means any of the following grounds for termination of my engagement, in each case as reasonably determined by the Board within 60 days of the Board becoming aware of the existence of the event or circumstance: (A) fraud, embezzlement, or any act of moral turpitude or willful misconduct on my part; (B) conviction of or the entry of a plea of nolo contendere by me for any felony; (C) the willful breach by me of any material term of this Agreement; or (D) the willful failure or refusal by me to perform my duties to the Company, which, if capable of being cured, is not cured on or before fifteen (15) days after my receipt of written notice from the Company.

Conditional Requirement to Seek Further Bankruptcy Court Approval of Agreement

The official committee of unsecured creditors in the Bankruptcy Case (the "Committee") may, upon two weeks advance written notice to the Company, require the Company to file a motion with the Bankruptcy Court on normal notice seeking a continuation of this Agreement and if such motion is not filed, this Agreement will terminate at the expiration of such two week period. If the Company files such motion, I will be entitled to my Base Compensation through and including the date on which a final order is entered on such motion by the Bankruptcy Court. Notwithstanding anything herein to the contrary, the Committee may not deliver such notice to the Company until a date which is more than ninety days following the date the Bankruptcy Court enters an order approving this Agreement.

Indemnification

As a material part of the consideration to me under this Agreement, the Company agrees (i) to indemnify and hold harmless me and any of my affiliates (the "Indemnified Party"), to the fullest extent lawful, from and against any and all losses, claims, costs, damages or liabilities (or actions in respect thereof), joint or several, arising out of or related to this Agreement, my engagement under this Agreement, or any actions taken or omitted to be taken by me or the Company in connection with this Agreement and (ii) to reimburse the Indemnified Party for all expenses (including, without limitation, the reasonable fees and expenses of counsel) as they are incurred in connection with investigating, preparing, pursuing, defending, settling or compromising any action, suit, dispute, inquiry, investigation or proceeding, pending or threatened, brought by or against any person (including, without limitation, any shareholder or derivative action, or any fee dispute), arising out of or relating to this Agreement, or such engagement, or actions. However, the Company shall not be liable under the foregoing indemnity and reimbursement agreement for any loss, claim, damage or liability which is finally judicially determined by a court of competent jurisdiction to have resulted primarily from the willful misconduct or gross negligence of the Indemnified Party.

The indemnification and insurance currently covering my role as a director shall be extended to me and fully cover me as provided therein in my roles as CEO and CRO.

Miscellaneous

This Agreement (a) constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes any other communications, understandings or agreements among the parties with respect to the subject matter hereof, and (b) may be modified, amended or supplemented only by written agreement among all the parties hereto.

This Agreement is subject to approval by the Bankruptcy Court. As part of such approval the Company shall request that any such order approving this Agreement contain a provision extending the protections afforded to me as a Board Member pursuant to Paragraph 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 [Docket No. 339] to my role as CEO and CRO, which Order prohibits the commencement of any action against me without first obtaining Bankruptcy Court approval to initiate such action.

This Agreement and all controversies arising from or related to performance hereunder shall be governed by and construed in accordance with the laws of the State of New York. The parties hereby submit to the jurisdiction of and venue in the federal and state courts located in New York City and waive any right to trial by jury in connection with any dispute related to this Agreement.

This Agreement shall be binding upon the parties and their respective successors and assigns, and no other person shall acquire or have any right under or by virtue of this Agreement.

Failure of any party at any time to require performance of any provision of this Agreement shall not affect the right to require full performance thereof at any time thereafter, and the waiver by any party of a breach of such provisions shall not be taken as or held to be a waiver of any subsequent breach or as nullifying the effectiveness of such provision.

Notices provided for in this Agreement shall be in writing and shall be deemed to have been duly given when delivered by hand or overnight courier or three days after it has been mailed by United States registered mail, return receipt requested, postage prepaid, addressed to the respective address set forth above in this Agreement, or to such other address as either party may have furnished to the other in writing in accordance herewith.

This Agreement and my rights and duties hereunder shall not be assignable or delegable by me.

The Company may withhold from any amounts payable under this Agreement such Federal, state and local taxes as may be required to be withheld pursuant to any applicable law or regulation.

This Agreement may be executed (including by electronic execution) in any number of counterparts, each of which when so executed shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by electronic mail shall have the same force and effect as the delivery of an original executed counterpart of this Agreement.

Please confirm the foregoing is in accordance with your understanding by signing and returning a copy of this Agreement, whereupon it shall become binding and enforceable in accordance with its terms.

Very truly yours,

James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner

John Dubel Director Strand Advisors, Inc.	Russell Nelms Director Strand Advisors, Inc.

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Very truly yours,

James. P. Seery, Jr.

AGREED AND ACCEPTED

HIGHLAND CAPITAL MANAGEMENT L.P.

By: Strand Advisors, Inc., its general partner

John Dubel
Director
Strand Advisors, Inc.

Russell Nelms
Director
Strand Advisors, Inc.

Appendix Exhibit 44

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 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.	)	

DEBTOR'S FIRST OMNIBUS OBJECTION TO CERTAIN (A) DUPLICATE CLAIMS; (B) OVERSTATED CLAIMS; (C) LATE-FILED CLAIMS; (D) SATISFIED CLAIMS; (E) NO-LIABILITY CLAIMS; AND (F) INSUFFICIENT-DOCUMENTATION CLAIMS

*****CLAIMANTS RECEIVING THIS OBJECTION SHOULD LOCATE THEIR NAMES AND CLAIMS IN THE SCHEDULES ATTACHED TO THE PROPOSED ORDER ON THIS OBJECTION*****

[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.

A COPY OF YOUR CLAIM IS AVAILABLE ONLINE AT HTTP://WWW.KCCLLC.NET/HCMLP/CREDITOR/SEARCH OR BY EMAIL REQUEST TO JONEILL@PSZJLAW.COM

A HEARING WILL BE CONDUCTED ON THIS MATTER ON SEPTEMBER 10, 2020 AT 2:30 P.M. CENTRAL TIME.

IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT 1100 COMMERCE STREET, RM. 1254, DALLAS, TEXAS 75242-1496 BEFORE CLOSE OF BUSINESS ON SEPTEMBER 1, 2020 WHICH IS AT LEAST THIRTY-THREE (33) DAYS FROM THE DATE OF SERVICE HEREOF. YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THIS NOTICE; OTHERWISE THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

Highland Capital Management, L.P. (the "Debtor"), by and through its undersigned counsel, hereby files this omnibus objection (the "Objection"), seeking entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Order"), (i) disallowing certain duplicate claims listed on **Schedule 1** to the Order (the "Duplicate Claims"), (ii) reducing and allowing certain overstated claims listed on **Schedule 2** (the "Overstated Claims") in amounts which comport with the Debtor's books and records, (iii) disallowing certain claims that were filed after the applicable bar date listed on **Schedule 3** to the Order (the "Late-Filed Claims"), (iv) disallowing certain claims that have already been satisfied listed on **Schedule 4** to the Order (the "Satisfied Claims"), (v) disallowing certain claims for which the Debtor's books and records show no liability listed on **Schedules 5** and **6** to the Order (the "No-Liability Claims"), and (vi) disallowing claims which contain insufficient documentation listed on **Schedule 7** to the Order (the "Insufficient-Documentation Claims," and together with the Duplicate Claims, the

Overstated Claims, the Late-Filed Claims, the Satisfied Claims, and the No-Liability Claims, the "Disputed Claims"). In support of this Objection, the Debtor respectfully represents as follows:

I. JURISDICTION

1. The Court has jurisdiction to consider and determine this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(A), (B) and (O). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory bases for the relief requested herein are sections 105(a) and 502(b) of title 11 of the United States Code (the "Bankruptcy Code"), Rules 3007 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 3007-1 and 3007-2 of the Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas (the "Local Rules").

II. BACKGROUND

3. 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").

4. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the United States Trustee in the Delaware Court.

5. 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]

[2] All docket numbers refer to the docket maintained by this Court.

6. 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.

7. On March 2, 2020, the Court entered its *Order (I) Establishing Bar Dates for Filing Claims and (II) Approving the Form and Manner of Notice Thereof* [Docket No. 488] (the "Bar Date Order"). The Bar Date Order fixed April 8, 2020 at 5:00 p.m. (prevailing Central Time) as the deadline for any person or entity, other than Governmental Units (as such term is defined in section 101(27) of the Bankruptcy Code), to file proofs of claim against the Debtor (the "General Bar Date"). For Governmental Units, the Bar Date Order fixed the deadline to file proofs of claim as April 13, 2020 at 5:00 p.m. (prevailing Central Time). The Bar Date Order also set April 23, 2020 as the deadline to file claims for investors in funds managed by the Debtor (the "Fund Investor Bar Date"). The Debtor also sought and obtained the extended employee bar date of May 26, 2020 per the *Order Granting Debtor's Emergency Motion and Extending Bar Date Deadline for Employees to File Claims* [Docket No. 560].

8. On March 3, 2020, the Debtor filed the *Notice of Bar Dates for Filing Claims* [Docket No. 498] (the "Bar Date Notice"). The Bar Date Notice was mailed to all known creditors and equity holders on March 5, 2020. *See* Certificate of Service [Docket No. 530].

9. The Debtor caused the Bar Date Notice to be published on two occasions each in *The New York Times* and *The Dallas Morning News*—once on March 12, 2020, and once on March 13, 2020. *See Debtor's Notice of Affidavit of Publication of the Notice of Bar Dates for Filing Claims in The New York Times* [Docket No. 533] and *Debtor's Notice of Affidavit of Publication of the Notice of Bar Dates for Filing Claims in The Dallas Morning News* [Docket No. 534].

The Claims Resolution Process

10. In the ordinary course of business, the Debtor maintains books and records (the "Books and Records") that reflect, *inter alia*, the Debtor's liabilities and the amounts owed to its creditors.

11. The Debtor's register of claims (the "Claims Register"), prepared and maintained by Kurtzman Carson Consultants LLC ("KCC")—the court-appointed notice and claims agent in this case—reflects that, as of the date of this Objection, 194 proofs of claim have been filed in the Debtor's chapter 11 case.

12. The Debtor and its professionals have been reviewing and analyzing claims. This process includes identifying categories of claims that may be targeted for disallowance and expungement, reduction, and/or reclassification.

III. RELIEF REQUESTED

13. The Debtor seeks entry of an order, pursuant to section 502 of the Bankruptcy Code and Bankruptcy Rule 3007, (i) disallowing the Duplicate Claims listed on Schedule 1 to the Order, (ii) reducing and allowing the Overstated Claims listed on Schedule 2 to the Order in amounts which comport with the Books and Records; (iii) disallowing the Late-Filed Claims listed on Schedule 3 to the Order, (iv) disallowing the Satisfied Claims listed on Schedule 4 to the Order, (v) disallowing the No-Liability Claims listed on Schedules 5 and 6 to the Order, and (vi) disallowing the Insufficient-Documentation Claims listed on Schedule 7 to the Order.

IV. OBJECTIONS

14. Section 502(a) of the Bankruptcy Code provides that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). A chapter 11 debtor has the duty to object to the allowance of any

claim that is improper. 11 U.S.C. §§ 704(a)(5), 1106(a)(1), 1107(a); *see also Int'l Yacht & Tennis, Inc. v. Wasserman Tennis, Inc. (In re Int'l Yacht & Tennis, Inc.)*, 922 F.2d 659, 661-62 (11th Cir. 1991).

15. As set forth in Bankruptcy Rule 3001(f), a properly executed and filed proof of claim constitutes *prima facie* evidence of the validity and amount of the claim under section 502(a) of the Bankruptcy Code. *See In re O'Connor*, 153 F.3d 258, 260 (5th Cir. 1998); *In re Texas Rangers Baseball Partners*, 10-43400 (DML), 2012 WL 4464550, at *2 (Bankr. N.D. Tex. Sept. 25, 2012). To receive the benefit of *prima fac*ie validity, however, "[i]t is elemental that a proof of claim must assert facts or allegations . . . which would entitle the claimant to a recovery." *In re Heritage Org., L.L.C.*, 04-35574 (BJH), 2006 WL 6508477, at *8 (Bankr. N.D. Tex. Jan. 27, 2006), *aff'd sub nom., Wilferth v. Faulkner*, 3:06 CV 510 K, 2006 WL 2913456 (N.D. Tex. Oct 11, 2006). Additionally, a claimant's proof of claim is entitled to the presumption of *prima facie* validity under Bankruptcy Rule 3001(f) only until an objecting party refutes "at least one of the allegations that is essential to the claim's legal sufficiency." *In re Am. Reit, Inc.*, 07-40308, 2008 WL 1771914, at *3 (Bankr. E.D. Tex. Apr. 15, 2008); *In re Starnes*, 231 B.R. 903, 912 (N.D. Tex. May 14, 2008). "The ultimate burden of proof always lies with the claimant." *In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006).

16. Section 502(b)(1) of the Bankruptcy Code requires disallowance of a claim if "such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law . . . ." 11 U.S.C. § 502(b)(1).

The Disputed Claims Should Be Disallowed and Expunged or Reduced

17. For the reasons set forth below, the Disputed Claims are not enforceable and should be disallowed, expunged, or reduced as set forth herein.

A. Duplicate Claims

18. The Debtor has identified 3 proofs of claim—listed on Schedule 1 to the Order—where each claimant filed multiple proofs of claim representing a single obligation of the Debtor. The Debtor is requesting that the listed Duplicate Claims be disallowed such that only the surviving claims listed on Schedule 1 remain, subject to any other objection the Debtor may bring in the future. Disallowing and expunging these claims will prevent the claimants from receiving multiple recoveries for a single claim.

B. Claims to be Reduced and Allowed

19. The Debtor has examined the 4 proofs of claim listed on Schedule 2 to the Order and has determined that the amounts listed on the claims exceed the liability listed for each claimant on the Debtor's Books and Records. The Debtor is requesting that the amount of each claim be reduced so that it correctly reflects the amount of the Debtor's books and records.

C. Late-Filed Claims

20. The Debtor has identified 1 proof of claim listed on Schedule 3 to the Order that was filed after the passage of the applicable Bar Date.

D. Satisfied Claims

21. The Debtor has identified 11 proofs of claim listed on Schedule 4 to the Order that, according to the Debtor's books and records, were fully satisfied in the ordinary course of business. Disallowing and expunging such claims, therefore, will prevent the claimants from obtaining double-recovery on account of their claims.

E. No-Liability Claims

22. The Debtor has identified 63 proofs of claim listed on Schedules 5 and 6 to the Order that can be characterized as "No-Liability Claims"—*i.e.*, claims that erroneously assert a

liability that is not reflected in the Debtor's books and records. Certain claims listed on Schedule 5 to the Order appear to be protective claims for claimants asserting claims related to agreements with the Debtor. No amount is asserted on these claims and, although the claimants have indicated they would supplement the claims within ninety (90) days, that time has passed and no amendment or supplement has been filed and no additional documentation has been provided to support the claims. Each claim listed on Schedule 6 to the Order erroneously asserts a claim against the Debtor which has no basis in the Books and Records and is not an obligation of the Debtor. The Debtor has reviewed each No-Liability Claim listed on Schedules 5 and 6 to the Order and all supporting information and documentation provided therewith, made reasonable efforts to research each No-Liability Claim, and determined that the Debtor is not liable for such No-Liability Claims. Accordingly, the Debtor requests that each No-Liability Claim be disallowed and expunged.

F. Insufficient-Documentation Claims

23. The Debtor was not able to determine the validity of the 10 claims listed on Schedule 7 to the Order because such claims were not filed with sufficient accompanying documentation and provided no explanation for the bases of the claims. Additionally, no liability for these claims appears on the Debtor's books and records. Accordingly, the Debtor requests that the Insufficient-Documentation Claims be disallowed and expunged because the claimants have failed to carry their burden to support their claims.

V. RESPONSES TO OBJECTIONS

24. To contest an objection, a claimant must file and serve a written response to this Objection (each, a "Response") so that it is received no later than **September 1, 2020 at 5:00 p.m. (Central Time)** (the "Response Deadline"). Every Response must be filed with the Office

of the Clerk of the United States Bankruptcy Court for the Northern District of Texas (Dallas Division), Earle Cabell Federal Building, 1100 Commerce Street, Room 1254, Dallas, TX 75242-1496 and served upon the following entities, so that the Response is received no later than the Response Deadline, at the following addresses:

Pachulski Stang Ziehl & Jones LLP
Jeffrey N. Pomerantz
Ira D. Kharasch
Gregory V. Demo
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
jpomerantz@pszjlaw.com
ikharasch@pszjlaw.com
gdemo@pszjlaw.com
joneill@pszjlaw.com

-and-

Hayward & Associates PLLC
Melissa S. Hayward
Zachery Z. Annable
10501 N. Central Expy, Ste. 106
Dallas, TX 75231
mhayward@haywardfirm.com
zannable@haywardfirm.com

25. Every Response to this Objection must contain, at a minimum, the following information:

i. a caption setting forth the name of the Court, the name of the Debtor, the case number, and the title of the objection to which the Response is directed;

ii. the name of the claimant, his/her/its claim number, and a description of the basis for the amount of the claim;

iii. the specific factual basis and supporting legal argument upon which the party will rely in opposing this Objection;

iv. any supporting documentation (to the extent it was not included with the proof of claim previously filed with the clerk of the Court or KCC) upon which the party will rely to support the basis for and amounts asserted in the proof of claim; and

v. the name, address, telephone number, email address, and fax number of the person(s) (which may be the claimant or the claimant's legal representative) with whom counsel for the Debtor should communicate with respect to the claim or the Objection and who possesses authority to reconcile, settle, or otherwise resolve the objection to the disputed claim on behalf of the claimant.

26. If a claimant fails to file and serve a timely Response by the Response Deadline, the Debtor will present to the Court an appropriate order disallowing such claimant's claim, as set forth in **Exhibit A**, without further notice to the claimant.

VI. REPLIES TO RESPONSES

27. Consistent with Local Rules, the Debtor may, at its option, file and serve a reply to a Response by no later than 5:00 p.m. (prevailing Central Time) three (3) days prior to the hearing to consider the Objection.

VII. SEPARATE CONTESTED MATTERS

28. To the extent that a Response is filed regarding any claim listed in this Objection and the Debtor is unable to resolve the Response, the objection by the Debtor to each such claim asserted herein shall constitute a separate contested matter as contemplated by Bankruptcy Rule 9014. Any order entered by the Court regarding an objection asserted in the Objection shall be deemed a separate order with respect to each claim.

VIII. RESERVATION OF RIGHTS

29. The Debtor hereby reserves the right to object in the future to any of the claims that are the subject of this Objection on any ground, including, but not limited to, 11 U.S.C. § 502(d), and to amend, modify, and/or supplement this Objection, including, without limitation, to object to amended or newly filed claims.

30. Notwithstanding anything contained in this Objection or the attached exhibits, nothing herein shall be construed as a waiver of any rights that the Debtor may have to exercise rights of setoff against the holders of such claims.

IX. NOTICE

31. Notice of this Objection shall be provided to (i) the Office of the United States Trustee for the Northern District of Texas; (ii) each of the claimants whose claim is subject to this Objection; and (iii) all entities requesting notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Debtor submits that no further notice is required.

X. COMPLIANCE WITH LOCAL RULES

32. This Objection includes citations to the applicable rules and statutory authorities upon which the relief requested herein is predicated and a discussion of their application to this Objection. The Debtor objects to no more than 100 proofs of claim herein. The Debtor has served notice of this Objection on those persons whose names appear in the signature blocks on the proofs of claim and in accordance with Bankruptcy Rule 7004. Moreover, the Debtor has notified claimants that a copy of their claim may be obtained from the Debtor upon request. Accordingly, the Debtor submits that this Objection satisfies Local Rule 3007-2.

WHEREFORE, the Debtor respectfully requests the entry of the proposed Order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested and granting such other and further relief as the Court deems just and proper.

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Dated: July 30, 2020

PACHULSKI STANG ZIEHL & JONES LLP

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Counsel for the Debtor and Debtor-in-Possession

EXHIBIT A
(Proposed Order)

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.	)	**Re: Docket No. ____**

ORDER SUSTAINING FIRST OMNIBUS OBJECTION TO CERTAIN (A) DUPLICATE CLAIMS; (B) OVERSTATED CLAIMS; (C) LATE-FILED CLAIMS; (D) SATISFIED CLAIMS; (E) NO-LIABILITY CLAIMS; AND (F) INSUFFICIENT-DOCUMENTATION CLAIMS

Having considered the *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* (the "Objection"),[2] the claims listed on Schedules 1-7 attached hereto, any responses thereto, and the arguments of counsel, the Court finds that (i) notice of the Objection was good and sufficient upon the particular circumstances and that no other or further notice need be given; (ii) the Objection is a core proceeding under 28 U.S.C. § 157(b)(2); (iii) each holder of a claim listed on Schedules 1–7 attached hereto was properly and timely served with a copy of the Objection, the proposed form of this Order, the accompanying schedules, and the notice of hearing on the Objection; (iv) any entity known to have an interest in the claims subject to the Objection has been afforded reasonable opportunity to respond to, or be heard regarding, the relief requested in the Objection; and (v) the relief requested in the Objection is in the best interests of the Debtor's creditors, its estate, and other

[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 defined in this Order shall have the meanings ascribed to them in the Omnibus Objection.

parties-in-interest. Accordingly, the Court finds and concludes that there is good and sufficient cause to grant the relief set forth in this Order. It is therefore **ORDERED THAT:**

1. The Objection is **SUSTAINED** as set forth herein.

2. Each of the claims listed as a Duplicative Claim on **Schedule 1** hereto is disallowed and expunged in its entirety.

3. Each of the claims listed as an Overstated Claim on **Schedule 2** hereto is reduced and allowed in the amount as stated on Schedule 2.

4. The claim listed as a Late-Filed Claim on **Schedule 3** hereto is disallowed and expunged in its entirety.

5. Each of the claims listed as a Satisfied Claim on **Schedule 4** hereto is disallowed and expunged in its entirety.

6. Each of the claims listed as a No-Liability Claim on **Schedule 5** and **Schedule 6** hereto is disallowed and expunged in its entirety.

7. Each of the claims listed as an Insufficient-Documentation Claim on **Schedule 7** hereto is disallowed and expunged in its entirety.

8. The official claims register in the Debtor's chapter 11 case shall be modified in accordance with this Order.

9. The Debtor's rights to amend, modify, or supplement the Objection, to file additional objections to the Disputed Claims and any other claims (filed or not) which may be asserted against the Debtor, and to seek further reduction of any claim to the extent such claim has been paid, are preserved. Additionally, should one or more of the grounds of objection stated in the Objection be overruled, the Debtor's rights to object on other stated grounds or any other grounds that the Debtor may discover are further preserved.

10. Each claim and the objections by the Debtor to such claim, as addressed in the Objection and set forth on **Schedule 1** through **Schedule 7** attached hereto, shall constitute a separate contested matter as contemplated by Bankruptcy Rule 9014. This Order shall be deemed a separate Order with respect to each claim. Any stay of this Order pending appeal by any claimant whose claims are subject to this Order shall only apply to the contested matter which involves such claimant and shall not act to stay the applicability and/or finality of this Order with respect to the other contested matters listed in the Objection or this Order.

11. The Debtor is authorized and empowered to take any action necessary to implement and effectuate the terms of this Order.

12. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

13. The Court shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order.

###END OF ORDER###

Highland Capital Management, L.P.
Case No. 19-34054-sgj11
Schedule 1 - Duplicate Claims

Sequence No.	Claimant's Name	Claim No. to be Disallowed	Date Filed	Claim Amount	Surviving Claim No.	Objection Page No. Reference
1	Daniel Sheehan and Associates, PLLC	40	3/10/2020	$ 32,433.75	Claim 47	7
2	Dun & Bradstreet	18	12/27/2019	$ 5,746.40	Claim 25	7
3	Eastern Point Trust Company, Inc.	21	12/23/2019	$ 34,875.91	Claim 52	7

Highland Capital Management, L.P.
Case No. 19-34054-sgj11
Schedule 2 - Overstated Claims

Sequence No.	Claimant's Name	Claim No.	Date Filed	Claim Amount	Notes	Proposed Amount	Objection Page No. Reference
1	Collin County Tax Assessor/Collector	34	2/24/2020	$ 524.24	Claim #34 includes an estimated fee of $300.00 for year 2020 property tax. In the ordinary course, the property tax for year 2020 would be due and payable in the calendar year 2021.	$ 224.24	7
2	Collin County Tax Assessor/Collector	35	2/24/2020	$ 2,391.91	Claim #34 includes an estimated fee of $400.00 for year 2020 property tax. In the ordinary course, the property tax for year 2020 would be due and payable in the calendar year 2021.	$ 1,991.91	7
3	Dallas County	6	11/6/2019	$ 62,694.94	Claim #6 includes tax statements for Highland Capital (5 Center Ave, Little Falls, NJ 07242). The Debtor is not affiliated with that party.	$ 60,592.37	7
4	Opus 2 International Inc	10	11/21/2019	$ 51,156.88	Claim #10 includes $11,943 of interest charges. Interest charges are not defined in The Amendment To Opus 2 Internationals Work Order signed on 9/19/2013 between an employee of the Debtor and Opus 2 International, Inc.	$ 39,214.00	7

Highland Capital Management, L.P.
Case No. 19-34054-sgj11
Schedule 3 - Late Filed Claims

Sequence No.	Claimant's Name	Claim No.	Date Filed	Claim Amount	Notes	Objection Page No. Reference
1	Parmentier, Andrew	181	5/13/2020	$ 150,000.00	Claim #181 was filed past the April 8, 2020 bar date.	7

Highland Capital Management, L.P.
Case No. 19-34054-sgj11
Schedule 4 - Satisfied Claims

Sequence No.	Claimant's Name	Claim No.	Date Filed	Claim Amount	Notes	Objection Page No. Reference
1	4CAST Inc	12	11/26/2019	$ 16,500.00	Paid via wire on 2/14/2020	7
2	Advent Software Inc	29	12/30/2019	$ 8,378.68	Paid via wire on 3/20/2020	7
3	ConvergeOne, Inc.	61	03/24/2020	$ 23,518.15	Paid via wire on 5/19/2020	7
4	Denton County	Scheduled	12/13/2019	$ 557.14	Paid online on 2/5/2020	7
5	Internal Revenue Service	179	04/27/2020	$ 10,386.87	IRS assessed a late tax deposit penalthy for the claim amount; Payroll provider Paylocity informed Debtor the penalty was removed.	7
6	Kaufman County	9	11/06/2019	$ 12,081.17	Paid online on 2/4/2020	7
7	Maples and Calder	Scheduled	12/13/2019	$ 25,800.11	Paid via wire on 5/29/2020	7
8	McLagen Partners, Inc.	74	04/06/2020	$ 16,400.00	Paid via wire on 4/22/2020	7
9	Microsoft Corporation and Microsoft Licensing GP, a Subsidiary of Microsoft Corporation	76	04/03/2020	$ 7,436.56	Paid by NexBank via check	7
10	Moodys Analytics, Inc.	91	04/08/2020	$ 5,728.05	Paid on 6/8/20 - Reference # 1259769	7
11	Quintairos, Prieto Wood & Boyer	Scheduled	12/13/2019	$ 8,608.17	Paid via wire on 5/13/2020	7

Highland Capital Management, L.P.
Case No. 19-34054-sgj11
Schedule 5 - No Liability Claims

Sequence No.	Claimant's Name	Claim No.	Date Filed	Claim Amount	Notes	Objection Page No. Reference
1	Advisors Equity Group, LLC	111	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
2	Eagle Equity Advisors, LLC	110	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
3	HCRE Partner, LLC	146	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
4	Highland Capital Management Fund Advisors,	95	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
5	Highland Capital Management Fund Advisors,	119	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
6	Highland Capital Management Services, Inc.	175	04/23/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
7	Highland Capital Management Services, Inc.	176	04/23/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
8	Highland Energy MLP Fund	102	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
9	Highland Fixed Income Fund	109	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
10	Highland Floating Rate Fund	125	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
11	Highland Funds I	106	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
12	Highland Funds II	114	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
13	Highland Global Allocation Fund	98	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
14	Highland Healthcare Opportunities Fund	116	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
15	Highland iBoxx Senior Loan ETF	122	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
16	Highland Income Fund HFRO	105	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
17	Highland Long/Short Equity Fund	112	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
18	Highland Merger Arbitrage Fund	132	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
19	Highland Opportunistic Credit Fund	100	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
20	Highland Small-Cap Equity Fund	127	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
21	Highland Socially Responsible Equity Fund	115	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
22	Highland Tax-Exempt Fund	101	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
23	Highland Total Return Fund	126	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
24	NexBank SSB	178	04/23/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
25	NexPoint Advisors, L.P.	104	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
26	NexPoint Advisors, L.P.	108	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
27	NexPoint Capital, Inc.	107	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
28	NexPoint Capital, Inc.	140	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
29	NexPoint Discount Strategies Fund	117	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
30	NexPoint Energy and Material Opportunities I	124	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
31	NexPoint Event-Driven Fund	123	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
32	NexPoint Healthcare Opportunities Fund	121	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
33	NexPoint Latin America Opportunities Fund	130	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
34	NexPoint Real Estate Strategies Fund	118	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
35	NexPoint Strategic Opportunities Fund	103	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
36	The Dugaboy Investment Trust	131	04/08/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8
37	The Dugaboy Investment Trust	177	04/23/20	Unliquidated	No liability on the Debtor's books and records; no amount is asserted with respect to this claim	7/8

Highland Capital Management, L.P.
Case No. 19-34054-sgj11
Schedule 6 - No Liability Claims

Sequence No.	Claimant's Name	Claim No.	Date Filed	Claim Amount	Notes	Objection Page No. Reference
1	Callan, Bentley	157	04/08/2020	Unliquidated	No liability on the Debtor's books and records; claim is for a stock appreciation unit related to a Non-Debtor party	7/8
2	City of Garland	19	12/16/2019	$ 254.58	No liability on the Debtor's books and records; claim is filed against an entity with a similar name to Debtor, but not a Debtor party	7/8
3	Clay Callan	162	04/08/2020	$ 55,125.60	No liability on the Debtor's books and records	7/8
4	Eastern Point Trust Company, Inc.	52	03/18/2020	$ 34,875.91	No liability on the Debtor's books and records; claim appears to be filed against Debtor affiliate, but not a Debtor obligation	7/8
5	Garland Independent School District	20	12/16/2019	$ 459.81	No liability on the Debtor's books and records; claim is filed against an entity with a similar name to Debtor, but not a Debtor party	7/8
6	Grayson County	3	11/06/2019	$ 1,882.01	No liability on the Debtor's books and records; claim is filed against an entity with a similar name to Debtor, but not a Debtor party	7/8
7	HarbourVest 2017 Global Fund L.P.	143	04/08/2020	Unliquidated	No liability on the Debtor's books and records	7/8
8	HarbourVest 2017 Global AIF L.P.	147	04/08/2020	Unliquidated	No liability on the Debtor's books and records	7/8
9	HarbourVest Partners L.P. on behalf of funds and accounts under management	149	04/08/2020	Unliquidated	No liability on the Debtor's books and records	7/8
10	HarbourVest Dover Street IX Investment L.P.	150	04/08/2020	Unliquidated	No liability on the Debtor's books and records	7/8
11	HarbourVest Skew Base AIF L.P.	154	04/08/2020	Unliquidated	No liability on the Debtor's books and records	7/8
12	Hartman Wanzor LLP	42	03/10/2020	$ 701.25	No liability on the Debtor's books and records; claim appears to be filed against Non-Debtor estate	7/8
13	Irving ISD	5	11/06/2019	$ 827.96	No liability on the Debtor's books and records; claim is filed against an entity with a similar name to Debtor, but not a Debtor party	7/8
14	John Morris	60	03/23/2020	$ 500,000.00	No liability on the Debtor's books and records; claim appears to be filed against Debtor affiliate, but not a Debtor obligation	7/8
15	John R. Watkins	89	04/07/2020	$ 322,701.12	No liability on the Debtor's books and records; Never an employee of the Debtor and not an obligation of the Debtor	7/8
16	Linear Technologies, Inc.	4	11/06/2019	$ 489.94	No liability on the Debtor's books and records; claim appears to be filed against Debtor affiliate, but not a Debtor obligation	7/8
17	Mass. Dept. of Revenue	45	03/13/2020	$ 1,352.46	No liability on the Debtor's books and records; claim appears to be filed against Debtor affiliate, but not a Debtor obligation	7/8
18	Mediant Communications Inc.	15	12/02/2019	$ 1,755.57	No liability on the Debtor's books and records; claim appears to be filed against Debtor affiliate, but not a Debtor obligation	7/8
19	Oklahoma Tax Commission	28	02/03/2020	$ 2,706.93	No liability on the Debtor's books and records; claim appears to be filed against Debtor affiliate, but not a Debtor obligation	7/8
20	Park, Jun	73	04/06/2020	$ 32,676.61	No liability on the Debtor's books and records; claimant is an employee of a subsidiary of the Debtor	7/8
21	Paul N. Adkins	65	03/30/2020	$ 23,957.95	No liability on the Debtor's books and records; claimant is an employee of a subsidiary of the Debtor	7/8
22	Paul N. Adkins	66	03/31/2020	$ 249,230.48	No liability on the Debtor's books and records; claimant is an employee of a subsidiary of the Debtor	7/8
23	Tarrant County	2	11/06/2019	$ 8,267.52	No liability on the Debtor's books and records; claim is filed against an entity with a similar name to Debtor, but not a Debtor party	7/8
24	Theodore N. Dameris	85	04/07/2020	Unliquidated	No liability on the Debtor's books and records; claimant does not list an proceeding that they are named as a deponent, witness, party, or any other type of participant in a proceeding.	7/8
25	Theodore N. Dameris	174	04/08/2020	Unliquidated	No liability on the Debtor's books and records; claim related to pension and should be asserted against pension, not the Debtor	7/8
26	Zang, Weijun	170	04/09/2020	$ 25,000.00	No liability on the Debtor's books and records; individual not employed at time of bonus payout and not entitled to receive bonus	7/8

Highland Capital Management, L.P.
Case No. 19-34054-sgj11
Schedule 7 - Insufficient Documentation Claims

Sequence No.	Claimant's Name	Claim No.	Date Filed	Claim Amount	Notes	Objection Page No. Reference
1	Anish Tailor	56	03/20/2020	Unliquidated	No supporting documentation or explanation of the basis of the claim was provided. No liability for this claimant on the Debtor's books and records.	8
2	Boyce-Field, Mollie	43	03/12/2020	Unliquidated	No supporting documentation or explanation of the basis of the claim was provided. No liability for this claimant on the Debtor's books and records.	8
3	Charles Byrne	44	03/13/2020	Unliquidated	No supporting documentation or explanation of the basis of the claim was provided. No liability for this claimant on the Debtor's books and records.	8
4	Donald Salvino	41	03/10/2020	Unliquidated	No supporting documentation or explanation of the basis of the claim was provided. No liability for this claimant on the Debtor's books and records.	8
5	Garcia, Ericka	71	04/03/2020	$ 2,000.00	No supporting documentation or explanation of the basis of the claim was provided. No liability for this claimant on the Debtor's books and records.	8
6	Garman Turner Gordon	161	04/08/2020	Unliquidated	No supporting documentation or explanation of the basis of the claim was provided. No liability for this claimant on the Debtor's books and records.	8
7	Joe Kingsley	171	04/10/2020	BLANK	No supporting documentation or explanation of the basis of the claim was provided. No liability for this claimant on the Debtor's books and records.	8
8	Mason, Frederic	63	03/25/2020	Unliquidated	No supporting documentation or explanation of the basis of the claim was provided. No liability for this claimant on the Debtor's books and records.	8
9	TDA Associates, Inc.	55	03/20/2020	$ 7,000.00	No supporting documentation or explanation of the basis of the claim was provided. No liability for this claimant on the Debtor's books and records.	8
10	Wilkinson Center	54	03/20/2020	$ -	No supporting documentation or explanation of the basis of the claim was provided. No liability for this claimant on the Debtor's books and records.	8

Appendix Exhibit 45

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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.	§	

DEBTOR'S OBJECTION TO PROOFS OF CLAIM 190 AND 191 OF UBS SECURITIES LLC AND UBS AG, LONDON BRANCH

[1] The last four digits of the Debtor's taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

NO HEARING WILL BE CONDUCTED ON THIS OBJECTION TO CLAIM UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT 1100 COMMERCE STREET, RM. 1254, DALLAS, TEXAS 75242-1496 BEFORE 5:00 P.M. (CENTRAL TIME) ON SEPTEMBER 9, 2020 WHICH IS AT LEAST THIRTY-THREE (33) DAYS FROM THE DATE OF SERVICE HEREOF.

ANY RESPONSE SHALL BE IN WRITING AND FILED WITH THE CLERK AND A COPY SHALL BE SERVED UPON COUNSEL FOR THE OBJECTING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED A HEARING MAY BE HELD WITH NOTICE ONLY TO THE RESPONDING PARTY.

IF NO HEARING ON SUCH OBJECTION TO CLAIM IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER SUSTAINING THE OBJECTION TO CLAIM.

Highland Capital Management, L.P., the debtor and debtor-in-possession ("Debtor") in the above-captioned chapter 11 case ("Bankruptcy Case"), hereby submits this objection to Proof of Claim No. 190 and Proof of Claim No. 191 (substantively identical claims that are referenced collectively as the "UBS Claim") filed by UBS Securities LLC and UBS AG, London Branch (collectively "UBS") on June 26, 2020, and in support thereof, respectfully states as follows:[2]

INTRODUCTION

1. When global financial markets collapsed in late 2008, UBS and other participants in the securities trading industry suffered enormous losses. Among the losers were offshore funds related to the Debtor that were counterparties to warehousing agreements with UBS (the "Fund Counterparties"), which were unable to honor contractual margin calls. After eleven years of litigation in the New York state courts, UBS has obtained a determination that this was a breach of contract by the Fund Counterparties. UBS now holds a judgment against the

[2] Exhibits 1-12 to this objection are attached to *Appendix A of Exhibits in Support of Debtor's Objection to Proofs of Claim of UBS Securities LLC and UBS AG, London Branch*, filed concurrently herewith, and all citations herein to "A__" refer to Appendix A. Exhibits 13-17 to this objection are attached to *Appendix B of Exhibits in Support of Debtor's Objection to Proofs of Claim of UBS Securities LLC and UBS AG, London Branch.* Concurrently herewith, the Debtor is requesting the Court's permission to file Appendix B under seal. All citations herein to "B__" refer to Appendix B.

Fund Counterparties that, with the accrual of interest at 9% over a decade, exceeds $1 billion (the "Phase I Judgment").

2. UBS's problem, of course, is that the Fund Counterparties do not have sufficient assets to satisfy UBS's judgment. In the *Debtor's Objection UBS's Motion for Relief from the Automatic Stay to Proceed with State Court Action* [Docket No. 687], the Debtor said that the Fund Counterparties were insolvent. However, the Fund Counterparties are insolvent only because of UBS's judgment, and the Debtor believes each Fund Counterparty has assets. The Debtor is continuing to assess those assets and their value.

3. However, in addition to the lack of assets at the Fund Counterparties, and potentially more important, the operative agreements expressly exclude the Debtor from any liability for losses related to the transaction. The governing agreements contain no agreement by the Debtor to pay, guarantee or otherwise backstop the Fund Counterparties' obligations. That was a conscious decision by UBS: when the warehousing agreements were restructured earlier in 2008, UBS did not bargain for any assurance of performance by the Debtor, and thus the agreements do not obligate the Debtor to do so. UBS, one of the largest and most sophisticated banks in the world at the time, bet that between the Fund Counterparties and the warehouse collateral there would be enough cushion to absorb any risk. UBS knowingly took the risk that if the Fund Counterparties defaulted, it would have no recourse against the Debtor. Instead of accepting the consequences of its bad business deal, UBS has used the litigation process to recut the deal to place liability on the Debtor. The New York State Appellate Division, First Department so held in the prepetition state court litigation in 2010, dismissing UBS's claim in its February 24, 2009 complaint for contractual indemnification against the Debtor. That New York State appellate court ruled that the Debtor had undertaken no obligation to ensure that the Fund Counterparties would be able to perform, and that contractual limitation was always clear to UBS.

4. That decision has not stopped UBS from attempting to pin liability on the Debtor for the past decade. After the dismissal of its claim against the Debtor for breach of contract, UBS commenced a second action in New York state court, asserting a claim that the Debtor had breached an implied covenant of good faith and fair dealing by not ensuring that the Fund Counterparties could perform. UBS also added fraudulent transfer claims against the Debtor and others arising from an alleged $233 million in transfers made by a parent of one of the Fund Counterparties, Highland Financial Partners, L.P. ("HFP"), and its subsidiaries HFP Asset II and HFP Asset III (together, "HFP Asset II/III") in March 2009 (the "March 2009 Transaction"). UBS was not a creditor of HFP, so, in order to manufacture standing to challenge the transfers, UBS alleged HFP was an alter ego of a Fund Counterparty. UBS did not, and still has not, pled an alter ego claim against the Debtor, nor has it prevailed on its claim that HFP is the alter ego of one of the Fund Counterparties.

5. Three decisions by the Appellate Division bar any claim to hold the Debtor responsible for any portion of the Phase I Judgment:

- The first of these decisions, as noted, was the dismissal of UBS's original complaint against the Debtor (filed on February 24, 2009) and a judgment on the merits in favor of the Debtor on UBS' breach of contract claim. The Appellate Division based its determination on the fact that the Debtor did not promise to undertake liability as to UBS's losses, or to ensure the Funds' performance under their contracts with UBS. *See UBS v. Highland Capital Mgmt., L.P.*, 2010 NY Slip Op 1436, ¶ 1 (N.Y. App. Div.) [**Exhibit 1** at A002].

- The second decision, issued after UBS tried to re-assert the same claim against the Debtor by labeling it as different legal theories (as UBS is now doing), held that UBS is barred by *res judicata* from asserting claims against the Debtor that "implicate events alleged to have taken place before the filing of the original complaint" on February 24, 2009. *See UBS v. Highland Capital Mgmt., L.P.*, 86 A.D.3d 469, 474 (N.Y. App. Div. 2011) [**Exhibit 2** at A010].

- In its third decision, the Appellate Division extended its *res judicata* ruling to the Debtor's co-defendants in the state court litigation, holding that UBS's claims against other defendants – including the claim that HFP is the alter ego of one of the

> Fund Counterparties – are likewise limited to conduct that occurred after February 24, 2009. *See UBS v. Highland Capital Mgmt., L.P.*, 93 A.D.3d 489, 490 (N.Y. App. Div. 2012) [**Exhibit 3** at A014].

6. The only post-February 24, 2009 conduct at issue in the UBS Claim and attachments is the March 2009 Transaction, which entailed transfers by HFP and HFP Asset II/III of assets valued at $239 million (later reduced to $233 million).[3] The breach of contract on which the Phase I Judgment is based occurred earlier: the warehousing agreements were terminated on December 3, 2008 and were found to have been breached on December 5, 2008. Accordingly, the Appellate Division's two *res judicata* decisions preclude UBS from attempting to hold the Debtor liable for UBS's breach of contract judgment against the Fund Counterparties, which is based solely on pre-February 24, 2009 conduct, directly or indirectly.

7. The UBS Claim incorporates its operative state court complaint. The claims for relief against the Debtor are the breach of implied covenant claim and the fraudulent transfer claim. UBS describes the UBS Claim as follows:

> Claimant hereby asserts a claim, pending litigation of Phase II, for damages arising from the Debtor's breach of the implied covenant of good faith and fair dealing, its specific role in directing the fraudulent transfers of assets involving HFP, additional interest, further damages (including punitive damages), and attorneys' fees that may be awarded by any court at the conclusion of Phase II.

UBS Claim, ¶ 26. UBS has also suggested, though it is not pled in the state court complaint or in the UBS Claim, that it is at this late date expanding its assertion of alter ego liability beyond HFP and the Fund Counterparties to also subsume the Debtor, in what would apparently be yet another attempt to render the Debtor liable for the entire Phase I Judgment notwithstanding the Appellate Division rulings. *See* Demonstrative at Slide 2 (showing currently pending claims).[4]

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[3] *See* NY D.I. 411 at pg. 22 of 36 [**Exhibit 4** at A038] (State Court decision reciting that, in UBS's complaint, UBS alleged that $239 million of assets were transferred in the March 2009 transaction).

[4] The Debtor believes its Demonstrative sets forth only undisputed facts. The Demonstrative is attached hereto as Exhibit 18.

8. The Debtor has numerous meritorious defenses to UBS's fraudulent transfer claims in connection with the March 2009 Transaction. Several raise factual issues, but two do not. First, UBS has unequivocally released the Debtor with respect to all claims arising from $172 million of the alleged $233 million in fraudulent transfers (the "UBS Release").

9. The UBS Release was granted to the Debtor pursuant to settlement agreements UBS entered into in 2015 with co-defendants that received more than 80% of the allegedly fraudulent transfers made in the March 2009 Transaction. UBS expressly released the Debtor from any claims "for losses or other relief specifically arising from" the approximately $172 million in transfers.[5]

10. Second, UBS lacks standing as a non-creditor to challenge transfers made by HFP Asset II/III, entities against which UBS has asserted no claim. As UBS has long known, HFP Asset II/III were the transferors of approximately $187.5 million of the assets transferred in March 2009. Most of the transfers by those entities ($152.3 million) are covered by the UBS Release, leaving $35.2 million of transfers that, based on UBS's lack of standing, it cannot assert. This brings the total of fraudulent transfer claims that ***cannot*** be brought against the Debtor to $207.2 million out of $233 million.

11. UBS appears to concede that the Appellate Division rulings limit its claim for breach of the implied covenant of good faith and fair dealing to the March 2009 Transaction. Thus, the implied covenant claim amounts to no more than a restatement of the fraudulent transfer claim, *i.e.*, the Debtor breached the implied covenant by engaging in fraudulent transfers.[6] To the extent there is no liability for the transfers, the implied covenant claim

[5] *See* Exhibit 13 at Section 5.3, pg. 6 [B007]; Exhibit 14 at Section 5.3, pg. 5 [B037]. In its motion for injunctive relief against the settling defendants, UBS (i) reduced the total amount it claimed was transferred in the March 2009 transaction, and (ii) identified the transfers to the settling defendants as totaling more than 80% of the total amount of the March 2009 transaction. *See* NY D.I. 315 at pg. 6 [**Exhibit 15** at B061].

[6] *See, e.g.*, 05/01/18 State Court Hrg. Tr. at 10:13-16 [**Exhibit 5** at A063] (in discussing whether the implied covenant claim is based solely on the March 2009 transaction, UBS's counsel stated "basically,

obviously fails as well. Regardless, on the merits, no promise can be implied into the warehousing agreements that the Debtor would ensure that the Fund Counterparties would have the ability to pay UBS, when those contracts were restructured to *eliminate* any direct claim against the Debtor.

12. Even if there was liability (which there is none), UBS cannot use the implied covenant claim to render the Debtor liable for the alleged fraudulent transfers for which it released the Debtor from liability. The settlement agreements clearly preclude circumvention by relabeling claims.

13. Finally, UBS cannot use the doctrine of alter ego liability to render the Debtor liable for the Phase I Judgment. *Res judicata* bars any alter ego claims against the Debtor based on conduct predating February 24, 2009. Thus any claims UBS tries to create based upon the conduct occurring prior to the filing of its complaint (*i.e.*, the period of the parties' dealings) are barred.

14. UBS likely hopes to escape this clear claims barrier by casting alter ego liability as a post-judgment remedy under New York procedure rather than as a claim, but that maneuver fails. New York law applies *res judicata* to bar the assertion of alter ego liability against a person that was a party to terminated litigation, and the Appellate Division applied it in this case to limit UBS's claims against HFP, including an alter ego claim, on the basis that HFP was in privity with the Debtor. Accordingly, any assertion of alter ego liability is limited to the March 2009 Transaction, as to which UBS has not pled an alter ego claim against the Debtor.

15. UBS's factual allegations do not in any event support any determination of alter ego liability. A federal district court judge rejected similar arguments in nearly identical circumstances as a basis for alter ego liability in an action against the Debtor commenced by Citibank in the Southern District of New York. *Highland CDO Opportunity Master Fund, L.P. v.*

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you know, the implied covenant of good-faith and fair-dealing claim that we now have is that they shouldn't have committed fraudulent conveyances …").

Citibank, N.A., 270 F. Supp. 3d 716 (S.D.N.Y. 2017) ("*Citibank*"). The Debtor believes the Court will find the district judge's reasoning persuasive and the facts analogous, namely, that under New York law, Citibank's allegations of asset-stripping and diversion of assets that made it impossible to fulfill a margin call were not the kind of "wrong" that supports alter ego liability.

16. This Objection identifies those defenses to the UBS Claim as to which the Debtor contends there is no relevant factual dispute. The Debtor submits the Court can and should decide those defenses at this time without discovery or further proceedings. The Debtor requests that the Court establish a schedule for discovery and further proceedings on defenses identified or determined to be based upon disputed facts. The Debtor reserves all rights to supplement or amend this Objection, as appropriate.

STATEMENT OF FACTS

A. The CLO Warehouse Agreements

17. In April 2007, UBS entered into agreements (collectively, the "CLO Warehouse Agreements") with the Debtor and the two Fund Counterparties -- Highland Special Opportunities Holding Co. ("SOHC") and Highland CDO Opportunity Master Fund, L.P. ("CDO Fund") -- to establish a warehouse facility to finance the acquisition of syndicated leveraged loan vehicle liabilities and credit default swaps. (Ex. A, 4/12/07 Original Synthetic Warehouse Agreement; Ex. B, 4/20/07 Original Engagement Ltr.; Ex. C, 5/22/07 Original Cash Warehouse Agreement.) Those assets, in turn, were to serve as the basis for a securitization pursuant to which notes would be sold to investors. Due to market conditions, the securitized offering did not occur by the contractual deadline, and the CLO Warehouse Agreements terminated in August 2007. *See generally* UBS Claim, ¶¶2-3.[7]

18. In March 2008, UBS, the Debtor, as servicer and the Fund Counterparties entered into restructured warehouse agreements (collectively, the "Restructured CLO Warehouse

[7] Paragraph references are to the *Addendum to Proof of Claim* attached to each UBS proof of claim.

Agreements"). (Motion at ¶6, Exs. C, D, E.) In addition to the collateral posted by the Fund Counterparties as initial margin, the Restructured CLO Warehouse Agreements gave UBS the right to make margin calls for additional collateral on the Fund Counterparties in the event of a decline in the market value of the loans and swaps. UBS Claim, ¶¶4-5. If the margin calls were not met, the agreements permitted UBS to protect its exposure by swiftly foreclosing on the assets. Neither the Restructured CLO Warehouse Agreements nor any other agreements allowed UBS to obtain margin or any similar recovery from the Debtor. To the contrary, the agreements made clear that the Fund Counterparties bore all risk on the facilities. Among other things, the engagement letter between UBS and the Debtor provided that the Fund Counterparties would "in aggregate bear 100% of the risk of the Warehouse Facility" in accordance with the Fund Counterparties' respective allocation percentages. (Ex. 19, § 3(c); *see also* Demonstrative Slide 3.)

19. The UBS Claim is laced with extraneous and untrue allegations of supposed misrepresentations made by the Debtor to induce UBS to enter the Restructured CLO Warehouse Agreements, *e.g.*, that it "assured Claimant that the Fund Counterparties had sufficient assets to cover any losses," or that it misrepresented the amount of cash held by the Fund Counterparties, or failed to disclose encumbrances on collateral. *Id.*, ¶¶4-7. The Court should recognize these as futile efforts to "poison the well." Based on the margin structure of the facilities and the parties' sophistication, UBS could never "establish justifiable reliance to support its claims that defendants committed fraud by misrepresenting their creditworthiness or the assets they owned prior to entering the transaction." *UBS Sec. LLC v. Highland Capital Mgmt., L.P.*, 159 A.D.3d 512, 514 (N.Y. App. Div. 2018) (affirming trial court's finding of a question of fact on the issue). UBS also cannot square this allegation with its own contemporaneous internal documents. *See* Ex. 20 (two days before the 2008 Restructured Transaction: "CRC [credit risk committee] view as to the Highland Hedge Funds ability to pay if

they were to default today to close to zero."); Ex. 21 (seven days before the transaction: "The counterparties have illiquid assets, little cash, and no ability to raise cash on their assets in the current market. Thus we assign a very low probability to the two counterparties ability to meet our claim of $166 mil."); and Ex. 96. ("At Feb 29th CRC advised they were ascribing zero value to the potential claim on the two hedge funds offered as obligors to cover this exposure.").[8]

20. As noted above, the Restructured CLO Warehouse Agreements explicitly placed the risk of loss on the Fund Counterparties, and not the Debtor, as the New York court has determined. *UBS Securities LLC v. Highland Capital Mgmt., L.P.*, 893 N.Y.S.2d 869 (N.Y. App. Div. 2010) ("the agreements between the parties contain no promise on the part of Highland to undertake liability with respect to the investment losses suffered by plaintiffs, or to ensure or guarantee the performance of [Fund Counterparties]' obligations to bear the risk of investment losses.").

21. As the market deteriorated in the fall of 2008, UBS made three margin calls on the Fund Counterparties. SOHC managed to satisfy the first two margin calls in September and October 2008, using funds provided by SOHC's parent corporation, HFP. UBS Claim, ¶11; *UBS Securities LLC, et al v. Highland Capital Mgmt., L.P.*, et al, No. 650097-2009, at 4 (N.Y. Sup. Ct. Nov. 19, 2019).

22. Ironically, in view of UBS's mantra that the Debtor schemed "to intentionally frustrate and prevent Claimant from recovering any of the amounts" owed to UBS (UBS Claim, ¶13), UBS concedes that "the Debtor moved assets around for other entities it controlled to make the first two collateral calls[.]" *Id.*, ¶11. The Debtor moved assets into UBS's counterparties and paid those assets *to UBS*. And the Debtor did so even after the start of the global financial crisis.

[8] Ultimately UBS's dealmakers overcame the objections of their internal risk team, asserting they had done business with Highland for years and were "pretty sure that we could get Highland to buy back their counterparty exposure… for more than zero." *See* Ex. 23.

23. The Fund Counterparties were unable, however, to satisfy a third margin call in November 2008, and UBS issued a notice of termination of the Restructured CLO Warehouse Agreements in December. *Id.* UBS alleges that, as of December 5, 2008, its losses were over $520 million. *Id.*, ¶12.

B. The HFP Notes and the March 2009 Transaction

24. The other subject matter of the UBS Claim is transfers made in connection with the March 2009 Transaction that it alleges were fraudulent transfers. It is undisputed that the transfers were made by HFP (or its non-defendant subsidiaries), which was not a party to either the CLO Warehouse Agreements or the Restructured CLO Warehouse Agreements, and so owed no debt or duty to UBS. Nonetheless, UBS claims standing to challenge the transfers because it may in the future be owed money by HFP, provided it prevails on its claim that HFP is an alter ego of the Fund Counterparties. *Id.*, ¶16. UBS alleges in the State Court complaint that on March 17, 2009, the Debtor caused HFP to transfer all of its assets to the Debtor and affiliated co-defendants in the New York action (the "Affiliated Transferee defendants"), in what UBS alleged were fraudulent conveyances of $239 million in assets.

25. The March 2009 Transaction was the settlement of certain notes issued by HFP in the fall of 2008. In September 2008, HFP, through two newly-created, wholly-owned subsidiaries, acquired $321 million in CLO assets and life settlement insurance contracts from the Affiliated Transferee defendants in exchange for senior secured notes in a principal amount of $316 million with a maturity date of 2018. *See* Demonstrative Slide 4 The notes required HFP to make amortizing quarterly payments of $15 million to the Affiliated Transferee defendants, starting in February 2009. HFP was required to transfer a security interest to the Affiliated Transferee defendants in the shares of two wholly owned subsidiaries into which HFP transferred the newly acquired assets.

26. In October 2008, HFP issued an additional $55,488,000 of secured notes, also due in 2018, to Highland Crusader Offshore Partners, L.P. ("Crusader Fund"). The September and October notes (the "HFP Notes") brought HFP's debt obligation to the Affiliated Transferee defendants to approximately $371 million. Toward the end of 2008, the assets that secured the HFP Notes were subject to significant credit downgrades, decreasing cash flows available to HFP as dividends. The decreased cash flows made it unlikely that HFP would be able to meet its debt service obligations under the HFP Notes, or its obligation to pay premiums on the life settlement contracts it had acquired, jeopardizing the underlying collateral.

27. Based on these concerns, HFP's Board therefore approved a settlement with respect to the HFP Notes to relieve it of these obligations, which satisfied the notes and transferred the collateral back to Highland Credit Strategies Master Fund, L.P. ("Credit Strategies"), Highland Credit Opportunities CDO, L.P. and Crusader Fund, and to other noteholders/obligees (including Citibank and the Debtor). The March 2009 Transaction eliminated approximately $370 million of debt and protected HFP from further exposure as the value of the collateral securing the HFP Notes continued to deteriorate. *See* Demonstrative Slides 5 and 6. The satisfaction of the HFP Notes and the return of the collateral was effectuated pursuant to a "Termination, Settlement and Release Agreement" dated March 20, 2009, between HFP, HFP Asset Funding II, Ltd., and HFP Asset Funding III, Ltd., as Issuers, and the noteholders/obligees.

28. The March 2009 Transaction was unrelated to debts owed by SOHC to UBS (and so, as discussed below, was patently not an "actual intent" fraudulent conveyance). The transferor was an entity, HFP (or its unrelated subsidiaries), which did not and still does not owe anything to UBS. Further, the challenged transfers satisfied secured debt to non-insiders (which, as discussed below, constitutes "fair consideration" under section 273 of the New York

Debtor and Creditor Law ("NYDCL") meaning they could not be constructively fraudulent either).

C. Procedural History

29. On February 24, 2009, UBS commenced a lawsuit against the Debtor and the Fund Counterparties in New York state court, alleging breach of the Restructured CLO Warehouse Agreements by the Fund Counterparties and seeking indemnification from the Debtor for certain losses (the "2009 Action") (Ex. F, Compl., *UBS Sec. LLC v Highland Capital Mgmt., L.P.*, No. 650097/09 (N.Y. Sup. Ct. Feb. 24, 2009).) The indemnification claim—the only cause of action that UBS asserted against the Debtor—was dismissed by the New York Appellate Division. "Dismissal of plaintiffs' indemnification claim against Highland is warranted, since ***the agreements between the parties contain no promise on the part of Highland to undertake liability with respect to the investment losses suffered by plaintiffs, or to ensure or guarantee the performance of defendant off-shore funds' obligations to bear the risk of investment losses.***" *UBS Securities LLC v. Highland Capital Management, L.P.*, 70 A.D.3d 526, 893 N.Y.S.2d 869 (2010) (emphasis added).

30. After the Debtor was dismissed from the 2009 Action, UBS twice amended its complaint in the 2009 Action to add five new defendants (including HFP, Credit Strategies, and Crusader Fund) and filed a new action against the Debtor on June 28, 2010, captioned as *UBS v. Highland Capital Management, L.P.*, Index No. 65072/2010 (N.Y. Sup. Ct.) (the "2010 Action").[9] The 2009 Action and the 2010 Action were later consolidated. As its claims against the Debtor, UBS asserted that the March 2009 Transaction was a fraudulent conveyance that benefitted the Debtor, and that the Debtor breached the implied covenant of good faith and fair dealing by causing it. Recognizing it was not a creditor of HFP (and thus

[9] The operative complaint against the Debtor, filed in the 2010 Action, is attached as **Exhibit 16** to Appendix B [B064-B121], and the operative complaint against the remaining defendants, filed in the 2009 Action, is attached as **Exhibit 17** to Appendix B [B123-B180].

lacked standing to challenge the transfers), UBS needed a bootstrap to assert the fraudulent transfer claims against HFP and other defendants, UBS's amended complaint in the 2009 Action included a claim for declaratory relief against HFP seeking a determination that HFP was the alter ego of one of the Funds. The alter ego claim against HFP is the only alter ego cause of action that UBS has asserted in the New York state court litigation; in over a decade of litigation, UBS has never asserted that the Debtor is the alter ego of the Funds or any other entity.

31. In 2011 and 2012, the Appellate Division issued two more decisions that eliminated, or otherwise significantly limited, UBS's claims against the Debtor and new defendants. Both decisions applied *res judicata* to restrict UBS from seeking recovery for any conduct that occurred prior to February 24, 2009, the date on which UBS filed its original complaint in the 2009 Action, in which a final judgment was rendered on the merits in favor of the Debtor. *See* Exhibit 2 at A010; Exhibit 3 at A014.

32. In the 2011 decision, after UBS tried to re-assert the same claim against the Debtor under different legal theories (much like UBS is now doing), the Appellate Division held:

> [T]o the extent the [UBS] claims against Highland in the new complaint implicate events alleged to have taken place before the filing of the original complaint, res judicata applies. That is because UBS's claims against Highland in the original action and in this action all arise out of the restructured warehousing transaction. While the claim against Highland in the original action was based on Highland's alleged obligation to indemnify UBS for actions taken by the affiliated funds, and the claims against Highland in the second action arose out of Highland's alleged manipulation of those funds, they form a single factual grouping. ***Both are related to the same business deal and to the diminution in the value of the securities placed with UBS as a result of that deal***.

UBS v. Highland Capital Mgmt., L.P., 86 A.D.3d 469, 474 (N.Y. App. Div. 2011) (emphasis added) [**Exhibit 2** at A010].

33. In the 2012 decision, the Appellate Division extended its *res judicata* ruling to the Debtor's co-defendants in the state court litigation, holding that UBS's claims

against other defendants (which included a claim that HFP is the alter ego of one of the Fund Counterparties) are likewise limited to conduct that occurred after February 24, 2009. *UBS v. Highland Capital Mgmt., L.P.*, 93 A.D.3d 489, 490 (N.Y. App. Div. 2012) [**Exhibit 3** at A014]. "This Court's reversal of an order denying dismissal of the complaint in a related action (UBS Sec. LLC v Highland Capital Mgt., L.P., 86 AD3d 469 [2011]), warrants dismissal of a portion of plaintiff's claims in this action due to res judicata since defendants are in privity with the defendant in the other action." *Id*. (citation omitted).

34. In light of the Appellate Division's decisions, UBS's remaining claims against the Debtor are limited to those that arise out of the allegedly fraudulent transfers in the March 2009 Transaction. This includes its claim for breach of the implied covenant, which UBS acknowledged to the state court "involves [the Debtor's] role in the March 2009 fraudulent conveyances [and] overlaps factually with the ... fraudulent conveyance claims"[10] and more succinctly: "the implied covenant of good-faith and fair-dealing claim that we now have is that they shouldn't have committed fraudulent conveyances to make it certain that these two parties couldn't have paid."[11]

D. The UBS Settlement and Release

35. In June 2015, in exchange for payments totaling $70.5 million, UBS released its claims against the Debtor (and other parties) pursuant to settlement agreements it entered into with three affiliates of the Debtor – Crusader Fund, Highland Crusader Holding Corporation and Credit Strategies. The UBS Release covers transfers to these affiliates representing approximately $172 million of the $233 million of challenged transfers. Section 5.3 of the settlement agreements provides, in relevant part:

> [T]he UBS Releasing Parties do hereby release, and covenant not to sue, [the Debtor] with respect to such Claims to the limited extent the Claims are for losses or other relief specifically arising from the fraudulent

[10] Exhibit 6 at A106.
[11] 05/01/18 State Court Hrg. Tr. at 5:14-18 and 7:16-10:16 [Exhibit 5 at A058, A060-A063].

> transfers to [the settling defendants] alleged in the UBS Litigation. For the avoidance of doubt, the Claims released do not include (a) any Claims for losses or other relief arising from the alleged fraudulent transfers to any defendant in the UBS Litigation other than [the settling defendants] or (b) any other Claims for losses or other relief arising from the [warehouse agreement], except to the limited extent the Claims are for losses or other relief that specifically arise from the alleged fraudulent transfers to [the settling defendants] …

E. The Phase I Trial

36. The New York state court conducted a bench trial in July 2018 on the breach of contract claims against the Fund Counterparties under the Restructured CLO Warehouse Agreements. It issued its decision in November 2019, finding the Fund Counterparties liable for breaching the Restructured CLO Warehouse Agreements and awarding damages in the amount of $519,374,149, plus prejudgment interest, for a total judgment of approximately $1.05 billion. *UBS Securities LLC, et al v. Highland Capital Mgmt. L.P., et al*, No. 650097-2009 (N.Y. Sup. Ct. Nov. 19, 2019) [Doc. No. 641]. The State Court made no findings with respect to the Debtor or the remaining defendants. Those claims were scheduled to be heard during a second trial.

F. Summary of the UBS Claim

37. The UBS Claim alleges anew the fraudulent transfer claims that UBS released in the UBS Release: "the Debtor and HFP caused asset transfers of millions of dollars of assets to the Debtor, [Credit Strategies], [Crusader Fund], and Highland Credit Opportunities CDO, L.P…, among others, thereby further reducing Highland's abilities to meet their obligations to Claimant." UBS Claim, ¶18. The premise appears to be that although UBS has already recovered the value of $172 million of the alleged fraudulent transfers by way of its settlement with the Debtor and others, it can recover the very same amounts from the Debtor a second time as damages for causing the transfers to be made. UBS attempts this magic trick by re-casting the same claims as a breach of an implied duty "to act in good faith to cause HFP to satisfy the debts, as much as possible, then owed to Claimant." *Id.* And although it never got a

guaranty or a keep-well promise of any type, UBS further alleges that the Debtor "deliberately kept the Fund Counterparties undercapitalized, and allowed all assets of any value to be drained from the Fund Counterparties" and so precluded UBS from recovering anything. *Id*., ¶¶16, 18.

38. Further confusing matters, although the filing of the UBS Claim post-dates this Court's denial of relief from stay, UBS postulates that its claim against the Debtor will be tried before a jury in the State Court:

> The next step in the State Court Action is Phase II of the trial, where Claimant's remaining claims against not only the Debtor, but also against other Highland affiliates are to be tried to a jury, with the court deciding liability as to the breach of the implied covenant of good faith and fair dealing claim and the jury deciding all remaining claims. (*Id.* at 2 n.1, 38.) The claims to be tried in Phase II include claims for breach of the implied covenant of good faith and fair dealing, fraudulent conveyances, and alter-ego liability. The specific amounts the two non- Debtor affiliates owe to Claimant for their breach of the Warehouse Agreements are now set forth and embodied in the final $1 billion judgment from Phase I. And Claimant has stated claims against the Debtor—which was also a party to the same contract and exercised complete control over the two liable affiliates—under which Claimant is entitled to damages that are at least as much as the Phase I judgment amount. Claimant will seek damages for the Debtor's various breaches of the implied covenant as well as its specific role in the fraudulent transfer scheme, and pre-judgment interest and attorneys' fees where available. In addition, Claimant will seek punitive damages against the Debtor for its role in orchestrating the extended efforts to prevent Claimant from collecting the amounts owed under the Warehouse Agreements.

Id., ¶ 24.

39. UBS then summarizes its claim as follows:

> Claimant hereby asserts a claim, pending litigation of Phase II, for damages arising from the Debtor's breach of the implied covenant of good faith and fair dealing, its specific role in directing the fraudulent transfers of assets involving HFP, additional interest, further damages (including punitive damages), and attorneys' fees that may be awarded by any court at the conclusion of Phase II.

Id., ¶ 26.

OBJECTION TO CLAIM

A. Legal Standard

40. The Bankruptcy Code establishes a burden-shifting framework for proving the amount and validity of a claim. "A claim . . . , proof of which is filed under section 501 [of the Bankruptcy Code], is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). "A proof of claim executed and filed in accordance with the [Bankruptcy Rules] shall constitute *prima facie* evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f); *see also In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006). However, the ultimate burden of proof for a claim always lies with the claimant. *Armstrong*, 347 B.R. at 583 (citing *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15 (2000)).

B. The Fraudulent Transfer Claim Should be Disallowed

41. UBS's fraudulent transfer claim against the Debtor is limited to conduct that occurred after February 24, 2009, and is therefore limited to the March 2009 Transaction extinguishing the HFP Notes, which UBS contends was both a constructively fraudulent conveyance and an actual fraudulent conveyance under New York law.[12]

42. A conveyance is constructively fraudulent under New York law if it is made while the transferor is insolvent or satisfies other similar financial criteria, and if the transferor does not receive "fair consideration" in exchange for the transfer. *Englander Capital Corp. v. Zises*, 79 N.Y.S.3d 502, 506 (N.Y. Sup. Ct. 2018); NYDCL §§ 273, 274, 275. A transfer is an actual fraudulent conveyance under New York law if it is made with actual intent to hinder, delay or defraud the transferor's creditors. *Id*. at 507; NYDCL § 276.

43. UBS contends the March 2009 Transaction was a fraudulent conveyance because (i) UBS was a creditor of SOHC under the Restructured CLO Warehouse Agreements,

[12] The recent amendments to New York's fraudulent conveyance laws took effect on April 4, 2020 and are not retroactive. Therefore, UBS's fraudulent conveyance claims are governed by New York Debtor and Creditor law as it existed prior to the recent amendments.

(ii) SOHC was the alter ego of HFP, (iii) as part of the settlement of the HFP Notes, HFP transferred assets to the Debtor, its affiliates and Citibank, (iv) HFP did not receive "fair consideration" for the transfers (even though the HFP Notes were cancelled), (v) HFP and SOHC were insolvent at the time, and (vi) the settlement of the HFP Notes was made with the actual intent to hinder, delay or defraud UBS, as a creditor of SOHC.

44. The fraudulent conveyance claim should be disallowed for the following reasons:

- UBS has released the Debtor with respect to the transfers covered by the UBS Release, which total approximately $172 million of the total $233 million transfer. The Debtor submit this defense may be decided on the existing record, without further proceedings.

- UBS lacks standing to challenge transfers that were made not by HFP but by two of its subsidiaries, HFP Asset II/III, which are not defendants in the UBS litigation and as to which UBS is not a creditor or even a purported creditor. The Debtor submits this defense may be decided on the existing record, without further proceedings.

- UBS cannot establish that the Debtor was the beneficiary of any transfers other than the $17.8 million that it received directly. Further proceedings will be required on this issue.

- UBS cannot establish that the transfers were not supported by "fair consideration" because the asset transfers were return of collateral to extinguish secured debt. Further proceedings will be required on this issue.

- UBS cannot establish that the March 2009 Transaction was entered into in bad faith or with the intent to hinder, delay or defraud UBS or any other creditors. Further proceedings will be required on this issue.

- UBS cannot establish that HFP was insolvent at the time of the transfers. Further proceedings will be required on this issue.

i) UBS Released All Claims Against the Debtor Arising From Transfers to Credit Strategies, Crusader Fund and Highland Crusader Holding Corporation

45. As noted, in June 2015, in exchange for payments totaling $70.5 million, UBS released its claims against the Debtor (and other parties) arising from transfers to Credit Strategies, Crusader Fund and Highland Crusader Holding Corporation, which represent $172

million of the alleged fraudulent transfers. The UBS Release is at Section 5.3 of the settlement agreements, which provides:

> [T]he UBS Releasing Parties do hereby release, and covenant not to sue, [the Debtor et al.] with respect to such Claims to the limited extent the Claims are for losses or other relief specifically arising from the fraudulent transfers to [the settling defendants] alleged in the UBS Litigation. For the avoidance of doubt, the Claims released do not include (a) any Claims for losses or other relief arising from the alleged fraudulent transfers to any defendant in the UBS Litigation other than [the settling defendants] or (b) any other Claims for losses or other relief arising from the [warehouse agreement], except to the limited extent the Claims are for losses or other relief that specifically arise from the alleged fraudulent transfers to [the settling defendants] …

46. On its face, the UBS Release explicitly applies to the fraudulent transfer claims against the Debtor asserted in the UBS Claim. It is indisputable that those claims are, in the express words of the UBS Release, "Claims [ ] for losses or other relief specifically arising from the fraudulent transfers to [the settling defendants] in the UBS Litigation." Just as clearly, neither exclusion in the UBS Release applies, namely: (a) these are not transfers "to any defendant in the UBS Litigation other than [the settling defendants]"; and (b) nor are they "any other Claims for losses or other relief arising from the [warehouse agreement]…."

47. The Debtor submits that the Court can decide this issue without further proceedings.

ii) UBS Lacks Standing to Challenge Transfers Made by HFP Asset II/III

48. Conveyances can only be challenged as fraudulent by a creditor of the initial transferor. *See e.g., Avilon Auto. Grp. v. Leontiev*, 2020 NY Slip Op 30837(U), ¶ 41 (N.Y. Sup. Ct.) (plaintiff's status as a creditor is a requirement to have standing under New York's fraudulent conveyance laws). The creditor can seek relief against the transferors, the transferees, and any non-transferee beneficiaries of the fraudulent conveyance. *Fed. Deposit Ins. Corp. v. Porco*, 75 N.Y.2d 840, 842 (N.Y. 1990).

49. HFP Asset II/III were the transferors of approximately $187.5 million of the assets transferred in the March 2009 Transaction. UBS is not a creditor of HFP Asset II/III

and has not named those entities as defendants in the UBS Litigation. Of that amount, $152.3 million were transfers covered by the UBS Release. Of the remaining $35.2 million: (a) approximately $11.7 million was transfers to Citibank, and (b) approximately $23.5 million was transfers to Highland Credit Opportunities Holding Corporation and Multi-Strat.

50. None of the transfers were to the Debtor, but to the extent UBS might otherwise succeed in imposing liability upon the Debtor for transfers to other transferees, UBS has no standing to challenge those transfers made by HFP Asset II/III.

51. The Debtor submits that the Court can decide this issue without further proceedings.

iii) The Debtor is Not the Beneficiary of the Transfers

52. The Debtor received only $17.8 million of the transfers in the March 2009 Transaction, as a subsequent transferee from HFP. UBS will be unable to meet its burden of demonstrating that Debtor benefited sufficiently from other transfers to impose liability, such as the $17.4 million in aggregate transfers to Citibank. The Court should establish a schedule for further proceedings on this issue.

iv) HFP Received "Fair Consideration" for the Transfers

53. UBS cannot meet its burden of showing that any transfers were not made for "fair consideration." "Fair consideration" is provided when property is given "in good faith" to satisfy a preexisting debt "as a fair equivalent therefor." NY Dr & Cr § 272. While a transfer to an insider to satisfy an antecedent debt is "presumed to lack good faith," *Englander Capital Corp.*, 79 N.Y.S.3d at 506, that presumption does not apply when the transfer is to an insider who is legitimately a secured creditor. *Id.*

54. The March 2009 Transaction satisfied HFP's obligations on the HFP Notes. The HFP Notes were secured at their inception, well before UBS filed its complaint on February 24, 2009. They were secured by, among other things, HFP's interests in HFP Asset

II/III. While UBS contests whether the HFP Notes actually were secured, the Southern District of New York district court in Citibank held that they were. *Citibank*, 270 F. Supp. 3d at 733 ("HFP's financial condition is irrelevant to the value of the HFP Notes because the notes were secured by independently valued collateral"). The State Court declined to decide the issue on summary judgment.

55. The fact that the security interests were not perfected is irrelevant, so long as they were effective between the parties. NY UCC § 9-201(a) ("a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors"); *Ultimore, Inc. v. Bucala*, 464 B.R. 626, 632 (Bankr. S.D.N.Y. 2012) (NY UCC § 9-201(a) gives an unperfected secured creditor rights superior to those of unsecured creditors).

56. A security interest attaches to collateral and becomes enforceable if three requirements are met: (i) value has been given; (ii) the debtor had rights in the collateral or the power to transfer rights in the collateral to the secured party; and (iii) the debtor has authenticated (*i.e.*, signed) a security agreement that describes the collateral. NY UCC § 9-203(b). These requirements were met. The noteholders gave value in exchange for the security interests by transferring assets to HFP's subsidiaries. HFP had rights in the collateral or the power to transfer rights in the collateral.

57. With respect to the final requirement, "[a]ny document showing the required intent to grant an interest in the collateral will serve as a security agreement.... For there to be a valid and enforceable security agreement, a formal and separately signed document labeled 'security agreement' is not necessary." *Ultimore, Inc.*, 464 B.R. at 631 (citations omitted). "Almost any combination of documents can be used to prove the existence of a security agreement so long as the documents embody the intention of the parties to create a security interest." *Id.* Here, the HFP Notes and other related documents state that the HFP Notes were

secured, and evince an intent to create a security interest. As to HFP's interests in HFP Asset II/III, the parties also executed a charge over shares agreement that describes the collateral and repeatedly refers to the security interest granted in HFP's shares of HFP Asset II/III. The remaining collateral is described in detail in the underlying note purchase agreement. (Ex. 24.)

58. Undeterred by the secured nature of the HFP Notes, UBS asserts that the HFP Notes are not really secured debt because they should be recharacterized as equity interests. The Fifth Circuit permits debt to be recharacterized as equity only if that remedy is allowed under applicable state law. *Grossman v. Lothian Oil Inc. (In re Lothian Oil Inc.),* 650 F.3d 539 (5th Cir. 2011) (rejecting use of section 105(a) as basis for recharacterization). There are no New York state court decisions allowing recharacterization, and UBS cannot rely on bankruptcy court decisions on recharacterization to argue a state law claim. *See Alliance Shippers, Inc. v. Garcia*, 2015 U.S. Dist. LEXIS 51316, at *3-4 (S.D.N.Y. Apr. 17, 2015) ("Defendants next argue that both 'recharacterization' and 'equitable subordination' are claims under the bankruptcy law and not properly before this Court. They are correct. . . They do not constitute valid causes of action outside of the bankruptcy context.").

59. Because UBS cannot establish that the HFP Notes were not secured, its constructive fraudulent transfer claims must fail.

v) UBS Cannot Demonstrate Fraudulent Intent or Lack of Good Faith

60. For all the reasons described above, among others, both the issuance of the HFP Notes and their extinguishment in the March 2009 Transaction had a legitimate, good faith basis, and had nothing to do with attempting to divert assets from UBS, which was not a creditor of HFP (or its non-defendant subsidiaries) either when the notes were issued or even at the time of the March 2009 Transaction (and will never become a creditor of HFP unless it prevails on its alter ego claim). UBS cannot meet its burden of proof of establishing lack of good faith or intent to hinder or defraud creditors.

C. UBS's Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing Should be Disallowed

61. The Restructured CLO Warehouse Agreements are governed by New York law. As a result, the implied covenant claim, which is based on the restructured agreements, also is governed by New York law. *Official Comm. of Unsecured Creditors of Lois/USA, Inc. v. Conseco Fin. Servicing Corp.*, 264 B.R. 69, 97-98 (Bankr. S.D.N.Y. 2001). Under New York law, a covenant of good faith and fair dealing is "[i]mplicit in all contracts." *19 Recordings Ltd. v. Sony Music Entm't*, 165 F. Supp. 3d 156, 161 (S.D.N.Y. 2016) (citations omitted). The implied covenant is "a promise that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id*. (internal quotation marks and citations omitted). A plaintiff must (i) identify the implied duties allegedly arising out of the parties' contract, (ii) establish that the defendant breached those implied duties and, in doing so, acted malevolently or in bad faith, and (iii) establish that the defendant's conduct caused the plaintiff's alleged damages.

i) A Duty on the Debtor's Part to Ensure That UBS Would be Paid Cannot Be Implied When UBS Knowingly Did Not Contract For It

62. It is axiomatic that the implied covenant also cannot be used to create new rights or impose new obligations that are inconsistent with the express terms of the parties' contract. *Id*. at 165. A party asserting "the existence of an implied-in-fact covenant bears a heavy burden, for it is not the function of the courts to remake the contract agreed to by the parties, but rather to enforce it as it exists." *Rowe v. Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 69 (N.Y. 1978). Therefore, a party asserting an implied covenant claim "must prove not merely that it would have been better or more sensible to include such a covenant, but rather that the particular unexpressed promise sought to be enforced is in fact implicit in the agreement viewed as a whole." *Id*.

63. UBS wishes the Court to imply a duty by the Debtor to ensure that the Fund Counterparties' are able to pay UBS. Such a flies directly in the face of the contracts and the Appellate Division's very first decision in the UBS litigation dismissing the contractual indemnity claim against the Debtor. Because of the *res judicata* decisions, UBS is, at most, left with a repackaged fraudulent transfer claim: an implied duty by the Debtor to not permit the March 2009 alleged fraudulent transfers.

64. The Restructured CLO Warehouse Agreements do not impose any direct liability on the Debtor to ensure or guarantee performance by the Fund Counterparties. Such a basic obligation cannot be implied, which is precisely why the Appellate Division *already* held that the indemnification provisions did not impose on the Debtor an obligation "to ensure or guarantee the performance" of the Funds' obligations to UBS. These are highly complex contracts negotiated by highly sophisticated parties. There are numerous "protective" provisions in the Restructured CLO Warehouse Agreements, presumably heavily negotiated, relating to the posting of collateral and collateral calls, and there are numerous other protections for which UBS could have negotiated, but did not.

65. The Appellate Division ruling is dispositive. UBS had alleged that the Debtor had breached an indemnification obligation that was *implied*, not express. So is the covenant that UBS now seeks to imply into the same contracts. There is no material difference in the context that would support any decision other than that which the Appellate Division already reached. Both implied provisions amount to an imagined guaranty by the Debtor of performance of the Fund Counterparties, something that simply cannot be implied into a contract, and certainly not one between sophisticated parties such as these.

66. In *Citibank*, the district court rejected Citibank's similar attempt to imply a promise by the Debtor to ensure that cash would be available for distribution on the HFP Notes. CDO Fund (a Fund Counterparty) had pledged its HFP Notes to Citibank as collateral for its

obligations under a separate financing arrangement with Citibank. As part of the pledge agreement, the Debtor agreed "that as long as Citi held any of the HFP Notes under a pledge from CDO Fund, if HFP has cash available on a Quarterly Payment Date in an amount equal or greater to the Quarterly Payment Amount, [the Debtor] will recommend to the board of directors and management of HFP, to the extent consistent with [the Debtor's] fiduciary duties, that HFP not exercise the [payment-in-kind] Option on the Notes for such Quarterly Payment Date." *Citibank*, 270 F. Supp. 3d at 731. Citibank argued, in seeking to impose alter ego liability on the Debtor, that the Debtor had an implied obligation under the pledge agreement to ensure that cash was available for distribution on the HFP Notes. The court granted summary judgment in favor of the Debtor. It was "unpersuaded that HCM even owed Citi a good faith obligation to ensure that cash was available for distribution on the HFP Notes." *Id*. at 732. "[I]t makes little sense to read into the [pledge agreement] an implied promise that [the Debtor] would ensure that cash was available for distribution on the HFP Notes. To the contrary, such an implied promise would impose a duty on [the Debtor] beyond that which Citi bargained for." *Id*.

67. Similarly, in *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1508 (S.D.N.Y. 1989), the court granted summary judgment against bondholders who contended their indentures carried an implied covenant not to incur LBO debt. The court refused to use the implied covenant to "create an indenture term that, while bargained for in other contexts, was not bargained for here and was not even within the mutual contemplation of the parties." *Id*. In particular, the court held:

> … [T]he "fruits" of these indentures do not include an implied restrictive covenant that would prevent the incurrence of new debt to facilitate the recent LBO. **To hold otherwise would permit these plaintiffs to straightjacket the company in order to guarantee their investment. These plaintiffs do not invoke an implied covenant of good faith to protect a legitimate, mutually contemplated benefit of the indentures; rather, they seek to have this Court create an additional benefit for which they did not bargain.**

Id. at 1519 (emphasis added).

68. Here, as in *Metro Life Ins. Co.*, UBS is attempting to create an obligation that could have been bargained for and made part of the restructured agreements – but was not. Imposing an obligation on the Debtor to ensure that UBS would be paid is in effect to create a guaranty where none was purchased. In these circumstances, it would create an obligation to prefer UBS over other creditors. That is not a reasonable extension of the parties' express agreement.

ii) Since Any Breach of the Implied Covenant Can Only be Based on the Alleged Fraudulent Conveyances, the UBS Release Applies

69. As a result of the two *res judicata* decisions, UBS can only base its implied covenant claim on the alleged fraudulent conveyances made in the March 2009 Transaction. But it has released the Debtor from liability with respect to $172 million of the $233 million in transfers. The UBS Release applies without ambiguity.

70. Once again, Section 5.3 of the settlement agreements provides:

> [T]he UBS Releasing Parties do hereby release, and covenant not to sue, [the Debtor et al.] with respect to such Claims to the limited extent the Claims are for losses or other relief specifically arising from the fraudulent transfers to [the settling defendants] alleged in the UBS Litigation. For the avoidance of doubt, the Claims released do not include (a) any Claims for losses or other relief arising from the alleged fraudulent transfers to any defendant in the UBS Litigation other than [the settling defendants] or (b) any other Claims for losses or other relief arising from the [warehouse agreement], except to the limited extent the Claims are for losses or other relief that specifically arise from the alleged fraudulent transfers to [the settling defendants] …

71. A claim that the Debtor breached an implied obligation not to let a fraudulent transfer occur is unambiguously a claim "for losses or other relief specifically arising from the fraudulent transfers…." Again, the exclusions do not apply. First, the Debtor is not attempting to apply the UBS Release to transfers to other parties. Second, the subject of the implied covenant claim is the fraudulent transfers, and so even if the implied covenant claim is technically an "other Claim[] for losses or other relief arising from the [warehouse agreement],"

it is nonetheless a claim that quite literally comes within the exception "for losses or other relief that specifically arise from the alleged fraudulent transfers…." There is no room for interpretation. The settlement cannot be dispensed with by relabeling the claim.

iii) UBS Cannot Prove that Any Duty to Ensure That UBS Would be Paid was Breached in Bad Faith or With Malevolence Targeting the Plaintiff

72. If a duty could be implied, UBS would have the burden of proving that the Debtor breached it in bad faith or with malevolence targeting UBS specifically. *Wilder v. World of Boxing LLC*, 310 F. Supp. 3d 426, 451 (S.D.N.Y. 2018) (to establish a lack of good faith, the plaintiff must show that the defendant exercised a right malevolently, for its own gain as part of a purposeful scheme designed to deprive the plaintiff of the benefits under the contract).

73. There is no duty to ensure the Fund Counterparties could pay UBS, but even if there were, and even assuming that implied duty was breached by entering into the March 2009 Transaction, UBS cannot meet its burden of proving that it was done in bad faith or malevolently targeting UBS, The March 2009 Transaction was a good faith, commercially reasonable transaction that was not designed to "shield assets" from UBS, but instead was designed to try to protect the financial viability of HFP and its subsidiaries. It was approved by HFP's board based on legitimate concerns regarding HFP's ability to service the debt or maintain the collateral, in particular, its ability to make the premium payments due on the life settlement contracts. It eliminated approximately $370 million of debt, and protected HFP from further exposure as the value of the collateral securing the HFP Notes continued to deteriorate.

74. Not only was the March 2009 Transaction a legitimate, commercially reasonable decision, it cannot be shown to have targeted UBS. HFP has no business relationship with UBS. HFP was not even a defendant in the complaint filed by UBS on February 24, 2009. That complaint was solely against the Fund Counterparties and the Debtor and was only for breach of contract. Only after losing its contract claim against the Debtor in the February 2010

appellate decision did UBS cast a wider net, for the first time adding HFP as a defendant and alleging alter ego in June 2010.

75. UBS will not be able to establish at trial that the Debtor breached any implied duty to UBS, let alone that the March 2009 Transaction was anything other than a "good faith" transaction.

iv) Causation and Damages

76. Causation is an "essential element" of damages for an implied covenant claim, meaning that the plaintiff must establish that the defendant's breach "directly and proximately" caused the plaintiff's damages. *St. Christopher's, Inc. v. Forgione*, 2019 U.S. Dist. LEXIS 115476, *28 (S.D.N.Y. July 11, 2019) (citations omitted); *see also Wilder*, 310 F. Supp. 3d at 448 (plaintiff must establish that defendant's breach of implied covenant proximately caused plaintiff's damages).

77. As a result of the *res judicata* decisions, UBS can only base its implied covenant claim on the March 2009 Transaction. That being the case, the maximum amount of damages that could be shown to be proximately caused by such a breach, assuming *arguendo* that there was a breach, would be any amount of transfers made in the March 2009 Transaction found to be fraudulent. The March 2009 Transaction involved transfers of at most approximately $233 million of assets (roughly half of the principal amount of UBS's breach of contract damages) and UBS has already released the Debtor from liability with respect to $172 million of those transfers. Furthermore, the transfers to Citibank of $17.4 million cannot constitute damages to UBS.

78. In the event this Court finds that the UBS Release does not limit damages on the implied duty claim related to the alleged fraudulent transfers, the Debtor would nonetheless be entitled to an offset against damages for the $70.5 million of settlement payments that UBS received from the settling defendants. New York General Obligations Law ("GOL") §

15-103 provides for the offset of settlement amounts received from a "co-obligor" to the extent of "the amount received on the obligations of all co-obligors." GOL § 15-103. *See J.P. Endeavors v. Dushaj*, 8 A.D.3d 440, 442 (N.Y. App. Div. 2004) (under GOL § 15-103, where multiple defendants were sued for liability on a brokerage contract, plaintiff's settlement with one defendant reduced the amount on which the remaining defendants could be held liable); *D.H. Blair & Co., Inc. v. Gottdiener*, 2010 WL 4258967, *10 (S.D.N.Y. Oct. 27, 2010) (defendant was "entitled to a credit of the amount of the settlement" between other parties).

79. In addition, GOL § 15-108(a) provides that a settlement payment by a joint tortfeasor may offset or reduce the plaintiff's claims against other joint tortfeasors, and some New York courts have held that GOL § 15-108 is not limited to tort. *See e.g., Koch v. Greenberg*, 14 F. Supp. 3d 247, 270 (S.D.N.Y. 2014), *aff'd* 626 Appx. 335 (2d Cir. 2015) (reducing award and concluding that GOL § 15-108 is potentially applicable to other types of claims, notwithstanding its references to "tort" and "tortfeasor"); *Carter v. State*, 139 Misc. 2d 423, 427 (N.Y. Sup. Ct. 1988), *aff'd* 154 A.D.2d 642 (N.Y. App. Div. 1989) (New York courts have applied the statute "equally to claims and actions grounded on theories of liability other than tort"); *Cty. of Westchester v. Welton Becket Assocs.*, 102 A.D.2d 34, 45-46 (N.Y. App. Div. 1984), *aff'd* 66 N.Y.2d 642 (N.Y. 1985) (applying GOL § 15-108 even though claims were "essentially contractual in nature").

80. Offset of the $70.5 million settlement against any breach of implied covenant damages is also proper under New York common law. Specifically, under established New York law, parties cannot recover twice for the same injury or on the same alleged debt. *Morris v. Zimmer*, 2014 U.S. Dist. LEXIS 39608, *18 (S.D.N.Y. Feb. 11, 2014) ("It is well settled that Plaintiffs are not entitled to double recovery for the same debt."); *Zarcone v. Perry*, 78 A.D.2d 70, 79 (N.Y. App. Div. 1980), *aff'd* 55 N.Y.2d 782 (N.Y. 1981) ("[J]udicial policy forestalls a double recovery for an injury"). The alleged damage to UBS is the amount of the

fraudulent transfer; to the extent UBS has already recovered by settlement on account of a fraudulent transfer, a recovery from the Debtor for damages arising from the same transfer would be a double recovery.

81. The offset would apply before the calculation of prejudgment interest. *Lizden Indus., Inc. v. Franco Belli Plumbing & Heating & Sons, Inc.*, 2011 N.Y. Misc. LEXIS 4247, *22 (N.Y. Sup. Ct. Aug. 24, 2011) (denying request to calculate pre-judgment interest before offset of co-defendant's settlement payment), *aff'd* 95 A.D.3d 738 (N.Y. App. Div. 2012) (trial court "properly awarded prejudgment interest on the verdict after it was reduced by the amount of Belli's settlement, pursuant to General Obligations Law § 15-108").

D. Any Claim for Alter Ego Liability Should be Disallowed

82. UBS has not pled a claim against the Debtor for alter ego liability throughout the eleven year duration of the UBS litigation. The UBS Claim appears to assert for the first time that such liability exists and that it would subject the Debtor to the entire Phase I judgment against the Fund Counterparties. But any such claim is barred by *res judicata*, as the Phase I judgment only relates to conduct predating February 24, 2009. Like the rest of UBS's claims, therefore, any alter ego liability is limited to the March 2009 Transaction. Regardless, as the *Citibank* decision establishes, UBS's factual allegations do not entail the kind of "wrongs" that support alter ego liability.

i) Any Alter Ego Liability is Limited by *Res Judicata* to Conduct After February 24, 2009

83. The Appellate Division has already ruled that UBS is barred by *res judicata* from asserting claims against the Debtor that "implicate events alleged to have taken place before the filing of the original complaint" on February 24, 2009. *UBS v. Highland Capital Mgmt., L.P.*, 86 A.D.3d at 474 [**Exhibit 2** at A010]. This would include any new claim against

the Debtor for alter ego. *See UBS v. Highland Capital Mgmt., L.P.*, 93 A.D.3d at 490 [**Exhibit 3** at A014] (limiting the alter ego claim against HFP to post-February 2009).

84. UBS will contend that the Debtor's alter ego liability is not an independent "claim" but only a post-judgment remedy under New York Civil Practice Law and Rules ("CPLR") 5225(b) and therefore not subject to *res judicata*. *Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135 (N.Y. 1993). Of course, courts regularly consider alter ego relief in connection with pending litigation – notably in the present action, in which UBS seeks a declaratory judgment that HFP is the alter ego of SOHC, and in the Citibank litigation. *See also Mirage Entm't, Inc. v. FEG Entretenimientos S.A.*, 326 F. Supp. 3d 26, 33-35 (S.D.N.Y. 2018) (plaintiff may pierce corporate veil and sue non-signatory for breach of contract when non-party is an alter ego of one or more signatories).

85. While a proceeding to impose alter ego liability may be initiated as post-judgment supplementary proceedings in New York under the CPLR, that is not the case when the party against whom alter ego liability is asserted was a party to the underlying action. Where, as the newly alleged claim against the Debtor, the defendant on the newly-asserted alter ego claim was a party to the terminated action, *res judicata* applies to the assertion of alter ego liability. In *Bd. of Managers of the 195 Hudson St. Condo v. Jeffrey M. Brown Assocs*., 652 F. Supp. 2d 463, 478-82 (S.D.N.Y. 2009), the Board filed suit (the "Conversion Litigation") seeking damages for construction defects against, among others, K&J and JMB. The Board did not, however, assert a claim of alter ego liability against JMB in the Conversion Litigation itself. The Conversion Litigation against JMB was dismissed on the merits, with the court finding, among other things, that JMB was not a party to the underlying agreements. A breach of contract judgment was thereafter entered against K&J, and the Board initiated another separate action seeking to hold JMB liable, on alter ego grounds, for the breach of contract judgment against K&J. The court rejected the Board's attempt, holding that *res judicata* barred the assertion of the alter ego claims

against JMB in the subsequent proceeding because "the facts necessary to sustain both causes of action arise from the same transactions or factual grouping, form a convenient trial unit, and the facts essential to the instant claim were already present in the Conversion Litigation."

86. The same is true in this case, in which the Appellate Division observed one of UBS's complaints was "thoroughly suffused with allegations that [the Debtor] was essentially the alter ego of the parties it induced to breach the agreements." 86 A.D.3d at 477. In fact, one of the UBS claims against HFP that was limited on the basis of *res judicata* based on HFP's privity with the Debtor was an alter ego claim against HFP. For its own reasons, however, UBS has litigated for over a decade without expressly asserting alter ego liability against the Debtor, even though it asserted a claim for declaratory relief against HFP for a determination of alter ego liability.

87. Accordingly, any assertion of alter ego liability would be limited to post-February 24, 2009 conduct. Like the other claims against the Debtor, it would be subject to the UBS Release. Furthermore, no such claim has been pled and *res judicata* would bar its assertion.

ii) UBS's Allegations are an Insufficient Basis for Finding Alter Ego Liability

88. New York law disfavors disregard of the corporate form and only allows the drastic remedy of veil piercing under extraordinary circumstances. *Cobalt Partners, L.P. v. GSC Capital Corp.*, 97 A.D.3d 35, 40 (N.Y. App. Div. 2012). To pierce the corporate veil under New York law, a plaintiff bears a heavy burden to establish both (i) that the owner exercised complete domination over the corporation with respect to the transaction at issue **and** (ii) that such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil. *Citibank*, 270 F. Supp. 3d at 726. To avoid dismissal, a complaint must plead particular facts to demonstrate that the domination of the corporation caused the plaintiff's injury. *See e.g., CSX Tramp., Inc. v. Filco Carting Corp.*, 2011 U.S. Dist. LEXIS 74625, *10 (E.D.N.Y. July 7,

2011). Here, even if UBS could satisfy the first prong, domination, it cannot satisfy the second, because the "wrongs" it alleges do not support alter ego liability.

First Alter Ego Prong – Domination

89. The Second Circuit has identified ten factors to consider in determining whether an entity exercises complete domination over another entity for purposes of alter ego liability.[13] The Debtor denies that UBS can establish its "complete domination," while acknowledging that the district court in *Citibank* found that the Debtor "exercised complete control over CDO Fund." *Citibank*, 270 F. Supp. 3d at 726-28.

Second Alter Ego Prong – Wrong or Fraud

90. On the basis of allegations that included virtually the same as those made by UBS, the district court in *Citibank* held that Citibank failed to demonstrate the second prong – a "wrong or fraud" for veil piercing purposes – and granted summary judgment against Citibank's alter ego claims seeking to hold the Debtor liable for CDO Fund's obligations. *Citibank*, 270 F. Supp. 3d at 729-33. Citibank had identified three acts that it asserted constituted fraudulent or wrongful conduct: (i) the Debtor stripped cash and assets from CDO Fund prior to a margin call; (ii) the Debtor diverted cash distributions on the HFP Notes that would otherwise have been available to CDO Fund to satisfy the margin call; and (iii) the Debtor fraudulently misrepresented the value of the HFP Notes that CDO Fund pledged to Citibank as collateral. *Id.* at 729.

91. As to the "asset stripping" allegations, the district court found that the payments to the Debtor and its affiliates represented the repayment of preexisting obligations and

[13] These factors are: (1) absence of formalities and paraphernalia that are part of corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records, (2) inadequate capitalization, (3) whether funds are put in and taken out of corporation for personal purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, addresses and telephone numbers, (6) amount of business discretion displayed by dominated corporation, (7) whether related corporations deal with dominated corporation at arms' length, (8) whether corporations are treated as independent profit centers, (9) payment or guarantee of debts of dominated corporation by other corporations in the group, and (10) whether corporation in question had property used by other corporations as if it were their own.

that, even if the transfers were constructively fraudulent conveyances to insiders of CDO Fund, such transfers did not constitute a wrong for veil piercing purposes. *Id*. at 730-31. With respect to Citibank's similar argument that the Debtor diverted cash distributions on the HFP Notes to itself or related parties, the court found that there was no implied promise that would impose a duty on the Debtor to ensure that cash was available for distribution on the HFP Notes. The court determined that, "[t]o the contrary, such an implied promise would impose a duty on HCMLP beyond that which Citi bargained for," and noted that there was no authority for finding that a breach of an implied covenant of good faith would constitute a wrong for purposes of veil piercing. *Id*. at 732. In doing so, the court reiterated the well-established rule that an ordinary "breach of contract, without evidence of fraud or corporate misconduct, is not sufficient to pierce the corporate veil." *Id*. Based on its findings, the court held that "[b]ecause none of the acts identified by Citi constitutes a wrong or fraud for veil piercing purposes, [the Debtor] is not liable for CDO Fund's obligations under a traditional veil piercing theory." *Id*. at 733.

92. Courts applying New York law also have rejected alter ego claims where a sophisticated party knowingly contracts with its counterparty and then seeks to impose liability on a third party for breach of that contract – especially where the party could have negotiated for direct rights against the third party. *See TNS Holdings, Inc. v. MKI Sec. Corp.*, 92 N.Y. 2d 335, 339-40 (N.Y. 1998); *Skanska USA Bldg. Inc. v. Atl. Yards B2 Owner, LLC*, 146 A.D.3d 1, 12-13 (N.Y. App. Div. 2016). Here, UBS was well aware of the risks of the transaction and with the ownership and managerial structure of the Highland-related entities, yet it knowingly entered into the Restructured CLO Warehouse Agreements in which only the Fund Counterparties, and not the Debtor, were responsible for performance. There is no basis for piercing the corporate veil on such facts.

CONCLUSION

The UBS Claim is subject to disallowance or material limitation on a summary basis. Even without consideration of the Debtor's other defenses to UBS's asserted or threatened claims, the Court may rule that nearly all of the fraudulent conveyance claims have been released, that the undisputed facts preclude the implication of a guarantee of performance into the Restructured CLO Agreements, and that there is no legally sufficient basis for imposing alter ego liability. The few remaining claims are subject to numerous meritorious defenses, as described herein.

WHEREFORE, the Debtor respectfully requests that the UBS Claim be disallowed in its entirety, and grant the Debtor such other and further relief as the Court deems just and proper.

Dated: August 7, 2020.

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Counsel for the Redeemer Committee of the Highland Crusader Fund and the Crusader Funds[1]

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.	§	

REDEEMER COMMITTEE OF THE HIGHLAND CRUSADER FUNDS AND THE CRUSADER FUNDS' OBJECTION TO THE PROOF OF CLAIM OF UBS AG, LONDON BRANCH AND UBS SECURITIES, LLC AND JOINDER IN THE DEBTOR'S OBJECTION

[1] For purposes of this Objection and Joinder, Frost Brown Todd LLC is counsel only to the Redeemer Committee and Jenner & Block, LLP is counsel to the Redeemer Committee, and for the limited purpose of this Objection, the Crusader Funds.

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Pursuant to sections 502(b)-(d) and 558 of Title 11 of the United States Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), (i) the Redeemer Committee of the Highland Crusader Funds (the "Redeemer Committee") and (ii) Highland Crusader Offshore Partners, L.P., Highland Crusader Fund, L.P., Highland Crusader Fund, Ltd. and Highland Crusader Fund II, Ltd. (collectively, the "Crusader Funds")[2] object to Proof of Claim Nos. 190 and 191, submitted by UBS AG, London Branch and UBS Securities, LLC (together, "UBS" and such claims, the "UBS Claim"), and join in the objection to the UBS Claim submitted by Highland Capital Management, L. P. ("Highland" or the "Debtor")[3]

I. INTRODUCTION

UBS asserts that the Debtor is liable for breaches of contract by certain of its indirect subsidiaries, and for alleged fraudulent transfers involving other subsidiaries and funds that the Debtor currently or previously managed. UBS, the Debtor, and several of the Debtor's affiliates have been engaged in litigation that, prior to the commencement of the Debtor's chapter 11 case, had been ongoing since 2009 in the New York State courts (collectively, the "New York Courts"). The Redeemer Committee and the Crusader Funds have a unique perspective on the merits of the UBS Claim because two of the Crusader Fund entities were defendants in that action. The Redeemer Committee is a committee of investors, elected pursuant to the Scheme and Plan of Liquidation of the Crusader Funds approved by the Bermuda Court, to oversee Highland's management of the Crusader Funds through what was intended to be the complete liquidation of

[2] Highland Crusader Holding Corporation ("Crusader Holding"), a signatory to the UBS settlement agreement described in Section IV(C), is a wholly owned subsidiary of the Crusader master fund—Highland Crusader Offshore Partners, L.P.

[3] *See* Debtor's Obj. to Proofs of Claim 190 and 191 of UBS Sec. LLC And UBS AG, London Branch, *In re Highland Capital Mgmt., L.P.*, 19-34054-sgj11 (N.D. Tex. Aug. 7, 2020) (Doc. No. 928).

the fund. The Redeemer Committee played a central role in the negotiation of the settlement of UBS' claims against the Crusader Funds, pursuant to which UBS released the Debtor from much of the relief that UBS now seeks in its claim.

UBS asserts that the UBS Claim arises from three principal events: (1) in the fall of 2008, certain Highland affiliates failed to honor certain contractual margin calls in connection with a proposed securitization financing; (2) in the fall of 2008, certain Highland affiliates engaged in a series of asset transfers with Highland-managed funds; and (3) on March 20, 2009, Highland affiliates unwound those transactions with the Highland-managed funds. UBS claims the Debtor owes UBS at least $1,039,957,799—the amount of a judgment that UBS obtained in February 2020 arising from the non-Debtor affiliates' breaches of contract by failing to honor the margin calls in 2008.

The majority of the UBS Claim is barred by res judicata. The New York Courts have held that res judicata bars UBS from asserting claims against Highland that are based on conduct that occurred before February 24, 2009, the date on which UBS filed its initial complaint in New York. As discussed below, that ruling was the result of UBS filing a complaint that only asserted a claim against Highland for indemnification, a claim that was later dismissed. Notwithstanding this absolute bar, UBS asserts that the Debtor should be held liable for pre-February 24, 2009 conduct, including that of certain of its affiliates, which ultimately resulted in the New York trial court entering a $1,039,957,799 judgment against those entities. It is telling that UBS recently acknowledged that it has never even alleged in the New York action that Highland was the alter ego of the judgment debtors. *See* UBS Reply ISO its Mot. to Lift Automatic Stay at 6, *In re Highland Capital Mgmt., L.P.,* 19-34054-sgj11 (N.D. Tex. Jun. 11, 2020) (Doc. No. 733B); Hr'g Trans. at 30-31, *In re Highland Capital Mgmt., L.P.,* 19-34054-sgj11 (N.D. Tex. Jun. 15, 2020)

(Doc. No. 746A). Any such alter ego claim would be a new path to establish liability that is barred by res judicata. To the extent that the UBS Claim is based on the Debtor's pre-February 24, 2009 conduct, res judicata requires disallowance of that claim.

After giving effect to res judicata, the surviving part of the UBS Claim is based on certain asset transfers made by an affiliate of the Debtor, Highland Financial Partners LP ("HFP"), in March 2009. UBS asserts that those transfers were fraudulent conveyances, and that Highland breached the implied duty of good faith and fair dealing by participating in those transfers. UBS named several Highland-managed funds that received assets in March 2009 as defendants in the New York action, including two Crusader Fund entities—Highland Crusader Offshore Partners, L.P. ("Crusader Offshore Fund") and Highland Crusader Holding Corporation ("Crusader Holding")—as well as Highland Credit Strategies Master Fund, L.P. (the "Credit Strategies Fund"). These funds later entered into settlement agreements with UBS, and Highland was a signatory to each agreement. The settlement agreements provide, in relevant part, that UBS released Highland from any [redacted] each fund as alleged by UBS. The UBS releases of Highland foreclosed the possibility that Highland could later be found liable to UBS in connection with the transfers to those funds. This protection was of central importance to the funds [redacted]

The chapter 11 process does not provide an alleged creditor the opportunity to relitigate matters that are the subject of final, non-appealable decisions of a state court, or prevent enforcement of valid and binding settlement agreements. As demonstrated below, UBS ignores or misconstrues the New York Courts' decisions and the settlement agreements to attempt to avoid

the necessary conclusion that the UBS Claim must be disallowed as a matter of law other than to the extent it seeks damages arising from the March 2009 transfer of assets to entities other than Crusader and Credit Strategies. Based on UBS's expert valuations, in no instance would UBS's claim against the Debtor exceed [redacted] before prejudgment interest.

II. JURISDICTION

The Court has jurisdiction over this matter under the Bankruptcy Code and pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. §§ 157(b)(2)(A), (B) and (L). Venue is proper in this District under 28 U.S.C. §§1408 and 1409. The statutory predicates for the relief requested herein are 11 U.S.C. § 502(b)-(d) and Fed. R. Bankr. P. 3007.

III. BACKGROUND

A. Fund Counterparties Fail to Meet Margin Calls in 2008.

In April 2007, UBS entered into agreements (collectively, the "CLO Warehouse Agreements") with Highland and two affiliates of Highland—Highland CDO Opportunity Master Fund, L.P. ("CDO") and Highland Special Opportunities Holding Company ("SOHC") (together, the "Fund Counterparties")—to establish a warehouse facility to finance the acquisition of syndicated leveraged loans and credit default swaps. (Ex. 1, 4/12/07 Original Synthetic Warehouse Agreement; Ex. 2, 4/20/07 Original Engagement Ltr.; Ex. 3, 5/22/07 Original Cash Warehouse Agreement.) Those assets, in turn, were to serve as the basis for a securitization pursuant to which notes would be sold to investors.

Due to market conditions, the securitized offering did not occur by the contractual deadline, and the CLO Warehouse Agreements terminated. In March 2008, UBS, Highland, and the Fund Counterparties entered into restructured warehouse agreements (collectively, the "Restructured CLO Warehouse Agreements"). (*See* Ex. 4, UBS Securities LLC Proof of Claim ¶7, *In re Highland*

Capital Mgmt., L.P., 19-34054-sgj11 (N.D. Tex. Jun. 26, 2020) (Claim No. 190).) The Restructured CLO Warehouse Agreements gave UBS the right to make margin calls on the Fund Counterparties in the event of a decline in the market value of the loans and swaps.[4]

As the market deteriorated in the fall of 2008, UBS made three margin calls on the Fund Counterparties. The Fund Counterparties satisfied the first two margin calls in September and October 2008, using funds provided by SOHC's parent corporation, HFP. (Ex. 5, Decision and Order at 4, *UBS Sec. LLC, et al v. Highland Capital Mgmt., L.P., et al*, No. 650097-2009 (N.Y. Sup. Ct. 2019). The Fund Counterparties failed to satisfy a third margin call in November 2008, and UBS issued a notice of termination of the Restructured CLO Warehouse Agreements in December. *Id.*[5]

B. Highland Affiliates Engage in Fall 2008 Transfers

Meanwhile, during the fall of 2008, certain funds then managed by Highland—including the Crusader Offshore Fund—transferred certain assets to HFP in [redacted] (the "Fall 2008 Transfers"). [redacted] HFP was not a party to the Restructured CLO Warehouse Agreements.

C. The Fall 2008 Transfers are Unwound on March 20, 2009.

The parties to the Fall 2008 Transfers unwound those transactions on March 20, 2009 ("March 2009 Transfers"). [redacted]

[4] Furthermore, those agreements explicitly placed the risk of loss on the Fund Counterparties, and not Highland, as the New York Appellate Division held. *UBS Sec. LLC v. Highland Capital Mgmt., L.P., et al.*, 893 N.Y.S.2d 869 (N.Y. App. Div. 2010) ("the agreements between the parties contain no promise on the part of Highland to undertake liability with respect to the investment losses suffered by plaintiffs, or to ensure or guarantee the performance of [Fund Counterparties]' obligations to bear the risk of investment losses.").

[5] UBS's Proof of Claim employs sleight of hand by defining the term "Highland" to include the Fund Counterparties. (*See* Ex. 4, UBS Securities LLC Proof of Claim ¶¶2, 11, *In re Highland Capital Mgmt., L.P.*, 19-34054-sgj11 (N.D. Tex. Jun. 26, 2020) (Claim No. 190).) Accordingly, while the UBS Claim states that "Highland posted the required collateral" and refers to "Highland's default on UBS's third margin call," it was the Fund Counterparties that posted collateral and failed to meet the final margin call. *See id.* at ¶¶11-12.

As a result, [redacted] HFP returned the assets to the transferors, including the Crusader Fund and the Credit Strategies Fund. [redacted] According to UBS's expert in the New York action, HFP transferred assets with a market value of [redacted]

[redacted]

D. UBS Sues Over the Restructured Warehouse Transaction and Its Claim Against Highland Is Dismissed.

UBS filed its first complaint on February 24, 2009, against the Fund Counterparties and Highland. (Ex. 10, Compl., *UBS Sec. LLC v Highland Capital Mgmt., L.P., et al*, No. 650097/09 (N.Y. Sup. Ct. Feb. 24, 2009).) UBS's original complaint contained only one claim against Highland—a contractual claim for indemnification. *Id.* ¶¶50-56. Highland moved to dismiss that claim, arguing that the indemnification provision did not apply to the particular losses claimed by UBS. *UBS Sec. LLC v. Highland Capital Mgmt., L.P., et al*, 893 N.Y.S.2d 869 (N.Y. App. Div. 2010). The indemnification claim was dismissed by the New York appellate court. *UBS Sec. LLC v. Highland Capital Mgmt., L.P., et al*, 893 N.Y.S.2d 869 (N.Y. App. Div. 2010) ("the agreements

[6] Highland Crusader Holding Corporation is a wholly-owned subsidiary of the Crusader Fund. (Ex. 8, Compl., *UBS Sec. LLC v. Highland Crusader Holding Co.*, No. 652646/2011 ¶23 (N.Y. Sup. Ct. Sept. 26, 2011); Ex. 9, 6/17/15 UBS and Crusader Fund Settlement Agreement, at 1.)

between the parties contain no promise on the part of Highland to undertake liability with respect to the investment losses suffered by plaintiffs, or to ensure or guarantee the performance of [Fund Counterparties]' obligations to bear the risk of investment losses.").

E. New York Appellate Division Dismisses Claims Against Highland as Barred by Res Judicata.

On February 16, 2010, UBS sought amend its original complaint to assert new claims against Highland and others[7] for claims arising from the Restructured Warehouse transaction, the Fall 2008 Transfers and the March 2009 Transfers, alleging that the March 2009 Transfers were fraudulent conveyances that benefitted Highland, and that, by causing the unwinding, Highland breached the implied covenant of good faith and fair dealing in the Restructured Warehouse Agreement. (Ex. 12, 2/16/10 UBS Ltr. to Court, *UBS Sec. LLC v Highland Capital Mgmt., L.P.*, No. 650097/2009 (N.Y. Sup. Ct.).) The New York Supreme Court denied the portion of UBS's motion that sought leave to add new claims against Highland, agreeing with Highland's position that a party cannot amend a pleading that has already been dismissed. (Ex. 11, Ruling at 5, *UBS Sec. LLC v Highland Capital Mgmt., L.P.*, No. 650097/2009 (N.Y. Sup. Ct. Jun. 17, 2010).)

Thereafter, UBS commenced a new action against Highland, in which it asserted the causes of action it had unsuccessfully sought to add to the original complaint. (Ex. 13, Compl., *UBS Sec. LLC v Highland Capital Mgmt., L.P.*, No. 650752/2010 (N.Y. Sup. Ct. Jun. 28, 2010).).[8]

[7] UBS sought to add Highland Financial Partners, LP, Highland Credit Strategies Fund, Highland Crusader Offshore Partners, LP, Highland Credit Opportunities CDO, LP, and Strand Advisors, Inc. (*See* Ex. 11, Ruling at 2, *UBS Sec. LLC v Highland Capital Mgmt.*, L.P., No. 650097/09 (N.Y. Sup. Ct. Jun. 17, 2010).)

[8] The trial court consolidated the second action against Highland with the original action that had pending claims against CDO, SOHC, HFP, Credit Strategies Fund, Crusader Offshore Fund, Highland Credit Opportunities CDO, L.P., and Strand Advisors, Inc. (Ex. 14, Consolidation Order, *UBS Sec. LLC v Highland Capital Mgmt., L.P.*, No. 650097/2009 (N.Y. Sup. Ct. Nov. 4, 2010.) UBS also later filed a separate lawsuit against Crusader's wholly owned subsidiary, Crusader Holding. (Ex. 8, Compl., *UBS Sec. LLC v Highland Crusader Holding Co.*, No. 652646/2011 (N.Y. Sup. Ct. Sept. 26, 2011).)

Highland moved to dismiss the new action, and the trial court granted the motion in part and denied it in part. *UBS Sec. LLC v Highland Capital Mgmt. L.P., et al*, No. 650097/09, 2010 WL 6268233 (N.Y. Sup. Ct. Aug. 05, 2010). The parties appealed. *UBS Sec. LLC v. Highland Capital Mgmt., L.P., et al*, 86 A.D.3d 469 (N.Y. App. Div. 2011). The appellate court dismissed the fraudulent inducement claim against Highland, and held that to the extent UBS's new claims for breach of the covenant of good faith and fair dealing and fraudulent conveyance arise from conduct alleged to have occurred before the commencement of the original action, *i.e.*, February 24, 2009, the claims must be dismissed. *Id.* The appellate court reasoned:

> Here, to the extent the claims against Highland in the new complaint implicate events alleged to have taken place before the filing of the original complaint, res judicata applies. That is because UBS's claims against Highland in the original action and in this action all arise out of the restructured warehousing transaction.

Id. Because this ruling precluded UBS from pursuing claims against Highland arising from conduct occurring before February 24, 2009, the appellate court barred UBS from asserting any claims based on (1) the Fund Counterparties' failure to meet the margin calls in late 2008—the claim on which the trial court ultimately found the Fund Counterparties liable in the amount of $1,039,957,799, and (2) the Fall 2008 Transfers. As a result of this ruling, the only surviving claims against the Debtor arise from the March 2009 Transfers.

F. In 2013, Highland Moves for Summary Judgment

In October 2013, Highland, HFP, and other defendants moved for summary judgment on UBS's remaining claims. The trial court recognized that "the Appellate Division decisions preclude any fraudulent conveyance claims arising before February 24, 2009. They therefore preclude UBS from recovering for any alleged fraudulent transfers made before that date." (Ex. 15, Ruling at 25, *UBS Sec. LLC v Highland Capital Mgmt., L.P., et al*, No. 650097/2009 (N.Y.

Sup. Ct. Mar. 24, 2017).) The court stated that UBS could still introduce evidence of pre-February 24, 2009 conduct to support claims that only arose after February 24, 2009:

> However, proof of pre-February 24, 2009 transfer, and of other conduct involving the operation of the Highland entities, is not prohibited to the extent necessary to prove UBS's claims for post-February 24, 2009 fraudulent conveyances, which are maintainable under the Appellate Division decisions under an alter ego theory.[9]

Id. The court also dismissed UBS's claim against Highland for breach of good faith and fair dealing because the contract at issue, the Restructured CLO Warehouse Agreement, was terminated before February 24, 2009. *Id.* at 34-35.

The parties appealed. Initially, the Appellate Division reinstated the claim for breach of good faith and fair dealing and dismissed the entirety of the fraudulent conveyance claim against Highland, including for the March 2009 Transfers, but the court later vacated that opinion. (Ex. 17, Order at 3-4, *UBS Sec. LLC v. Highland Capital Mgmt., L.P., et al*, No. 650097/2009 (N.Y. App. Div. 2017)); *UBS Sec. LLC v. Highland Capital Mgmt., L.P., et al*, 159 A.D.3d 512, 514 (N.Y. App. Div. 2018). In its subsequent decision, the Appellate Division held that the fraudulent conveyance and breach of good faith and fair dealing claims could survive, but only to the extent they arose from conduct occurring after February 24, 2009:

> There is no dispute that plaintiffs are precluded from pursuing fraudulent conveyance and breach of implied covenant claims that arose prior to February 24, 2009. However, neither our prior decisions nor the doctrine of res judicata bars plaintiffs from introducing evidence of pre-February 24, 2009 conduct to the extent necessary to prove, with respect to post-February 24, 2009 conduct, their alter ego, fraudulent conveyance and breach of implied covenant claims. The court correctly rejected defendants' arguments in support of dismissal of the remaining claims at issue.

[9] The alter ego claim referenced in the court's decision was a claim against HFP, not against Highland. (*See* Ex.16, 2d Am. Compl., *UBS Sec. LLC v Highland Capital Mgmt., L.P., et al*, No. 650097/09 at ¶194 (N.Y. Sup. Ct. May 11 2011); Hr'g Trans. at 30-31, *In re Highland Capital Mgmt L.P., et al*, 19-34054-sgj11 (N.D. Tex. Jun. 15, 2020) (Doc. No. 746A.) UBS did not allege an alter ego claim against Highland.

UBS Sec. LLC v. Highland Capital Mgmt., L.P., et al, 159 A.D.3d 512, 514 (N.Y. App. Div. 2018).

G. The New York Court Holds the Phase I Trial, and Finds the Fund Counterparties Liable.

Although the New York courts barred UBS from pursuing claims against Highland arising before February 24, 2009, UBS's originally-pleaded breach of contract claims against the Fund Counterparties for failing to meet the margin calls in the fall of 2008 survived. (Ex. 10, Compl. ¶¶38-49, *UBS Sec. LLC v Highland Capital Mgmt., L.P., et al*, No. 650097/2009 (N.Y. Sup. Ct. Feb. 24, 2009).) The court bifurcated the case for trial, ruling that Phase I of the trial would be a bench trial on the breach of contract claims against the Fund Counterparties, and the remaining claims, including all of the claims involving post-February 24, 2009 conduct, would be tried in Phase II. (Ex. 18, 5/1/2018 Hearing Tr. at 35:15-22, *UBS Securities LLC, et al v. Highland Capital Mgmt. L.P., et al*, No. 650097-2009 (N.Y. Sup. Ct. May 1, 2018).)

The New York Court held the Phase I bench trial in July 2018, and on November 14, 2019 the court issued a decision finding the Fund Counterparties liable for breaching the Restructured CLO Warehouse Agreements and awarding damages of $519,374,149, which ultimately resulted in entry of a judgment for $1,039,957,799, with prejudgment interest. (Ex. 5, Decision and Order at 39 *UBS Sec. LLC, et al v. Highland Capital Mgmt. L.P., et al*, No. 650097/2009 (N.Y. Sup. Ct. Nov. 14, 2019.); Ex. 19, Judgment at 2, *UBS Sec. LLC v Highland Capital Mgmt., L.P., et al*, No. 650097/2010 (N.Y. Sup. Ct. Feb. 10, 2020).) The court made no findings with respect to Highland or the remaining defendants,[10] and those claims were scheduled to be heard during Phase II of the

[10] According to UBS, the remaining defendants and claims other than Highland are: (1) Highland CDO Master Fund, L.P., with claims for fraudulent inducement and fraudulent conveyance; (2) Highland Special Opportunities Holding Company, with claims for fraudulent inducement and fraudulent conveyance; (3) Highland Financial Partners, L.P., with claims for alter ego and fraudulent conveyance; (4) Strand Advisors, Inc., for general partner liability; and (5) Highland Credit Opportunities CDO, L.P., with a claim for fraudulent conveyance. (Ex. 20, Pl's Mot. to Bifurcate at 2-3, 15-16, *UBS Sec. LLC, et al v. Highland Capital Mgmt. L.P., et al*, No. 650097-2009 (N.Y. Sup. Ct. Apr. 18, 2018).)

proceedings. On October 16, 2019, the Debtor filed for chapter 11 protection, staying the proceedings against it.

Only two counts remain against the Debtor: (1) fraudulent conveyance, actual and constructive, premised on the March 2009 Transfers, in which HFP transferred assets to Highland and to the Highland-managed fund co-defendants; and (2) breach of the implied covenant of good faith and fair dealing attendant to the contracts underlying the Restructured CLO Warehouse Agreements, based on the March 2009 Transfers.

H. In 2015, UBS Released Claims Against Highland Arising From the March 2009 Transfers to the Credit Strategies Fund and the Crusader Fund.

In 2015, Highland Crusader Offshore Partners, L.P., Highland Crusader Holding Corporation, and Highland Credit Strategies Master Fund, L.P. entered into settlements with UBS. Highland was a signatory to both the Crusader and Credit Strategies settlement agreements. Each agreement settled all of UBS's claims against the applicable fund. The settlement agreements also released *Highland* from claims by UBS arising from the March 2009 Transfers to the Crusader and Credit Strategies funds. Highland is one of the [redacted]

[redacted]

[redacted]

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11 [redacted]

[redacted]

The Redeemer Committee negotiated this settlement agreement with UBS on the Crusader Fund's behalf. The Redeemer Committee negotiated for UBS's release of Highland to foreclose the risk that, in the event Highland was held liable to UBS for a transfer to the Crusader Fund, [redacted]

According to UBS's expert in the New York action, the assets that were the subject of the alleged fraudulent transfers to the two settling funds represented approximately [redacted] of the value of all of the assets that were transferred on March 20, 2009. [redacted] According to that expert, the market value of remaining assets that were not the subject of these releases was [redacted]

IV. ARGUMENT

In order to establish its claim for over $1 billion against the Debtor, UBS must ignore the decisions issued by the New York Courts and the settlement agreements pursuant to which it released the Debtor from liability arising from most of the March 2009 Transfers. The chapter 11 process, however, does not grant a creditor a "do over" so that it can relitigate claims that are the subject of final, non-appealable decisions issued by state courts, or valid and binding settlement agreements. For the reasons discussed below, the UBS Claim should be disallowed as a matter of law except to the extent UBS is seeking damages with respect to the remaining assets that it alleges

were the subject of fraudulent transfers to entities other than Crusader or Credit Strategies in March 2009, which according to its expert were valued at [redacted]

A. Standard

The Bankruptcy Code establishes a burden-shifting framework for proving the amount and validity of a claim. "A claim . . . , proof of which is filed under section 501 [of the Bankruptcy Code], is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. §502(a). "A proof of claim executed and filed in accordance with the [Bankruptcy Rules] shall constitute prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P.3001(f); *see also In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006). However, the ultimate burden of proof for a claim always lies with the claimant. *Armstrong*, 347 B.R. at 583 (*citing Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15 (2000)).

B. Several New York Court Rulings Bar UBS from Seeking Damages From the Debtor Arising From Conduct Occurring Before February 24, 2009.

This Court should disallow the UBS Claim to the extent it seeks to hold the Debtor liable for any conduct predating February 24, 2009 because the New York Courts have repeatedly held that res judicata bars any such claims. *UBS Sec. LLC v. Highland Capital Mgmt., L.P., et al*, 86 A.D.3d 469, 474 (N.Y. App. Div. 2011); *UBS v. Highland Capital Mgmt., L.P., et al*, 93 A.D.3d 489, 490 (N.Y. App. Div. 2012); *UBS Sec. LLC v Highland Capital Mgmt., L.P., et al*, No. 650097/09 at 34 (N.Y. Sup. Ct. Mar., 24 2017); *UBS Sec. LLC v. Highland Capital Mgmt., L.P., et al*, 159 A.D.3d 512, 514 (N.Y. App. Div. 2018). In its proof of claim, UBS seeks $1,039,957,799—the exact amount of the judgment against the Fund Counterparties for their failure to honor the margin calls in the fall of 2008—a claim entirely precluded by res judicata. (Ex. 4, UBS Securities LLC Proof of Claim ¶24, *In re Highland Capital Mgmt., L.P.*, 19-34054-sgj11 (N.D. Tex. Jun. 26, 2020) (Claim No. 190); Ex. 19, Judgment at 2, *UBS Sec. LLC v Highland*

Capital Mgmt., L.P., et al, No. 650752/10 (N.Y. Sup. Ct. Feb. 10, 2020).). UBS claims that it is entitled to recover the judgment against the Fund Counterparties from the Debtor because Highland was "party to the same contract and exercised complete control over the two liable affiliates—under which Claimant is entitled to damages that are at least as much as the Phase I judgment amount." (Ex. 4, UBS Securities LLC Proof of Claim ¶24, *In re Highland Capital Mgmt., L.P.*, 19-34054-sgj11 (N.D. Tex. Jun. 26, 2020) (Claim No. 190).) This argument flies in the face of the multiple rulings of the New York Courts to the contrary.

Those final, non-appealable New York Court rulings are binding here. *See Matter of Brady, Texas, Mun. Gas Corp.*, 936 F.2d 212, 218 (5th Cir. 1991) ("unless the Code provides otherwise, state courts have concurrent jurisdiction, and bankruptcy courts are prohibited from relitigating these matters if the state courts have already resolved them."); *In re Ocasio*, 10 F. App'x 531, 531-32 (9th Cir.2001); *In re Bellucci*, 119 B.R. 763, 769 (Bankr. E.D. Cal. 1990).

The Debtor and the Redeemer Committee each pointed out in their objections to UBS's motion to lift the automatic stay that res judicata bars UBS from pursuing these claims. *See* Debtor's Obj. to UBS's Mot. to Lift Automatic Stay ¶25-26, *In re Highland Capital Mgmt., L.P.*, 19-34054-sgj11 (N.D. Tex. Jun. 3, 2020) (Doc. No. 687); Redeemer Comm. Obj. to UBS's Mot. to Lift Automatic Stay at 13-14, *In re Highland Capital Mgmt., L.P.*, 19-34054-sgj11 (N.D. Tex. Jun. 8, 2020) (Doc. No. 714).) In its reply, UBS claimed that the New York courts had, in fact, held the opposite—that UBS was expressly permitted to assert claims arising from pre-February 24, 2009 conduct. (UBS Reply ISO its Mot. to Lift Automatic Stay ¶6, *In re Highland Capital Mgmt., L.P.*, 19-34054-sgj11 (N.D. Tex. Jun. 11, 2020) (Doc. No. 733B) ("This is virtually identical to the [res judicata] "defense" at hand, and both the State Court and the Appellate Division rejected the Debtor's ultimate conclusion—that UBS's ability to prove its claims against

the Debtor are, in fact, "limited" to reliance on post-February 2009 conduct only.") UBS quotes selective portions of those decisions to support its conclusion:

> The State Court rejected this point when it ruled on the Debtor's motion. *See* Docket No. 688-4 at 25 (Mar. 13, 2017 State Court Summ. J. Op.) ("This court previously rejected the contention, advanced by moving defendants here, that UBS cannot rely on events or conduct occurring before February 2009 to support its alter ego and fraudulent conveyance claims."). And the Appellate Division squarely rejected it once more on appeal. Ex. 2 at 46 (Mar. 15, 2018 Order) ("The court correctly rejected defendants' arguments" because "neither our prior decisions nor the doctrine of res judicata bars plaintiffs from introducing evidence of pre-February 24, 2009 conduct to the extent necessary to prove, with respect to post-February 24, 2009 conduct, their alter ego, fraudulent conveyance and breach of implied covenant claims.").

Id.

UBS's citations are misleading, at best. The full text of the lower court's ruling makes clear that UBS is barred from pursuing claims against the Debtor arising before February 24, 2009:

> This court previously rejected the contention, advanced by moving defendants here, that UBS cannot rely on events or conduct occurring before February 2009 to support its alter ego and fraudulent conveyance claims. ***As held in the prior decision, the Appellate Division decisions preclude any fraudulent conveyance claims arising before February 24, 2009. They therefore preclude UBS from recovering for any alleged fraudulent conveyances made before that date.*** However, proof of pre-February 24, 2009 transfers, and of other conduct involving the operations of the Highland entities, is not prohibited ***to the extent necessary to prove UBS's claims for post-February 24, 2009 fraudulent conveyances, which are maintainable under the Appellate Division decisions on an alter ego theory.***

(Ex. 15, Ruling at 25, *UBS Sec. LLC v Highland Capital Mgmt., L.P., et al*, No. 650097/2009 (N.Y. Sup. Ct. Mar. 24, 2017) (emphasis added).) Similarly, UBS again selectively omits the portion of the appellate ruling that precludes UBS from pursuing damages arising before February 24, 2009:

> ***There is no dispute that plaintiffs are precluded from pursuing fraudulent conveyance and breach of implied covenant claims that arose prior to February 24, 2009.*** However, neither our prior decisions nor the doctrine of res judicata bars plaintiffs from introducing evidence of pre-February 24, 2009 conduct to the extent necessary to prove, with respect to post-February 24, 2009 conduct, their alter ego, fraudulent conveyance and breach of implied covenant claims. The court correctly rejected defendants' arguments in support of dismissal of the remaining claims at issue.

UBS Sec. LLC v. Highland Capital Mgmt., L.P., et al, 86 A.D.3d 469, 474 (N.Y. App. Div. 2011) (emphasis added).

The New York Courts ruled that UBS may not pursue claims against Highland arising from conduct occurring before February 24, 2009. The language that UBS cites states only that, in pursuit of its post-February 24, 2009 claims regarding the March 2009 Transfers, UBS may introduce *evidence* of conduct predating its original complaint.

The "Phase I" judgment that UBS seeks to recover from Highland was, unequivocally, based entirely on conduct predating February 24, 2009. (Ex. 5, Decision and Order at 4-5, *UBS Sec. LLC, et al v. Highland Capital Mgmt., L.P., et al*, No. 650097-2009 (N.Y. Sup. Ct. 2019).) UBS concedes that it seeks to hold Highland liable based on that 2008 conduct, because it was "party to the same contract and exercised complete control over the two liable affiliates" *in 2008*. (*See* Ex. 4, UBS Securities LLC Proof of Claim at ¶24, *In re Highland Capital Mgmt., L.P.*, 19-34054-sgj11 (N.D. Tex. Jun. 26, 2020) (Claim No. 190).) This Court should disallow UBS's claim to the extent it seeks to impose any liability on the Debtor arising from pre-February 24, 2009 conduct, including liability for the Phase I judgment.

The only remaining claims UBS has against the Debtor are for fraudulent conveyance and the breach of good faith and fair dealing with respect to the March 2009 Transfers. However, as demonstrated below, UBS entered into two settlement agreements in the New York action that

substantially reduce UBS's claim to damages [redacted] before any prejudgment interest.

C. The Settlement Agreements Between UBS and the Crusader and Credit Strategies Funds Released UBS's Claims for Most of the Damages from the March 2009 Transfers.

This Court should disallow UBS's claim to the extent it seeks damages arising from the March 2009 Transfers to the Crusader Fund and the Credit Strategies Fund, because UBS released those claims in 2015 settlement agreements. Bankruptcy courts have the authority to enforce settlement agreements in the claims adjudication process. *In re City Equities Anaheim, Ltd.*, 22 F.3d 954, 958 (9th Cir. 1994) ("A bankruptcy court, as a court of equity, likewise possesses the power to summarily enforce settlements."); *In re Mortg. Analysis Portfolio Strategies, Inc.*, 221 B.R. 386, 388 (Bankr. W.D. Tex. 1998) (holding that "this Court has the inherent power to enforce settlement agreements between parties."); *In re De La Fuente*, 409 B.R. 842, 845 (Bankr. S.D. Tex. 2009).

As described above, on March 20, 2009, HFP transferred assets [redacted] according to UBS's expert in the New York action:

[redacted]

On June 11, 2015, UBS agreed to release Highland from [redacted] That provision released all claims UBS had against Highland, whether in the form of a fraudulent conveyance claim or a breach of good faith and fair dealing claim, with respect to the March 2009 Transfers to the Credit Strategies Fund.

A few days later, on June 17, 2015, UBS agreed to release Highland from [redacted] These provisions release all claims UBS had against Highland—regardless whether the claim was for breach of the implied covenant of good faith and fair dealing or for fraudulent conveyance—with respect to the March 20, 2009 Transfers to those entities.

As a result, UBS retained only claims against Highland for losses or other relief arising [redacted] Credit Opportunities Fund, Credit Opportunities Holding Corporation and Highland itself:

[redacted]

[redacted]

Based on the values provided by UBS's expert, UBS released Highland from claims arising from the transfer of assets valued at approximately [redacted] of the value of the entire transaction. [redacted] In exchange for releasing its claims for relief against Crusader, Credit Strategies and Highland arising from those transfers, UBS received [redacted] and avoided (to date) five more years of litigation against those funds. [redacted]

The Crusader Fund paid for and deserves to receive the full benefit of its bargain for its settlement agreement with UBS. [redacted] Crusader did. And the Redeemer Committee insisted that UBS release Highland because without that release, [redacted]

In its reply in support of its motion to lift the automatic stay, [redacted] UBS Reply ISO its Mot. to Lift Automatic Stay at 9, *In re Highland Capital Mgmt., L.P.*, 19-34054-sgj11 (N.D. Tex. Jun. 11, 2020) (Doc. No. 733B) (emphasis in original).) This is, again, selective quotation. The full provision reads:

[redacted] UBS further claims that [redacted] UBS Reply ISO its Mot. to Lift Automatic Stay at 9, *In re Highland Capital Mgmt., L.P.*, 19-34054-sgj11 (N.D. Tex. Jun. 11, 2020) (Doc. No. 733B).

But the settlement releases are not ambiguous, and their clear language controls—UBS released Highland for [redacted] *Shriners Hosp. for Children v. McCarthy Bros. Co.*, 80 F. Supp. 2d 707, 710 (S.D. Tex. 2000) ("Because the settlement provision at issue in this case contains no ambiguity, it therefore must be construed in accordance with its plain meaning.") [redacted] are both broad terms. "'[L]osses' is legally synonymous with 'damages,'" and in its good faith and fair dealing claim, UBS is seeking damages arising from the transfers to the Crusader Fund. *Nogueiro v. Kaiser Found. Hosps.*, 250 Cal. Rptr. 478, 481 (Ct. App. 1988); *see* DAMAGES, Black's Law Dictionary

(11th ed. 2019) ("Money claimed by, or ordered to be paid to, a person as compensation for loss or injury.") Further, even if UBS's claim for damages arising from the March 2009 Transfers was somehow not [redacted] UBS's Claim for damages is a request for [redacted] *Confederated Tribe of Colville Reservation v. White*, 1996 WL 33407856, at *3 (E.D. Wash. Nov. 7, 1996) ("filing a proof of claim is an affirmative act seeking relief via a court's adjudication of a dispute."); *In re Barrett Ref. Corp.*, 221 B.R. 795, 811 (Bankr. W.D. Okla. 1998) ("The filing of a proof of claim is not merely a defense, but is an affirmative claim for relief."); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 269 (1993).

UBS released all claims for any type of relief against Highland arising from the March 2009 Transfers to the two funds, including UBS's claim for breach of good faith and fair dealing arising from that transfer. The Redeemer Committee and the Crusader Fund should be given the full benefit of their bargain from the settlement agreement, and UBS should not be permitted to recover relief from the Debtor that UBS already released. The Crusader Fund and the Redeemer Committee respectfully request that this Court disallow UBS's claim to the extent it seeks to hold the Debtor liable under any legal theory for damages arising from the March 20, 2009 Transfers to the Crusader Fund or Credit Strategies Fund, including UBS's claims for fraudulent conveyance and breach of good faith and fair dealing.

CONCLUSION

For all these reasons, this Court should disallow UBS's claim against the Debtor to the extent that it (1) seeks to hold the Debtor liable for claims arising from conduct occurring before February 24, 2009; and (2) seeks to hold the Debtor liable for claims arising from the March 2009 Transfers with respect to the asset transfers to the Credit Strategies Fund and Crusader Fund.

Dated this 7th day of August, 2020

Respectfully submitted,

/s/ Mark A. Platt

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Counsel for the Redeemer Committee of the Highland Crusader Fund and the Crusader Funds[12]

[12] Frost Brown Todd LLC is counsel only for the Redeemer Committee and Jenner & Block, LLP is counsel to the Redeemer Committee, and for the limited purpose of this Objection, the Crusader Funds.

CERTIFICATE OF SERVICE

The undersigned hereby certifies, that on this 7th day of August, 2020, he caused to be served a true and correct copy of the *Redeemer Committee of the Highland Crusader Funds and the Crusader Funds' Objection to the Proof Of Claim of UBS AG, London Branch and UBS Securities, LLC and Joinder in the Debtor's Objection*, by electronically filing it with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system.

/s/ Mark A. Platt
Mark A. Platt

Appendix Exhibit 47

08/08/2022	182 Hearing held on 8/8/2022. (RE: related document(s)169 Motion to withdraw document, (related document(s) 84 Answer to complaint) filed by Defendant Highland Capital Management, L.P.,) (Appearances: A. Clubok for UBS; J. Morris, J. Pomeranz, and G. Demo for Highland. Evidentiary hearing. Motion granted and judgment to be entered as requested. Counsel to upload order.) (Edmond, Michael) (Entered: 08/10/2022)

Appendix Exhibit 48

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.	)	

PLAN OF REORGANIZATION OF HIGHLAND CAPITAL MANAGEMENT, L.P.

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Counsel for the 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.

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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.

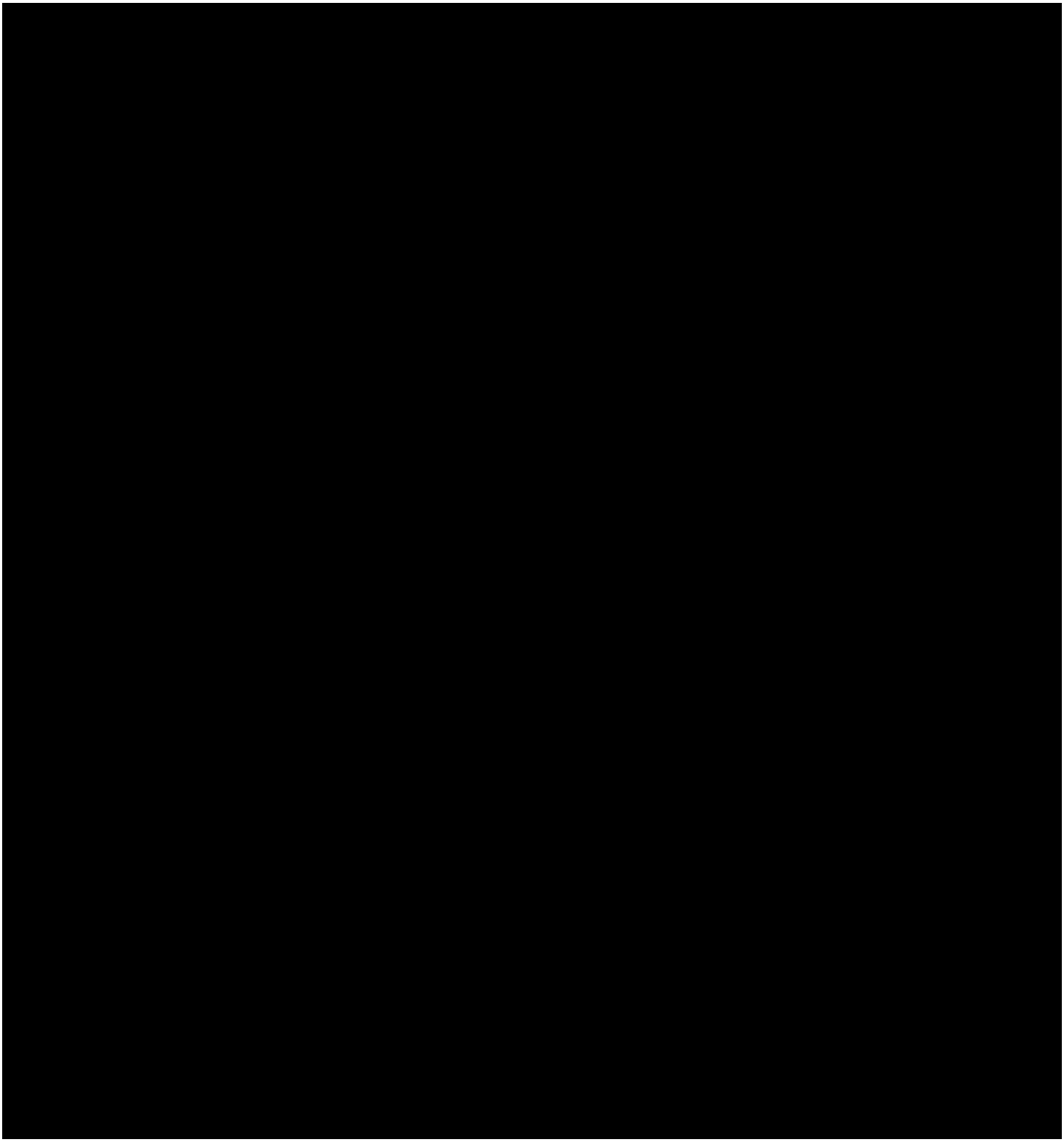
If this Plan cannot be confirmed, for any reason, then subject to the terms set forth herein, this Plan may be revoked.

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.



[redacted]

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.

[redacted]

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, or (b) 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.

[redacted]

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 [redacted] 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 [redacted] 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

[redacted]

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

[redacted]

[redacted]

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

[redacted]

ARTICLE IV.
MEANS FOR IMPLEMENTATION OF THIS PLAN

A. Summary

[redacted]

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 a Final Order of the Bankruptcy Court entered prior to the Effective 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 Supplement, on the Effective 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 Effective Date, the Debtor or the Reorganized Debtor, as applicable, may 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).

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

[redacted]

Rejection Claims shall be classified as Convenience Claims or General Unsecured Claims, as applicable, 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 Effective Date without the need for any objection thereto or any further notice to or action, order, or approval of the Bankruptcy Court.

D. Assumption of Insurance Policies

Upon the Effective Date, the Reorganized Debtor will assume all of the Insurance Policies pursuant to section 365(a) of the Bankruptcy Code and all such Insurance Policies shall vest in the Reorganized Debtor. Unless previously effectuated by separate order entered by the Bankruptcy Court, entry of the Confirmation Order will constitute the Bankruptcy Court's approval of the Debtor's foregoing assumption of each of the Insurance Policies and all such Insurance Policies shall continue in full force and effect thereafter in accordance with their respective terms. Notwithstanding anything to the contrary contained in this Plan, confirmation of this Plan will not impair or otherwise modify any rights of the Debtor or the Reorganized Debtor under the Insurance Policies. To the extent that any Insurance Policy is not assumable, it will be Reinstated.

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.

[redacted]

[redacted]

B. Distribution Agent

[redacted]

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

[redacted]

E. 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.

F. *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.I hereof within 120 days after the later of the (i) Effective Date and (ii) the date such Claim becomes an Allowed Claim. [redacted]

G. 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).

H. General Distribution Procedures

[redacted]

I. 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.

J. Undeliverable Distributions and Unclaimed Property

[redacted]

[redacted]

K. 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.

L. Setoffs

[redacted]

M. 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.

N. 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.N 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

[redacted]

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, even if a portion of the Claim is not disputed, unless and until such Disputed Claim or Disputed Equity Interest becomes an Allowed Claim and the amount of such Allowed Claim is determined by order of the Bankruptcy Court or by stipulation between

[redacted]

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.

[redacted]

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

[redacted]

EXCEPT AS OTHERWISE PROVIDED HEREIN OR AS AGREED TO [redacted]

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 [redacted] 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 been entered, not subject to stay pending appeal, and shall be in form and substance reasonably acceptable to the Debtor and the Committee. [redacted]

[redacted]

- All documents and agreements necessary to implement this Plan, including without limitation, [redacted] 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, [redacted]ts, 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.

B. Waiver of Conditions

[redacted]

C. Effect of Non-Occurrence of Conditions to Effectiveness

Unless waived as set forth in ARTICLE VIII.B, if the Effective Date of this Plan does not occur within twenty calendar days of entry of the Confirmation Order, the Debtor may withdraw this Plan and, if withdrawn, the Plan shall be of no further force or effect.

D. Dissolution of the Committee

[redacted]

[redacted]

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

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, [redacted] 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 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. 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, [redacted] rom 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, or (iv) 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.

E. Preservation of Rights of Action

1. Maintenance of Causes of Action

[redacted]

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 [redacted] (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). [redacted]

F. Injunction

Upon entry of the Confirmation Order, all holders of Claims and Equity Interests and other parties in interest, along with their respective Related Persons, shall be enjoined 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 Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor (whether proof of such Claims or Equity Interests has been filed or not 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) and other parties in interest, along with their respective Related Persons, are permanently enjoined, on and after the Effective Date, with respect to such Claims and Equity Interests, 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 [redacted], (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 [redacted], (iii) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against [redacted], (iv) asserting any right of setoff, directly or indirectly, against any obligation due from [redacted]

[redacted] 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 any successors of [redacted] and their respective property and interests in property.

[redacted]

G. Term of Injunctions or Stays

Unless otherwise provided in this Plan, the Confirmation Order, or in a Final Order of the Bankruptcy Court, all injunctions or stays arising under or entered during the Chapter 11 Case under section 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect until the later of the Effective Date and the date indicated in the order providing for such injunction or stay.

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 nay 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 [redacted] and this Plan as 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;

[redacted]

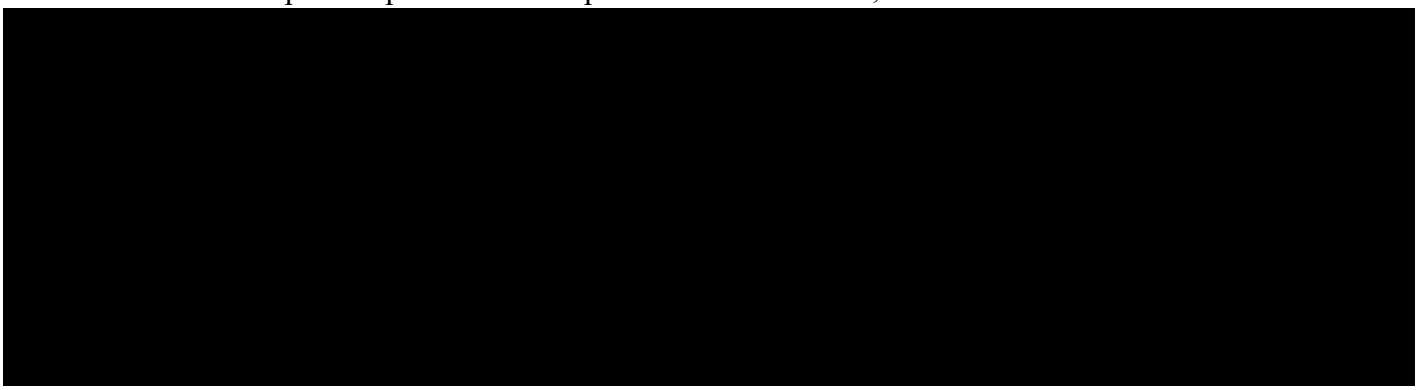
- make any determination with respect to a claim or cause of action against a Plan Party as set forth in ARTICLE IX;

- resolve any claim or cause of action against an Exculpated Party or Plan 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

[redacted]

- 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;



- 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

[redacted]

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. 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.

E. Closing of Chapter 11 Case

[redacted]

F. Successors and Assigns

[redacted]

G. Reservation of Rights

[redacted]

H. Further Assurances

[redacted]

I. 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.

J. Service of Documents

[redacted]

K. 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.

L. 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; [redacted]

M. 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.

N. 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.

O. 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: August 12, 2020

Respectfully submitted,

HIGHLAND CAPITAL MANAGEMENT, L.P.
(by its general partner, Strand Advisors, Inc.)

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Director

By:_____
James P. Seery, Jr.
Director

By:_____
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Appendix Exhibit 49

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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.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
v.	§	_____
	§	
HUNTER MOUNTAIN INVESTMENT TRUST,	§	
	§	
Defendant.	§	
	§	

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

DEBTOR'S (I) OBJECTION TO CLAIM NO. 152 OF HUNTER MOUNTAIN INVESTMENT TRUST AND (II) COMPLAINT TO SUBORDINATE CLAIM OF HUNTER MOUNTAIN INVESTMENT TRUST AND FOR DECLARATORY RELIEF

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the "Debtor" or the "Partnership"), as and for its objection to claim (the "Objection") and complaint (the "Complaint") against defendant Hunter Mountain Investment Trust ('HMT" or the "Defendant"), alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

Nature of the Action

1. HMT is the Debtor's parent, having acquired 99.5% of the Debtor's partnership interests in December 2015. Pursuant to a *Contribution Agreement* with the Debtor, dated as of December 21, 2015, HMT agreed to contribute capital of $70,000,000 in exchange for 55% of those partnership interests. Of that amount, $63,000,000 was represented by a promissory note in favor of the Debtor (the "Contribution Note"), guaranteed by HMT's indirect parent, Rand PE Fund I, LP, Series 1, a Delaware series limited partnership ("Rand"). Approximately $60,000,000 remains due on the Contribution Note. On April 8, 2020, HMT filed a proof of claim [Claim No. 152] (the "HMT Claim") in which it asserts that because it is not receiving "Priority Distributions" under the Partnership Agreement, it has a $60,298,739 indemnification claim against the Debtor under the Contribution Agreement, which it may set off against its obligation on the Contribution Note. In other words, the Debtor must indemnify HMT for not distributing enough to HMT to cover its obligation to the Debtor.

2. The HMT Claim is specious. HMT is the Debtor's owner, not a creditor, and the indemnity clause is inapplicable on its face. Under the Contribution Agreement, the Debtor indemnifies HMT against "Losses" arising from "any breach or non-fulfillment of any covenant,

agreement or obligation to be performed by the Partnership" under the Contribution Agreement or any related agreement to which the Debtor is a party. It does not apply to any failure to make distributions under the Partnership Agreement for one simple dispositive reason, among others: The Partnership Agreement contains no obligation to make Priority Distributions if there are no funds to distribute. The Partnership Agreement is an agreement between the partners governing their relationship and, unsurprisingly, HMT's general partner did not commit to making distributions for which there are no funds. The Partnership Agreement specifies HMT's remedy: Raise more funds by having the Partnership sell certain assets. Furthermore, there are no "Losses" within the meaning of the indemnity clause, and there is a strict limitation on damages that HMT simply ignores.

3. Finally, if despite these insurmountable hurdles HMT actually had an indemnity claim under the Contribution Agreement, that claim would be subordinated under section 510(b) of title 11 of the United States Code (the "Bankruptcy Code") to be on par with equity interests, and thus cannot be used to set off limited partners' contribution obligations under Bankruptcy Code § 553.[2] In summary, the HMT Claim misconstrues the Contribution Agreement, the Partnership Agreement, and basic principles of partnership and bankruptcy law in a futile and frivolous attempt to obtain rights for the Debtor's owners that are superior to the rights of its creditors.

4. Accordingly, this adversary proceeding is brought pursuant to Rules 7001(1), (8) and (9) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and sections 502, 510(b) 541 and 553 of the Bankruptcy Code to (i) disallow the HMT Claim under section 502(a) as unenforceable under applicable law, (ii) subordinate any HMT Claim under section

[2] *Dayton Sec. Assocs. v. Sec. Grp. 1980 (In re Sec. Grp. 1980)*, 74 F.3d 1103, 1114 (11th Cir. 1996).

510(b), and (iii) for declaratory relief that any HMT Claim may not be used for purposes of setoff.

Jurisdiction and Venue

5. 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.

6. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

7. 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.

8. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

The Parties

9. The Debtor is a limited partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

10. Defendant Hunter Mountain Investment Trust is a statutory trust organized under the laws of Delaware, with a business address in Saratoga Springs, New York.

Case Background

11. On October 16, 2019 (the "Petition Date"), 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 "Bankruptcy Case").

12. 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 Capital Management, L.P., and Acis Capital Management, GP, LLP.

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

14. On January 9, 2020, this Court entered an Order [Docket No. 339] on 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], pursuant to which an independent board of directors was appointed at the Debtor's general partner, Strand Advisors, Inc. ("Strand").

15. 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.

Factual Allegations

16. The operative limited partnership agreement between HMT and its partners is the *Fourth Amended and Restated Agreement of Limited Partnership of Highland Capital Management, L.P.*, dated December 24, 2015 (the "Partnership Agreement"). HMT owns 99.5% of the limited partnership interests in the Debtor—55% of which are designated as Class B nonvoting partnership interests, and 44.5% of which are designated as Class C nonvoting partnership interests. The remaining 0.50% of the limited partnership interests in the Debtor are the Class A voting partnership interests. Strand, the general partner, holds approximately half of

[3] All docket numbers refer to the main docket for the Bankruptcy Case maintained by this Court.

the Class A voting partnership interests, which represent approximately 0.25% of the total limited partnership interests. The remaining Class A limited partnership interests are held by The Dugaboy Investment Trust (0.1866%),[4] Mark Okada (0.0487%), Mark and Pamela Okada Family Trust – Exempt Trust #1 (0.0098%), and Mark and Pamela Okada Family Trust – Exempt Trust #2 (0.0042%).

17. HMT acquired 55% of the partnership interests, designated as Class B nonvoting partnership interests, pursuant to the Contribution Agreement with the Debtor dated December 21, 2015. The Contribution Agreement recites that HMT was "to contribute capital to the Partnership in exchange for a 55% limited partnership interest in the Partnership." The "Contribution Amount," as defined therein, was $70,000,000, comprised of $7,000,000 cash and the Contribution Note in the principal amount of $63,000,000. The Contribution Note bears interest at 2.61%. Annual payments commence on December 21, 2019 and terminate on December 21, 2030. As of July 31, 2020, $58,887,399.63 was owed on the Contribution Note.[5]

18. Pursuant to the Partnership Interest Purchase Agreement dated as of December 24, 2015, HMT acquired 44.5% of the partnership interests, designated as Class C nonvoting partnership interests, for purchase consideration aggregating $93,000,000.

19. The Partnership Agreement was amended and adopted twice in connection with HMT's acquisition of the Debtor's partnership interests—first with the closing of the Partnership Interest Purchase Agreement on December 21, 2015, and again with the closing of the Contribution Agreement on December 24, 2015.

20. Section 3.9 of the Partnership Agreement governs distributions. It provides, in part:

[4] The Dugaboy Investment Trust is the family trust for James Dondero.

[5] Prior to December 31, 2019, HMT made a series of prepayments on the Contribution Note which decreased the principal balance of the Contribution Note.

(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. . . . ***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***. . . .

(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 Partners 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; and

(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.

(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.

21. If the Priority Distributions are not made, section 4.2(e) of the Partnership Agreement specifies the remedy:

(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 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).

22. While the Partnership Agreement provides that Priority Distributions must be made ahead of certain other distributions, it has no requirement that HMT must receive distributions when there are insufficient funds to do so and no remedy supporting the assertion of a claim for distributions against the Debtor, Strand (as the general partner), or anybody else.

23. Instead, HMT points to a different agreement, citing the indemnification provision in the Contribution Agreement as follows:

> Section 6.02 Indemnification By the Partnership. Subject to the other terms and conditions of this Article VI, the Partnership shall indemnify and defend Contributor and its trustees, sponsors, administrators, grantors, officers, directors, managers, Affiliates, beneficiaries, shareholders, members, partners, successors and assigns (collectively, the "Contributor Indemnified Parties") against, and shall hold the Contributor Indemnified Parties harmless from and against, any and all *Losses incurred or sustained by, or imposed upon, any Contributor Indemnified Parties based upon, arising out of, with respect to or by reason of:*
>
> > (a) any inaccuracy in or breach of any of the representations or warranties of the Partnership contained in this Agreement or any of the other agreements contemplated hereby to which the Partnership is a party;
> >
> > *(b) any breach or non-fulfillment of any covenant, agreement or obligation to be performed by the Partnership pursuant to this Agreement or any of the other agreements contemplated hereby to which the Partnership is a party;* and
> >
> > (c) any and all actions, suits, proceedings, claims, demands and Losses incident to any of the foregoing or incurred in attempting to oppose the imposition thereof, or in enforcing this indemnity.

(Emphasis added).

24. Section 6.05 of the Contribution Agreement sets forth certain limitations on indemnification. Two are relevant here:

> (b) The aggregate amount of all Losses for which the Partnership shall be liable shall not exceed ten percent (10%) of the Contribution Amount; provided, however, that for purposes of this Section 6.05(b) only, the term "Contribution Amount" shall be limited to the sum of (i) cash contributed by the Class B

> Member and (ii) the amount of principal actually paid by the Class B Member on the Note at the time of a claim for indemnity. . . .
>
> (e) ***Subject to the limitations in this Section 6.05***, any indemnification obligation of the Partnership under Section 6.02 shall not be payable to the Indemnified Party in cash, but shall instead be satisfied by a reduction in the principal balance of the Contribution Note for the amount of such indemnification obligation.

(Emphasis added).

25. Although the HMT Claim asserts that only section 6.05(e) is relevant and that its remedy is a dollar-for-dollar reduction in the principal amount of the Contribution Note, subsection (e) is expressly subject to other limitations in section 6.05. Pursuant to subsection (b), the maximum aggregate of Losses for which the Partnership could be liable, therefore, would be 10% of the sum of (x) the $7 million cash component of the Contribution Amount plus (y) the amount of principal actually paid by the Class B Member on the Contribution Note at the time of a claim for indemnity—or $9,260,999.44. Consequently, HMT's indemnification claim, if allowed, is limited to **$1,626,099.94** (*i.e.*, $16,260,999.44 ($7,000,000 plus $9,260,999.44) times 10%).

OBJECTION TO CLAIM

A. Legal Standard

26. The Bankruptcy Code establishes a burden-shifting framework for proving the amount and validity of a claim. "A claim . . . , proof of which is filed under section 501 [of the Bankruptcy Code], is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). "A proof of claim executed and filed in accordance with the [Bankruptcy Rules] shall constitute *prima facie* evidence of the validity and amount of the claim." FED. R. BANKR. P. 3001(f); *see also In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006). However, the ultimate burden of proof for a claim always lies with the claimant. *Armstrong*, 347 B.R. at 583 (citing *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15 (2000)).

27. The HMT Claim asserts that the Debtor is liable under section 6.02(b) of the Contribution Agreement, under which the Debtor must indemnify HMT for:

> Losses … arising out of … any breach or non-fulfillment of any covenant, agreement or obligation to be performed by the Partnership pursuant to this Agreement or any of the other agreements contemplated hereby to which the Partnership is a party.

28. HMT claims this provision is triggered by the Debtor's failure to make Priority Distributions as it is purportedly obligated to do under the Partnership Agreement:

> With regard to missed Priority Distributions and Priority Distributions that likely will not occur hereinafter, HMT claims the maximum benefit available to it on account of the Indemnity referenced in Section 6.02 of the Contribution Agreement, with regard to ***the Debtor's obligation to fund Priority Distributions per the Fourth Amended and Restated Agreement of Limited Partnership, an "agreement or obligation to be performed by the Partnership pursuant to this Agreement or any of the other agreements contemplated hereby to which the Partnership is a party.***

HMT Claim, Ex. A at 2-3 (emphasis added).

29. By treating a partnership distribution as a contract right rather than a distribution of profits, and by using the claim as a setoff, HMT not only makes itself into a creditor rather than an equity holder, it actually elevates its rights to a position superior to that of general unsecured creditors! The HMT Claim fails for all of the following reasons.

B. The Indemnification Clause Is Inapplicable Because There Is No Agreement, Covenant or Obligation in the Partnership Agreement to Make Priority Distributions When the Partnership Has Insufficient Funds

30. The fundamental and dispositive flaw in the HMT Claim is that there is no "agreement, covenant or obligation" in the Partnership Agreement to make Priority Distributions if the partnership does not have the funds to do so. HMT's general partner agreed to distribute partnership funds in a certain order of priority, but it did not commit to distributing funds that the Partnership does not have. The parties expressly acknowledged, in fact, that distributions may

be limited by Partnership debts: "[T]he 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." Sec. 3.9(a).

31. What is mandatory is that, as the name suggests, Priority Distributions must be made "[p]rior to the distribution of any amounts to Partners pursuant to Section 3.9(a)" and shall be made pro-rata among the Class B and Class C limited partnership interests. Sec. 3.9(b). Nowhere does the Partnership Agreement (i) provide that a failure to make distributions (as opposed to making them in the wrong order of priority) is a breach of the Partnership Agreement, or (ii) confer a right of action to require distributions. Rather than require a distribution of funds that do not exist, the Partnership Agreement has a remedy specific to the failure to make Priority Distributions: Section 4.2(e) permits HMT to require the Debtor to sell certain securities in order to raise cash so that the Debtor is able to make such distributions.

32. HMT is the Debtor's owner, not its creditor. It does not have a contractual right to make a profit. To permit partners to draft partnership agreements to put themselves in a better position than creditors if things do not work out would turn partnership law on its head. The terms of the Partnership Agreement and Contribution Agreement do not reflect any such intention.

C. There Are No "Losses" Within the Meaning of the Indemnification Clause

33. The indemnity clause also does not apply because HMT has not incurred "Losses" within the meaning of the Contribution Agreement.

34. Under the Contribution Agreement, "'Losses' means all losses, damages, liabilities, claims, judgments, fines, penalties, costs or expenses, including reasonable attorneys',

accountants', investigators' and experts' fees and expenses in investigating or defending any of the foregoing or in the enforcement of this Agreement."

35. HMT does not allege what Losses were caused by the non-receipt of Priority Distributions but appears simply to assume that its Losses are the distributions HMT believes it had a right to receive. But, first, the non-distribution is the alleged ***breach***, not Losses caused by the breach. To hold that the breach itself is the covered Loss is to directly rewrite the remedial provisions of the Partnership Agreement.

36. Second, the non-receipt of money is not covered by the definition of "Losses." HMT is left with less income, but the non-receipt does not itself cause damages, liabilities, claims, or judgments. HMT can (and will) pay with other funds. Are all HMT's unpaid bills "Losses" that the Debtor must indemnify?

D. <u>Any Right to Indemnification Would Be Limited by Section 6.05(b) to $1,626,099.94</u>

37. Section 6.05(b) of the Contribution Agreement limits indemnification as follows:

> (b) The aggregate amount of all Losses for which the Partnership shall be liable shall not exceed ten percent (10%) of the Contribution Amount; provided, however, that for purposes of this Section 6.05(b) only, the term "Contribution Amount" shall be limited to the sum of (i) cash contributed by the Class B Member and (ii) the amount of principal actually paid by the Class B Member on the Note at the time of a claim for indemnity. . . .

HMT elects the setoff remedy in section 6.05(e) and contends that subsection (b) is irrelevant, but it is unclear why since Section 6.05(e) is expressly subject to Section 6.05 in its entirety, including Section 6.05(b):

> (e) ***Subject to the limitations in this Section 6.05***, any indemnification obligation of the Partnership under Section 6.02 shall not be payable to the Indemnified Party in cash, but shall instead be satisfied by a reduction in the principal balance of the Contribution Note for the amount of such indemnification obligation.

(Emphasis added).

38. Pursuant to subsection (b), the maximum aggregate of Losses for which the partnership can be liable would be **$1,626,099.94**, which is 10% of the sum of (x) the $7 million cash component of the Contribution Amount plus (y) the amount of principal actually paid by the Class B Member on the Contribution Note at the time of a claim for indemnity—or $9,260,999.44. As such, although HMT asserts a claim for $60,298,739.00, even if it prevailed on all of its arguments, its maximum setoff would only be $1,626,099.94.

FIRST CLAIM FOR RELIEF

(Subordination under Bankruptcy Code § 510(b))

39. The Debtor repeats and re-alleges as if set forth herein all of the foregoing factual allegations.

40. If HMT had a claim under the Contribution Agreement, it would be subordinated under Bankruptcy Code § 510(b), which provides:

> (b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

41. Section 510(b) applies to the ownership interests in a limited partnership. *See In re SeaQuest Diving, LP*, 579 F.3d 411 (5th Cir. 2009); *Templeton v. O'Cheskey (In re Am. Hous. Found.)*, 785 F.3d 143, 154 (5th Cir. (2015); *In re Garrison Mun. Partners, LP*, 2017 Bankr. LEXIS 3765, *8 (Bankr. S.D. Tex., Oct. 31, 2017). Accordingly, judgment should issue declaring that the HMT Claim is subordinated pursuant to 11 U.S.C. § 510(b) and shall, subject to such other defenses or objections as may exist with respect to the HMT Claim, have the same rank and priority as all partnership interests.

SECOND CLAIM FOR RELIEF

(Declaratory Relief Regarding Setoff Rights)

42. The Debtor repeats and re-alleges as if set forth herein all of the foregoing factual allegations.

43. If the HMT Claim is allowed in any amount, setoff against amounts owed under the Contribution Note should not be permitted on two bases. First, claims that are subordinated to the level of equity, such as under section 510(b), may not be used to set off against claims of a debtor. Second, whether or not any HMT Claim is subordinated, setoff under section 553 is subject to equitable limitations, and the Court has ample cause to limit setoff so that creditors are not prejudiced by the assertion by a partner of its rights under an agreement for the purchase of limited partnership interests.

44. Although there is authority that claims that are subordinated under section 510(a) or (c) or other subordination provisions of the Bankruptcy Code may nonetheless be used defensively for setoff purposes,[6] the same rationale does not apply to "claims" that are subordinated to the level of equity under section 510(b) and which therefore are not really "claims" at all.. The only authority identified that discusses the issue holds that such "claims" may ***not*** be used for setoff. *Dayton Sec. Assocs.*, 74 F.3d at 1114.

45. In *Dayton Securities Associates*, limited partners who were being sued to collect their capital contributions brought RICO counterclaims which they hoped to set off against capital contribution obligations. The bankruptcy court held that they "were not entitled to set off

[6] *Rochelle v. United States*, 521 F.2d 844, 855 (5th Cir. 1975), *mandate amended*, 526 F.2d 405 (5th Cir.), *cert. denied*, 426 U.S. 94 (1976); *United States v. Cherry St. Partners, L.P. (In re All. Health of Fort Worth, Inc.)*, 240 B.R. 699, 704 (N.D. Tex.) *aff'd* 200 F.3d 816 (1999) (table). ("The Fifth Circuit has determined that a subordinated claim can be used to set off a claim by the bankrupt estate against a creditor even though the subordinated claim could not itself share in the dividends.")

their purported damages against their liability to the creditors of the Limited Partnerships." *Id*. The Eleventh Circuit affirmed on the following basis:

> The appellants concede that the right to a set off under § 553 is merely permissive and subject to the discretion of the bankruptcy court. *In re Diplomat Electric, Inc*., 499 F.2d 342, 346 (5th Cir.1974) (holding that the right to a set off in bankruptcy is discretionary and reviewing the denial of a set off for "clear abuse"). In this case, had the bankruptcy court allowed the appellants' set off claims, the assets available to satisfy the Limited Partnerships' creditors would have been reduced dollar for dollar by the amount of the damages set off. In light of this situation, the bankruptcy court determined that the equities favored the Limited Partnerships' creditors, who relied on the limited partners' public promise to contribute additional capital. Under all the circumstances, including the strong policy underlying the partnership law of New York to protect creditors as compared to the capital contribution of partners, we cannot say that the bankruptcy court abused its discretion in denying the appellants' set off claims.

Id.

46. The Eleventh Circuit's holding and rationale applies squarely here. Even if mandatory subordination under section 510(b) did not *automatically* render such "claims" ineligible for setoff, setoff under section 553 is discretionary (as confirmed by the cited Fifth Circuit authority), and the equities in such a scenario are conclusively in favor of not permitting creditors to be leapfrogged and deprived of a recovery by an equity holder posing as a creditor that has its putative claim reduced to equity status.

47. The Debtor is entitled to an order and judgment under 28 U.S.C. § 2201 declaring that the HMT Claim, if any, may not be setoff under 11 U.S.C. § 553 against the Debtor's claim to collect on the Contribution Note.

Reservation of Rights

48. The Debtor reserves its right to supplement or modify this Objection and Complaint to assert such further objections, claims, or arguments as may later become available or apparent.

Prayer

WHEREFORE, the Debtor prays for judgment as follows:

1. For disallowance of the HMT Claim in its entirety;

2. For subordination of any HMT Claim pursuant to 11 U.S.C. § 510(b);

3. For a declaration that HMT is not entitled to use any HMT Claim for purposes of setoff under 11 U.S.C. § 553;

4. For costs of suit incurred herein; and

5. For such other and further relief as this Court deems just and proper.

Dated: August 26, 2020.

PACHULSKI STANG ZIEHL & JONES LLP
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Counsel for the Debtor and
Debtor-in-Possession

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	**ADVERSARY PROCEEDING NUMBER** (Court Use Only)

PLAINTIFFS	**DEFENDANTS**
Highland Capital Management, L.P.	Hunter Mountain Investment Trust
ATTORNEYS (Firm Name, Address, and Telephone No.) Pachulski Stang Ziehl & Jones LLP, 10100 Santa Monica Blvd, 13th Flr, Los Angeles, CA 90067, (310) 277-6910	**ATTORNEYS** (If Known) E.P. Keiffer, Rochelle McCullough, LLP, 325 N. Saint Paul, Ste. 4500, (214) 580-2525
PARTY (Check One Box Only) ■ Debtor □ U.S. Trustee/Bankruptcy Admin □ Creditor □ Other □ Trustee	**PARTY** (Check One Box Only) □ Debtor □ U.S. Trustee/Bankruptcy Admin ■ Creditor □ Other □ Trustee

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

The Debtor objects to Hunter Mountain Investment Trust's proof of claim, seeks subordination of the claim under 11 U.S.C. 510 to the extent allowed, and seeks declaratory judgment on issues of set off under 11 U.S.C. 553, among others.

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
- ☐ 11-Recovery of money/property - §542 turnover of property
- ☐ 12-Recovery of money/property - §547 preference
- ☐ 13-Recovery of money/property - §548 fraudulent transfer
- ☐ 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- ☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- ☐ 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- ☐ 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- ☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- ☐ 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- ☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- ☐ 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- ☐ 61-Dischargeability - §523(a)(5), domestic support
- ☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
- ☐ 63-Dischargeability - §523(a)(8), student loan
- ☐ 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- ☐ 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- ☐ 71-Injunctive relief – imposition of stay
- ☐ 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- ☑ 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- ☑ 91-Declaratory judgment

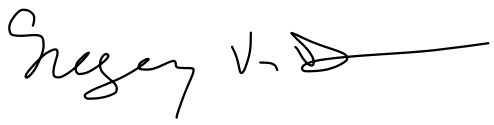
FRBP 7001(10) Determination of Removed Action
- ☐ 01-Determination of removed claim or cause

Other
- ☐ SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- ☐ 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

□ Check if this case involves a substantive issue of state law	□ Check if this is asserted to be a class action under FRCP 23
□ Check if a jury trial is demanded in complaint	Demand $ 0.00

Other Relief Sought (i) Disallowance of claim no. 152 of Hunter Mountain Investment Trust; (ii) Subordination of any claim of Hunter Mountain Investment Trust; (iii) Declaration that Hunter Mountain Investment Trust may not use any claim for purposes of setoff under 11 U.S.C. 553

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-sgj-11	
DISTRICT IN WHICH CASE IS PENDING Northern District of Texas	DIVISION OFFICE Dallas	NAME OF JUDGE 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 26, 2020	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Gregory V. Demo	

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.

Appendix Exhibit 50

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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]	:	Case No. 19-34054-sgj11
	:	
Debtor.	:	

OBJECTION TO THE PROOF OF CLAIM FILED BY REDEEMER COMMITTEE OF THE HIGHLAND CRUSADER FUND

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

1934054200826000000000003

UBS Securities LLC and UBS AG, London Branch (together, "UBS"), by and through their undersigned counsel, hereby submit this objection (the "Objection") to Proof of Claim No. 72 (the "Proof of Claim" or "Redeemer Claim"), filed by Redeemer Committee of the Highland Crusader Fund ("Redeemer"). In support of this Objection, UBS respectfully states as follows:

PRELIMINARY STATEMENT

The Redeemer Claim arises from an Arbitration Award issued by an American Arbitration Association ("AAA") panel against the Debtor. As set forth herein, however, there are fundamental flaws with several key aspects of both the Arbitration Award and the Redeemer Claim generally. For one thing, the Arbitration Award that underlies the Proof of Claim is actually two competing "final" arbitration awards—both issued by the same arbitral panel in the same proceeding, but neither of which has been confirmed, or otherwise entered as a final judgment, by any court of competent jurisdiction.

In rendering these awards, the arbitral panel impermissibly substantively (and unilaterally) modified several aspects of its first "final" arbitral award ***after*** that award had already been issued. This was improper as a matter of law. Under the long-standing common law doctrine of *functus officio*—not to mention the binding AAA Commercial Arbitration Rules that governed the arbitration proceedings in question—"anything an arbitrator does to modify a final award after it has been issued is without effect because at that point the arbitrator lacks any power to reexamine that decision." *See Hill v. Wackenhut Servs. Int'l*, 971 F. Supp. 2d 5, 12 (D.D.C. 2013); AAA R-50 ("The arbitrator is not empowered to redetermine the merits of any claim already decided."). This fact alone renders at least ***$36.5 million*** of the amounts Redeemer is claiming through its Proof of Claim unrecoverable and subject to vacatur.

Beyond that, roughly $115 million of the remaining $154 million in claims that Redeemer asserts are functionally worthless. Such amounts relate to what Redeemer refers to as its claims

for "Deferred Fees" and the "Cornerstone Award." But under the express terms of the Arbitration Award and the Crusader Fund[1] governing documents by and between Redeemer and the Debtor, Redeemer cannot recover either the "Deferred Fees" or "Cornerstone Award" amounts from the Debtor without triggering an obligation to turn over assets of great value to the Debtor. The amounts that Redeemer must turn over to the Debtor to collect on the "Deferred Fees" and "Cornerstone Award" will, in all likelihood, eclipse any actual recovery Redeemer might receive from the Debtor's estate on such claims as part of this bankruptcy. What that means is that Redeemer has grossly overstated its claim, and the true value of Redeemer's legitimate and allowable claims is unlikely to exceed $40 million, at the most.

JURISDICTION

1. This Court has jurisdiction to consider the Objection under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue is proper in this Court pursuant to 28 U.S.C. § 1409.

2. The statutory predicates for the requested relief are section 502 of title 11 of the United States Code (the "Bankruptcy Code"), Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 3007-1 of the Local Rules of the United States Bankruptcy Court of the Northern District of Texas (the "Local Rules").

BACKGROUND

A. The Debtor's Chapter 11 Bankruptcy Petition

[1] "Crusader Fund" is defined to include Highland Crusader Offshore Partners, L.P., Highland Crusader Fund, L.P., Highland Crusader Fund, Ltd., and Highland Crusader Fund II, Ltd.

3. The Debtor, Highland Capital Management, L.P. (the "Debtor" or "HCM"), is an investment management firm that manages a variety of hedge funds, structured investment vehicles, and mutual funds.

4. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for chapter 11 relief in the Bankruptcy Court for the District of Delaware. Pursuant to an order dated December 4, 2019, the Debtor's bankruptcy proceedings were transferred to this Court under the above-captioned case number.

5. On March 2, 2020, this Court entered a general *Order (I) Establishing Bar Dates for Filing Claims and (ii) Approving the Form and Manner of Notice Thereof*. (Dkt. No. 488.) Pursuant to that order, the general bar date for proofs of claim was set for April 8, 2020.

B. Redeemer's Proof of Claim

6. On April 3, 2020, Redeemer filed Proof of Claim No. 72 against the Debtor. (**Ex. A**, Proof of Claim ("POC") No. 72 at 1.) The Redeemer Claim is predicated upon what it refers to as the "Arbitration Award," which is actually two separate "final" arbitration awards issued in an arbitration proceeding that Redeemer filed against the Debtor in or around 2016. (**Ex. B**, Partial Final Award (defined below) (the "PFA") at 4.) Though its claims are principally based on the awards from this prepetition arbitration proceeding against HCM (which concerned only the Debtor's alleged prepetition conduct), the Redeemer Claim takes the position that any claims it might have are not, in fact, "prepetition claims." (Ex. A, POC Rider at 1.) Instead, Redeemer states that the Arbitration Award is actually "an executory contract under section 365 of the Bankruptcy Code" that the Debtor has not yet "moved to assume or reject." (*Id.*) Redeemer, thus, purports to be filing the Proof of Claim only "out of an abundance of caution." (*Id.*)

7. In its Proof of Claim, Redeemer asserts that it has a "Damage Claim" against the Debtor for "at least $190,824,557 plus interest that is accruing beginning as of October 16, 2019,

the date that HCM filed its bankruptcy case." (*Id.*) Redeemer then lists the "separate components of the Damage Claim," which it notes are "set forth in the Final Award." (*Id.*) The components of Redeemer's Damage Claim that are directly relevant to UBS's Objection are the so-called (1) "Deferred Fee Claim" (for which Redeemer claims $43,105,395); (2) "Distribution Fee Claim" ($22,922,608); (3) "Barclays Claim" ($30,811,366); (4) "Cornerstone Award" ($71,894,891); (5) "Legal Fees, Costs, and Expenses" ($11,351,850); and (6) 224 days of prejudgment interest calculated within the (a) "Taking of Plan Claims" ($171,576 of the $3,277,991 Redeemer claims); (b) "CLO Trades Claim" ($24,820 of $685,195); (c) "Credit Suisse Claim" ($151,085 of $3,660,130); and (d) "UBS Claim" ($112,776 of $2,600,968). (*Id.* at 1-2.)

8. In addition to the liquidated Damage Claim itself, Redeemer also asserts "an unliquidated claim for post-petition interest, attorneys' fees, costs and other expenses that continue to accrue in connection with the Damage Claim" (the "Post-Petition Claim"). (*Id.* at 2.) Redeemer cites no authority in support of this Post-Petition Claim. (*See generally id.*)

9. Lastly, Redeemer also asserts a claim for the transfer of certain interests or, in the alternative, "an unliquidated amount" for what it refers to as the "Cancellation of Limited Partnership Interests" in the Crusader Fund held by (i) HCM and Charitable DAF Fund, L.P. and (ii) Eames, Ltd. ("Eames"). (*Id.* at 2.) The claim for interests held by Eames appears to be based on certain relief set forth in the Final Award (and only the Final Award), which Redeemer claims provides for "HCM to transfer, or take all necessary steps to cause the transfer of, such interests to the Redeemer Committee for the benefit of the Crusader Fund." (*Id.*) Similarly, Redeemer claims to reserve its right to seek the distribution of funds held in the "Deferred Fee Account," or to claim an unliquidated amount if such distributions are not made. (*Id.*)

C. Background on Redeemer's Damage Claim and the Arbitration Award

10. The events giving rise to Redeemer's purported Damage Claim against HCM appear to be a series of disputes between Redeemer and HCM that arose out of their efforts to wind down the Crusader Fund—a lengthy process that began in or around 2008. (Ex. B, PFA at 2-3.) Specifically, Redeemer's Damage Claim appears to relate to a contractual "Plan and Scheme" by and between Redeemer and HCM that was meant to "enable the orderly management, sale, and distribution of the assets" of the Crusader Fund as part of their wind-down. (*Id.* at 2.)

11. In or around July 2016, Redeemer initiated an arbitration before the AAA—which the parties agreed would be subject to the AAA Commercial Arbitration Rules—and asserted, among other things, breach of contract and fiduciary duty claims against HCM. (*Id.* at 3-4.) Final hearings in the arbitration were held in September 2018. (*Id.* at 7.) Following such hearings, closing arguments, and post-hearing briefing, "the record was declared closed" on December 12, 2018. (*Id.* at 7.)

12. In early 2019, the panel of arbitrators (the "Panel") presiding over Redeemer's arbitration against HCM rendered two separate "final" arbitral awards: an initial Partial Final Award dated March 6, 2019 (the "Partial Final Award") and a subsequent Final Award dated April 29, 2019 (the "Final Award"). (*See id.*; **Ex. C**, Final Award (the "FA").) The first of these awards, the Partial Final Award, was a 56-page single-spaced reasoned decision unanimously signed by all three members of the Panel, which addressed the substantive claims and counterclaims that Redeemer and HCM had raised in the arbitration. (*See generally* Ex. B, PFA.) There are two aspects of the Partial Final Award that are relevant to this Objection:

- **Barclays LP Interests.** As part of the March 6, 2019 Partial Final Award, the Panel analyzed, discussed, and ruled on one of Redeemer's core allegations—namely, that HCM improperly transferred certain limited partner interests in the Crusader Fund that belonged to Barclays (the "Barclays LP Interests") from Barclays to an HCM affiliate, Eames. (*See, e.g.*, Ex. B, PFA at 8, 15, 20-22, 54.) The Panel not only analyzed HCM's transfers of these Barclays LP Interests, it

specifically determined in the Partial Final Award that such transfers were a "breach" of the parties' agreement and, thus, "improper." (*Id.* at 21-22, 54.) But—critically—the Panel did not treat HCM's transfers of the Barclays LP Interests to Eames as an independent wrongdoing. Instead, the Partial Final Award only ever discussed the transfer of the Barclays LP Interests in the context of one of Redeemer's broader sets of claims, known as its "Distribution Fee Claim." (*See id.* at 15; *id.* at 20 (analyzing "Payments to Barclays and Eames ***as Distributions***").) After determining that HCM's transfers of the Barclays LP Interests were "improper," (*id.* at 20-22, 54), the Panel went on to award Redeemer damages arising from such conduct as part of the Partial Final Award. In particular, the Partial Final Award provided Redeemer with a "total" of $14,452,275 in aggregate damages (plus prejudgment interest) to cover all of the "improper" conduct relating to its Distribution Fee Claim—a list that specifically included HCM's transfers of the Barclays LP Interests.[2]

- **Prejudgment Interest.** In addition to finding HCM liable for, and awarding damages arising out of, HCM's transfer of the Barclays LP Interests, the Panel also awarded Redeemer a limited amount of prejudgment interest for certain types of compensatory damages as part of the Partial Final Award. (*See e.g.*, *id.* at 48, 54-55.) In so doing, the Panel set an outside date by which the prejudgment interest would no longer run—March 6, 2019, ***the date of the Partial Final Award itself***. (*See, e.g.*, *id.* at 54 (awarding "statutory interest of 9%, calculated on a simple basis, from the dates of taking in January and April 2016 through the date of this Partial Final Award").)

13. On March 7, 2019—the day after the Panel issued the Partial Final Award—Redeemer sent an email to the Panel, requesting that the Panel modify the Partial Final Award. (Ex. B, FA at 1.) On March 14, 2019, before HCM even had a chance to respond, the Panel unilaterally issued a "Disposition of Application for Modification of Award" (the "Modification of Award"). (*Id.*) This modification added a completely new category of damages as a result of HCM's "improper" transfer of the Barclays LP Interests—damages above and beyond the $14.5 million already ordered for such conduct in the Partial Final Award. (*Id.* at 1, 11.)

[2] (*Id.* at 22 (concluding that "it was ***improper*** for Highland to include in the calculation of the amounts distributed to the Redeemers . . . ***[t]he Distribution Fee*** attributable to the value of the LP interests and amounts transferred to Eames"); *id.* at 54 ("[W]e find that the Respondent is ***liable*** for damages . . ." for ***"[t]he Distribution Fee*** attributable to the value of the LP interests and amounts transferred to Eames").)

14. The Panel styled this addition as a formal modification under Rule 50 of the AAA Rules to "correct any clerical, typographical, or computational errors in the award." (*Id.* at 1 n.1.) Under that Rule, however, the Debtor should have had "10 calendar days to respond to [Redeemer's] request" in writing. *See* AAA R-50. The Debtor never got that chance. HCM opposed the Modification of Award on March 17, 2019, noting that "the Panel is not empowered to take any further action beyond the issuance of its Partial [Final] Award," and requesting the Panel withdraw its Modification of Award and refrain from any further modification of the Partial Final Award. (Ex. C, FA at 2.)

15. Still, Redeemer requested—and the Panel granted—further modifications not once, but three times. (*Id.*) On April 5, 2019 (ten days after Rule 50's allotted period had closed), Redeemer submitted another formal written request to the Panel in which it asked the Panel to "award further damages in connection with the Barclays claim," as well as to "award prejudgment interest through" an extended date. (*Id.* at 2.) The Debtor again opposed Redeemer's request for such "further damages" on the basis that such post-award modifications are improper under the AAA Rules and governing law. (*Id.* at 2-3.)

16. On April 29, 2019, the Panel entered a new "Final Award" that agreed to "re-adopt all prior findings and conclusions" yet superseded and "specifically modified" portions of its prior Partial Final Award. (*Id.* at 1.) Such modifications included the correction of four non-controversial "clerical, typographical, or computational errors." (*Id.* at 11-12, 16.) But the Final Award also included a number of substantive changes to the Partial Final Award. For instance, through the Final Award, the Panel (1) awarded Redeemer an additional $21,768,743 in damages due to the transfers of the Barclays LP Interests (as well as prejudgment interest on these new damages); (2) granted injunctive relief requiring HCM to "take all necessary steps to cause the

improperly taken [] LP interests currently owned and controlled by Respondent through Eames, Ltd to be returned to Claimant"; and (3) completely reconsidered the prior time limitation on prejudgment interest that it had imposed under the Partial Final Award. (*Id.* at 15, 18.) Instead of limiting the amounts of prejudgment interest to only those amounts that ran through March 6, 2019, the Panel now held that all prejudgment interest would run indefinitely until "the earlier of the date paid or the entry of a final judgment." (*Id.* at 2, 14-15.)

17. Neither the Partial Final Award nor the Final Award (or any parts of them) has been confirmed or otherwise entered as a final judgment by any court of competent jurisdiction.

D. Redeemer and the Debtor Reach Agreement as to the Debtor's Preferred Resolution of the Redeemer Claim

18. In recent weeks, the Court, the Debtor, and parties in interest have decided to proceed towards mediation as a way to resolve certain creditor claims and negotiate a confirmable plan of reorganization or liquidation. (*See* Dkt. Nos. 817, 864, and 897 (July 8, July 14, and July 21, 2020 Hr'g Tr.).)

19. On July 8, 2020, the Debtor informed this Court that it and Redeemer had reached a settlement in principle as to Redeemer's claim amount and would file their agreement when certain language was finalized. (Dkt. 817, July 8, 2020 Hr'g Tr.) The Debtor acknowledged the settlement value of the Redeemer Claim is not as simple or straightforward as with a typical arbitration award and, instead, required negotiation on various points. (*Id.*) The Debtor has not filed a settlement agreement, and little has been shared with UBS about the settlement. UBS files this Objection to preserve its ability to object to the resolution of the Redeemer Claim and reserves its rights to make additional objections once the settlement agreement is filed. In this case, any resolution of the Redeemer Claim is of particular interest to the Debtor's other creditors, including UBS, because of a reciprocal obligation that was included in the Partial Final Award requiring

Redeemer to contribute certain shares of significant value to the Debtor's estate—value that other creditors would have a pro rata interest in.

20. UBS hereby objects to the Proof of Claim, including its characterization of the Arbitration Award as an "executory contract" and the allowance of those portions (including any Post-Petition Claim portions[3]) of the Redeemer Claim arising from the "new" relief in the Final Award. UBS further objects to any resolution of the Redeemer Claim that diminishes the value Redeemer will owe to the Debtor's estate upon payment of its claim.

ARGUMENT

I. THE ARBITRATION AWARD ON WHICH REDEEMER'S ENTIRE DAMAGE CLAIM IS BASED IS NOT AN "EXECUTORY CONTRACT."

21. Redeemer's Damage Claim against the Debtor's estate is based entirely on the "Arbitration Award." In its Proof of Claim, however, Redeemer takes the perplexing position that the Award—which arose from a prepetition arbitration proceeding concerning claims that related exclusively to prepetition conduct of the Debtor—does not actually reflect any general "prepetition claims" against the Debtor's estate. (Ex. A, POC Rider at 1.) Redeemer insists, instead, that the Award is actually "***an executory contract*** under section 365 of the Bankruptcy Code." (*Id.*) Because "HCM has not yet moved to assume or reject" the Award, Redeemer takes the position that its deadline to file a Proof of Claim "remains undetermined" and it is only filing the instant Proof of Claim "out of an abundance of caution." (*See id.* ("By filing the Proof of Claim, [Redeemer] does not concede that the amounts awarded under the Arbitration Award are prepetition claims or that it is required to file a proof of claim to be entitled to the amounts

[3] To the extent the settlement agreement proposed by the Debtor and Redeemer includes amounts for Redeemer's Post-Petition Claim, UBS objects. However, should the Court agree to allow that Post-Petition Claim and grant Redeemer post-petition interest or further relief, UBS reserves all rights to assert and seek post-petition interest or further relief in its own claim.

described herein.").) This appears to be little more than an attempt by Redeemer to transform its contingent, disputed, and unsecured prepetition litigation Damage Claim against the Debtor into something it is not—a bona fide executory contract between Redeemer and the Debtor.

22. It is axiomatic, however, that "an executory contract ***must be a 'contract'*** and not some other legal instrument." *See In re Denman*, 513 B.R. 720, 723 (Bankr. W.D. Tenn. 2014); *see also In re e2 Commc'ns, Inc.*, 354 B.R. 368, 402 (Bankr. N.D. Tex. 2006) ("An executory contract ***is a contract*** where performance remains due to some extent on both sides."). That is the end of Redeemer's argument that the Arbitration Award is an "executory contract" here. The Arbitration Award simply is not a contract, much less an "executory contract" under 11 U.S.C. § 365. The mere fact that the Arbitration Award imposes certain obligations on Redeemer or the parties that are to "be performed in the future and are, thereby, executory in nature" is not dispositive:

> [T]he 'executory' nature of an obligation does not, ipso facto, imply an 'executory contract.' . . . Contract rights arise upon an offer, acceptance, and transfer of adequate consideration between at least two assenting parties. If these elements do not exist, a contract right does not exist and, thereby, an executory contract cannot exist.

See In re Denman, 513 B.R. at 723. Redeemer has not identified any legal authority suggesting an arbitration award can, should be, or ever has been interpreted to be an "executory contract" under 11 U.S.C. § 365. There is no such authority. Nor is there any indication the Debtor believes the Arbitration Award is an executory contract. Indeed, the comprehensive Schedule G of all "Executory Contracts and Unexpired Leases" filed by the Debtor many months ago makes no reference to either Redeemer or the Arbitration Award. (*See* Dkt. No. 247.) That being the case, Redeemer's attempt to recharacterize the Arbitration Award—and its related general, unsecured, contingent, and disputed Damage Claim—as an "executory contract" fails as a matter of law.

II. NEW RELIEF GRANTED BY THE FINAL AWARD IS SUBJECT TO VACATUR AND CANNOT BE THE BASIS OF ANY CLAIM AGAINST THE DEBTOR.

23. In issuing the Final Award, the Panel overstepped its fundamental authority as arbitrators. An "arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2009). This leads to a simple maxim: where an arbitrator has "exceeded the authority granted by the parties' agreement to arbitrate" in rendering an award, such an award should be vacated. *See Smith v. Transp. Workers Union of Am.*, 374 F.3d 372, 375 (5th Cir. 2004) ("If an arbitral panel exceeds its authority, it provides grounds for a court to vacate that aspect of its decision."); *Townes Telecomms., Inc. v. Travis, Wolff & Co.*, 291 S.W.3d 490, 493-94 (Tex. App. 2009) (vacating portion of award rendered "in direct contravention of the [parties'] agreement and which exceeded the powers granted to [the panel] by the parties").

24. One way in which arbitrators exceed their authority is by modifying a substantive aspect of a final award ***after*** such award has already been rendered. In fact, courts across the country have long recognized, and applied, the following "general rule" to prohibit such modifications: "[O]nce an arbitration panel renders a decision regarding the issues submitted, it becomes *functus officio* and lacks any power to reexamine that decision." *See Colonial Penn Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 331 (3d Cir. 1991); *Hill v. Wackenhut Servs. Int'l*, 971 F. Supp. 2d 5, 12 (D.D.C. 2013) ("This means that anything an arbitrator does to modify a final award after it has been issued is without effect because at that point the arbitrator lacks any power to reexamine that decision."). Indeed, the Northern District of Texas, the Fifth Circuit, and Texas state courts have specifically endorsed, and applied, this doctrine. *See Weinberg v. Silber*, 140 F. Supp. 2d 712, 724 (N.D. Tex. 2001) ("[T]he arbitrator shall not revisit his decision on the merits, as his authority to do so has expired."), *aff'd*, 57 F. App'x 211 (5th Cir. 2003); *Smith*, 374 F.3d at

375 ("By modifying the original award, the arbitration panel in this case exceeded the authority granted by the parties' agreement to arbitrate."); *Barsness v. Scott*, 126 S.W.3d 232, 241 (Tex. App. 2003) ("When the panel subsequently modified its original award, . . . the panel exceeded its authority.").

25. This doctrine is so pervasive that it is codified directly into the AAA's Commercial Arbitration Rules. In particular, Rule 50 of the AAA Rules—entitled "Modification of Award"—states that "within 20 calendar days after the transmittal of an award," the parties "may request the arbitrator" to "correct any clerical, typographical, or computational errors in the award," but "[t]he arbitrator is ***not*** empowered to redetermine the merits of any claim already decided." *See* AAA R-50.

26. Here, the Panel did precisely what it was not permitted to do: It rendered a comprehensive initial Partial Final Award, but then—at Redeemer's urging—issued a series of subsequent decisions to modify that Partial Final Award, in which the Panel redetermined the merits of claims previously decided. This culminated in a new "Final Award" that materially modified, and is at direct odds with, key aspects of the Panel's own prior Partial Final Award. This new Final Award improperly modified the Partial Final Award in two distinct ways.

27. **First**, the Final Award dramatically expanded HCM's purported liability for Redeemer's claim that HCM had improperly transferred the Barclays LP Interests to Eames. Whereas the Partial Final Award had awarded Redeemer total damages in the amount of $14,452,275 (and prejudgment interest through March 6, 2019) for the Distribution Fee Claim, including for HCM's "improper" transfer of Barclays LP Interests, the Panel elected in the Final Award to grant Redeemer an additional $21,768,743 in damages arising out of HCM's "improper" transfer of the Barclays LP Interests. (Ex. C, FA at 18.) That is not all. The Final Award also

awarded Redeemer prejudgment interest on these new compensatory damages—a sum that, on its own, adds yet another $9,042,623 to the mix. (*Id.*) All told, the Panel's modification of these aspects of the Partial Final Award resulted in a combined total of ***$30,811,366 in new damages*** for HCM's transfers of the Barclays LP Interests—an amount Redeemer itself now refers to as the "Barclays Claim." (Ex. A, POC Rider at 2.) On top of these additional liquidated damages, the Panel ordered HCM to "take all necessary steps to cause the improperly taken [] LP interests currently owned and controlled by Respondent through Eames, Ltd to be transferred to Claimant . . . within sixty (60) days from the date of transmittal of this Final Award"—mandatory injunctive relief that is also not mentioned anywhere in the Partial Final Award. (Ex. C, FA at 18.)

28. **Second**, in the Final Award, the Panel reconsidered its prior ruling on prejudgment interest from the Partial Final Award. The Panel had previously ordered that HCM pay Redeemer a finite amount of prejudgment interest (9% per simple interest annum) "through the date of this Partial Final Award" (March 6, 2019), (Ex. B, PFA at 14), yet the Panel threw that limitation out entirely in the Final Award. After openly acknowledging its prior ruling, (*see* Ex. C, FA at 14 ("In the March 6 Partial Final Award, we awarded damages and interest through the date of that award . . . ")), the Panel announced in the Final Award that it was doing away with that March 6, 2019 end date and, instead, all such interest would run through "the earlier of the date paid or the entry of a final judgment," (*id.* at 2, 14). In addition to the $30.8 million in additional damages for the Barclays LP Interests, the additional interest contemplated by the Final Award accounted for at least another $5,698,571 through the Petition Date.[4]

[4] Redeemer's Proof of Claim makes clear that it is also asserting claims for interest accrued ***post-petition***. (Ex. A, POC Rider at 2.) Assuming Redeemer is entitled to any additional interest post-petition (*see supra* note 4), this $5.7 million figure does not fully capture the impact that the Panel's decision in the Final Award to remove the March 6, 2019 limitation on prejudgment interest will have had on the Redeemer Claim.

29. Under Rule 50 of the AAA Rules, the only way these post-award modifications might have been allowed is if they were legitimate attempts to correct "clerical, typographical, or computational errors" in the Partial Final Award. *See* AAA R-50. They are not. For starters, the Final Award very clearly contains modifications to address four simple "clerical errors" (all four of which were self-evident typos). (Ex. C, FA at 11-12.) Any suggestion that the two major modifications discussed above were also "clerical" in nature is belied by their sweeping impact. Prior to the Final Award, the aggregate amount of compensatory damages expressly awarded to Redeemer under the original Partial Final Award would have been roughly $142 million (excluding fees and costs and assuming prejudgment interest through March 6, 2019). The two modifications that the Panel made described above, standing alone, immediately add no less than $36.5 million to that compensatory damages sum—more than a ***25% increase***. In addition to these additional monetary damages, the modifications also impose mandatory injunctive relief purporting to require HCM to take the Barclays LP Interests from Eames and transfer them to Redeemer.[5] (Ex. C, FA at 18.) Redeemer cannot seriously expect any court to view such changes that fundamentally alter—and, in this instance, significantly increase and enhance—the relief granted as a mere correction of a "clerical error."

30. The only explanation the Panel itself has for these major modifications removes all doubt that they were not "clerical" in nature. In the Final Award, the Panel tries to excuse the new damages it awarded relating to the Barclays LP Interests by claiming there was "a paragraph missing from the damages portion" that it had left out of the Partial Final Award inadvertently. (*Id.* at 9.) But courts have considered, and rejected, this exact "explanation" before. *See Wein v.*

[5] This aspect of the Panel's ruling—which purports to require HCM to dispose of the assets currently being held by a non-party to the arbitration, Eames Ltd.—is independently subject to vacatur. *See Rapid Settlements, Ltd. v. Green*, 294 S.W.3d 701, 707 (1st Cir. 2009) (upholding the trial court's decision to vacate an arbitration award "because the arbitrator exceeded his powers in issuing an award against a party not subject to arbitration").

Morris, 909 A.2d 1186, 1198 (N.J. Super. Ct. App. Div. 2006) (deciding that AAA Rule 46, the predecessor to Rule 50, does not allow modifications to address "inadvertent omissions" and "neither expressly states nor suggests that claims denied through inadvertence could also be revisited").

31. In reality, both of the modifications here are simply attempts by the Panel to "redetermine the merits of [a] claim already decided." *See* AAA R-50. Indeed, both modifications related to issues that had already been directly addressed by the Partial Final Award. Not only had they been addressed, the Panel explicitly found in the Partial Final Award that HCM was liable for both transferring the Barclays LP Interests and for prejudgment interest. (Ex. B, PFA at 53-54.) In the Final Award, however, the Panel—at Redeemer's urging—revisited these same issues and simply arrived at new, different substantive conclusions. The Panel concedes as much. With regard to prejudgment interest, the Panel freely admitted that "the March Partial Final Award contained specific language awarding interest 'through the date of this Partial Final Award,'" but decided to reach a different conclusion in the Final Award because, in its own view, the prior ruling in the Partial Final Award was "***not determinative of this issue***." (Ex. C, FA at 15.) That, however, is exactly what the Panel cannot do. Where, as here, the panel issued a partial final award as to a particular issue or issues, any partial final award on such issues is rendered, by definition, determinative of the issue. *See Fluor Daniel Intercontinental, Inc. v. GE*, 2007 WL 766290, at *2-3 (S.D.N.Y. Mar. 13, 2007); *see also Trade & Transp., Inc. v. Nat. Petroleum Charterers Inc.*, 931 F.2d 191, 195 (2d Cir. 1991). Since the Partial Final Award here specifically addressed both HCM's liability for transferring the Barclays LP Interests and the amount of prejudgment interest to which Redeemer would be entitled, "the arbitrators ha[d] no further authority, absent agreement

by the parties, to redetermine [such] issue[s]" after rendering the Partial Final Award as a matter of law. *Trade & Transp., Inc.*, 931 F.2d at 195.

32. For the above reasons, the portions of the Final Award reflecting these improper, material modifications are examples of the Panel exceeding its authority and are subject to vacatur. *Smith*, 374 F.3d at 375 ("If an arbitral panel exceeds its authority, it provides grounds for a court to vacate that aspect of its decision."). Accordingly, UBS objects to any and all portions of Redeemer's Proof of Claim that rely on, or relate to, these modifications to the Partial Final Award.

III. ANY VALUATION OF REDEEMER'S CLAIMS MUST TAKE INTO ACCOUNT RECIPROCAL OBLIGATIONS REDEEMER OWES TO THE DEBTOR.

33. In addition to the vacatur issues described above, two of the largest components of its overall Damage Claim against the Debtor's estate—namely, its claims relating to the "Cornerstone Award" and the "Deferred Fee Claim"—are amounts on which Redeemer has no legitimate hope of any real recovery. This is due entirely to reciprocal rights relating to the "Cornerstone Award" and "Deferred Fee Claim" that Redeemer owes to the Debtor itself under the terms of the Arbitration Award, as well as the binding "Plan and Scheme" that governs the conduct of the Crusader Fund dissolution.

34. **First**, Redeemer's Proof of Claim attributes $71,894,891 of its overall claims to what it refers to as the "Cornerstone Award." (Ex. A, POC Rider at 2.) This is a reference to the order in the Final Award that HCM pay $48,070,407 to purchase the Cornerstone shares from Redeemer at a fair market valuation of $3,241.43 per share (plus an additional $23,824,484 in prejudgment interest). (Ex. C, FA at 17; *see also* Ex. B, PFA at 48, 55.) Under the terms of the Final Award, however, the obligations with regard to the "Cornerstone Award" run both ways. In fact, the Final Award is clear that "[w]hen the amount awarded for the Cornerstone claim is paid by" the Debtor—including, for instance, pursuant to any confirmed plan of reorganization or

liquidation in these proceedings—Redeemer immediately "shall cause the Crusader Fund to tender its Cornerstone shares to [the Debtor]." (Ex. C, FA at 17; *see also* Ex. B, 55.)

35. In other words, upon receipt of payment by HCM of the "Cornerstone Award" portion of its claim, Redeemer must immediately cause the specific Cornerstone shares in question (which are currently in Redeemer's control) to be turned over to HCM. This remains true even if Redeemer only recovers pennies on the dollar for its overall prepetition claim under any ultimate plan of reorganization or liquidation. What that means is that the true "value" of Redeemer's "Cornerstone Award" claim must take into account the need to immediately give up the value of the Cornerstone shares themselves. Based on recent valuations of the Cornerstone shares in question, the "value" of such claim against the Debtor's estate is far less than $71.9 million. By UBS's estimate, the shares are worth approximately $40 million—potentially more. In all likelihood, Redeemer will tender more in value to HCM when it is forced to turn over the Cornerstone shares than it could ever recover on this portion of its prepetition claims.

36. **Second**, $43,105,395 of the Redeemer Claim is based on its so-called "Deferred Fee Claim." (Ex. A, POC Rider at 1.) This appears to represent the $32,313,000 HCM was ordered to pay in the Final Award as a result of Redeemer's "Deferred Fee Claim" and $10,792,395 in prejudgment interest. But under the Crusader Fund's Plan and Scheme—contracts to which both Redeemer and the Debtor are parties—Redeemer has no right to retain the full $32,313,000 of such "Deferred Fees." Instead, upon a final and full liquidation of all remaining Crusader Fund interests, such fees will take a "round trip" and the contractual Deferred Fees must be paid back by Redeemer to HCM. (Ex. B, PFA at 9 ("Deferred Fees were annual performance fees payable to Highland but deferred until, as, and when there would be a 'complete liquidation' of the Crusader Funds' assets.").) As with the obligation to turn over the Cornerstone shares, this

obligation to pay back the Deferred Fees will likely trigger upon any payment of the allowed prepetition claim amount as a result of HCM's bankruptcy. Moreover, as with its claim relating to the Cornerstone shares, Redeemer will almost certainly end up giving more to the Debtor through this pay-back obligation than it would receive on its "Deferred Fee Claim" under any plan of restructuring or liquidation.

37. In light of these reciprocal obligations owed by Redeemer to the Debtor, the $115 million in claim value that Redeemer's Proof of Claim attributes to the Cornerstone Award and Deferred Fee components is vastly overstated, to say the least. In reality, Redeemer will likely be forced to turn over assets to the Debtor that are worth markedly more than the amounts it might ultimately recover on these components of its overall Damage Claim.

CONCLUSION

38. For the foregoing reasons, UBS respectfully submits that Redeemer's Proof of Claim is improper and overstated and, thus, requests that it be appropriately reduced and disallowed.

DATED this 26 day of August, 2020.

LATHAM & WATKINS LLP

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CERTIFICATE OF SERVICE

I, Martin Sosland, certify that the *Objection to the Proof of Claim Filed by Redeemer Committee to the Highland Crusader Fund* was filed electronically through the Court's ECF system, which provides notice to all parties of interest.

Dated: August 26, 2020.

/s/ *Martin A. Sosland*
Martin A. Sosland

Appendix Exhibit 51

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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.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
v.	§	_____
	§	
PATRICK HAGAMAN DAUGHERTY,	§	
	§	
Defendant.	§	
	§	

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

DEBTOR'S (I) OBJECTION TO CLAIM NO. 77 OF PATRICK HAGAMAN DAUGHERTY AND (II) COMPLAINT TO SUBORDINATE CLAIM OF PATRICK HAGAMAN DAUGHERTY

COMES NOW Highland Capital Management, L.P., the debtor and debtor-in-possession ("Debtor" or "Plaintiff") in the above-captioned chapter 11 case ("Bankruptcy Case"), filing the *Debtor's (i) Objection to Claim No. 77 of Patrick Hagaman Daugherty and (ii) Complaint to Subordinate Claim of Patrick Hagaman Daugherty* (the "Complaint") objecting to Proof of Claim No. 77 (amending and superseding an earlier-filed Proof of Claim No. 67) (the "Daugherty Claim") filed by Patrick Hagaman Daugherty ("Daugherty" or "Defendant") on April 6, 2020, and seeking subordination of the Daugherty Claim. In support of the Complaint, the Debtor alleges as follows:

I. NATURE OF THE ACTION

1. Daugherty is a former limited partner of the Debtor and a former officer of the Debtor's general partner, Strand Advisors, Inc. ("Strand"). On May 28, 2009, his employment by Strand was terminated for cause. Slightly over two years later, on September 28, 2011, he resigned from the Debtor. Litigation ensued in Texas state court (the "Texas Action"). The Debtor prevailed on claims for breach of contract and breach of fiduciary duty against Daugherty for non-monetary damages and obtained an award of $2.8 million in attorneys' fees. Each of Daugherty's claims against the Debtor was unsuccessful. He did, however, prevail on a third-party claim against Highland Employee Retention Assets LLC ("HERA"), an employee deferred compensation vehicle. He was awarded the value of his ownership interests—$2.6 million—on a claim against HERA for breach of the implied covenant of good faith and fair dealing in connection with actions that allegedly deprived him of the value of those interests (the "HERA Judgment"). Daugherty was unable to collect on the HERA Judgment against HERA. Not wishing to return to Texas state court, he sued the Debtor, HERA, and others in the Delaware

Chancery Court (the "Delaware Action"), alleging in part that HERA assets had been fraudulently transferred to the Debtor.

2. The Daugherty Claim attaches and incorporates his operative complaint in the Delaware Action, which was in trial on the Petition Date (as defined below), to which he adds two new claims to reach an asserted total of "at least $37,483,876.62." The Daugherty Claim has the following components:

(i) In the Delaware Action, he sought: (a) to collect the HERA Judgment of $2.6 million plus interest of $1.13 million; (b) a distribution of HERA assets, which he values at $26 million, on account of what he contends is his still-existing interest in HERA, notwithstanding that he was already awarded the value of that interest in the Texas Action; and (c) indemnification for his attorneys' fees incurred in the Texas Action and the Delaware Action under the Debtor's partnership agreement.

(ii) Defamation in a November 30, 2017, press release.

(iii) Indemnification as a former partner of the Debtor for any personal tax liability arising from a pending 2008/09 IRS audit of the Debtor that may result in additional pass-through income to the Debtor's partners. He values this claim at $6,751,902.41, plus interest of $992,790.40.

3. As addressed herein: (i) the Debtor will not object to allowance of Daugherty's claim for the value of his HERA Judgment plus interest to the Petition Date—totaling $3,722,019; (ii) the Debtor objects to Daugherty's $26 million claim for a distribution of his asserted interest in HERA's assets on the basis that it would constitute a double recovery on his HERA Judgment, and in any event could be no more than $4,967,828; (iii) the Debtor objects to indemnification of Daugherty's attorneys' fees in his personal litigation with the Debtor; (iv) the Debtor objects to Daugherty's defamation claim as time-barred under the "single publication rule"; and (v) the Debtor objects to Daugherty's claim that the Debtor is required to pay his personal taxes; furthermore, any such claim approximates $740,000 and not $6.7 million, and any such claim is subordinated under Bankruptcy Code § 510(b).

4. Accordingly, this adversary proceeding is brought pursuant to Rules 7001(1), (8) and (9) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and sections 502, 510(b), and 541 of title 11 of the United States Code (the "Bankruptcy Code") to (i) disallow the Daugherty Claim under section 502(a) as unenforceable under applicable law and (ii) subordinate the Daugherty Claim under section 510(b).

II. JURISDICTION AND VENUE

5. 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.

6. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

7. 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.

8. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

III. THE PARTIES

9. The Debtor is a limited partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

10. Defendant Patrick Hagaman Daugherty is an individual with an address at 3621 Cornell Avenue, Suite 830, Dallas, Texas 75205.

IV. CASE BACKGROUND

11. On October 16, 2019 (the "Petition Date"), 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 "Bankruptcy Case").

12. On October 29, 2019, the United States Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors.

13. On December 4, 2019, the Delaware Court entered an order transferring venue of the Bankruptcy Case to this Court [Docket No. 186].[2]

14. On January 9, 2020, this Court entered an Order [Docket No. 339] on 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] pursuant to which an independent board of directors (the "Independent Board") was appointed at the Debtor's general partner, Strand.

15. 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.

V. OBJECTION TO CLAIM

A. Legal Standard

16. The Bankruptcy Code establishes a burden-shifting framework for proving the amount and validity of a claim. "A claim . . . , proof of which is filed under section 501 [of the Bankruptcy Code], is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). "A proof of claim executed and filed in accordance with the [Bankruptcy Rules] shall

[2] All docket numbers refer to the main docket for the Bankruptcy Case maintained by this Court.

constitute *prima facie* evidence of the validity and amount of the claim." FED. R. BANKR. P. 3001(f); *see also In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006). However, the ultimate burden of proof for a claim always lies with the claimant. *Armstrong*, 347 B.R. at 583 (citing *Raleigh v. Ill. Dep't of Rev.*, 530 U.S. 15 (2000)).

B. <u>The Claim for Defamation Is Time-Barred</u>

17. Daugherty asserts a claim against the Debtor for allegedly "defaming him on its website pursuant to its November 30, 2017 press release titled *Matt Wirz, Wall Street Journal Fake News, Sloppy and Malicious Reporting*."[3] As of the Petition Date, Daugherty had not filed a lawsuit against the Debtor or any other party on the basis of defamation.

18. Defamation carries a one-year statute of limitations. TEX. CIV. PRAC. & REM. CODE § 16.002(a) ("A person must bring a suit for malicious prosecution, libel, slander, or breach of promise of marriage not later than one year after the day the cause of action accrues.") The statute runs from the date of first publication of the allegedly defamatory statement on the defendant's website. *Glassdoor, Inc v. Andra Group, LP*, 575 S.W.3d 523, 528–29 (Tex. 2019); *Mayfield v. Fullhart*, 444 S.W.3d 222, 230 (Tex. App.—Houston [14th Dist.] 2014, no pet.). The "single publication rule" serves to "avoid[ ] the potential for endless retriggering of the statute of limitations, multiplicity of suits, and harassment of defendants, along with the corresponding chilling effect on internet communications." *Glassdoor*, 575 S.W.3d at 528–529 (internal citations omitted). Accordingly, Daugherty was time-barred from asserting a defamation claim on December 1, 2018.

19. The Debtor believes this issue is dispositive but reserves the right to object on any other basis if necessary.

[3] The press release has been removed from the Debtor's website.

C. <u>The Claim for Tax Indemnification or a Tax Distribution Lacks Merit, Is Overstated, and Must Be Subordinated if Allowed</u>

(i) Daugherty Has No Right to Tax Indemnification

20. The Daugherty Claim has a damages breakdown that contains what is referred to as an indemnification claim of $992,790.40, including interest and penalties, on account of a pending IRS audit of the Debtor. Daugherty states:

> Daugherty is a former senior partner of Highland Capital Management, LP and this claim arises out of a 2008/2009 pending undecided audit/dispute (06252018 0028) between the Debtor and the Internal Revenue Service that remains unresolved.

21. The IRS audit of the Debtor's return for 2007-08 (not 2008-09 as erroneously stated in the Daugherty Claim) resulted in a determination that additional pass-through distributions were required to be made to the Debtor's partners. The audit determination is subject to appeal. Daugherty's 4% share of the additional distributions comes to $1,475,860. Assuming a 35% marginal rate ($440,227), and adding penalties ($88,045) and interest ($212,035), his total exposure approximates $740,307 at this time—not $992,790.

22. Regardless of amount, Daugherty has no right to mandatory indemnification of his personal tax liability as a former partner of the Debtor. Section 4.1(h) of the Partnership Agreement provides for indemnification of limited partners in the "sole and unfettered discretion" of the general partner. It does provide for mandatory indemnification of the general partner, Strand, of which Daugherty was an officer, but that provision is inapplicable to his personal tax liabilities. In relevant part, Section 4.1(h) reads as follows:

> <u>Indemnification</u>. 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.

23. Daugherty's personal income taxes on distributions received in his capacity as a limited partner of the Debtor do not fall within the Debtor's indemnification of its general partner for "liabilities, losses, and damages incurred . . . 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 . . . ." Daugherty incurred personal taxes on his income. The closest nexus to the Debtor would be that an indeterminate portion of that income came from the Debtor. He did not incur any loss or liability in his asserted capacity as a "GP Party," *i.e.*, an officer of Strand, the indemnified general partner. Therefore the indemnity clause does not apply as a matter of common sense and by its express terms.

24. Nor does Daugherty have a claim for a tax distribution from the Debtor. The last Partnership Agreement to which Daugherty was a signatory was the *Second Amended and Restated Agreement of Limited Partnership*. Distributions are addressed in section 3.9, which provides in part:

> (a) General. The General Partner shall review the Partnership's accounts at the end of each calendar quarter to determine whether distributions are appropriate. 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. 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. . . .
>
> (b) Tax Distributions. The General Partner shall promptly 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"). To satisfy this requirement, the Partnership shall pay to each Partner on or before April 14 of each Fiscal Year….

25. Partners do not have a right to distributions as if they were creditors. That is why section 3.9(a) clearly states that distributions will be limited if funds are insufficient to pay current debt. A partnership agreement is simply an agreement between partners as to when and how distributions may be made if the partnership has the funds to do so. Even if there were such an obligation, the Debtor had not made any distributions that would be subject to tax, and so would have had no obligation *at that time* to make tax distributions. And even if the Partnership Agreement were interpreted to call for a tax distribution to be made on account of income that is imputed to its partners ten years later as a result of the IRS audit (which is still contingent), the Debtor does not have funds in excess of current debt. Thus Daugherty has no claim for tax indemnification or a tax distribution.

(ii) A Partner's Claim for Tax Indemnification or Distributions under the Partnership Agreement Must Be Subordinated under Bankruptcy Code § 510(b)

26. Even if Daugherty had a claim under the Partnership Agreement, it would be subordinated under Bankruptcy Code § 510(b), which provides:

> (b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

27. Section 510(b) applies to the ownership interests in a limited partnership. *See In re SeaQuest Diving, LP*, 579 F.3d 411 (5th Cir. 2009); *Templeton v. O'Cheskey (In re Am. Hous. Found.)*, 785 F.3d 143, 154 (5th Cir. (2015); *In re Garrison Mun. Partners, LP*, 2017 Bankr. LEXIS 3765, *8 (Bankr. S.D. Tex. Oct. 31, 2017).

28. Thus, there are three distinct categories of claims subject to mandatory subordination under section 510(b): (1) a claim arising from rescission of a purchase or sale of a

security of the debtor (the rescission category); (2) a claim for damages arising from the purchase or sale of a security of the debtor (the damages category); and (3) a claim for reimbursement or contribution allowed under 11 U.S.C. § 502 on account of either (1) or (2). *SeaQuest*, 579 F.3d at 418.

29. Even if Daugherty had a claim under the Partnership Agreement to cover his taxes, such a claim would be a claim for damages "arising from" the purchase of a security (category 2). The category covers claims arising from not just the purchase itself but all claims arising thereafter as incidents of ownership, except where the claim is genuinely a "debt"—*e.g.*, where it arises from a documented loan or other distinct transaction between the partner and the partnership.

> For purposes of the damages category, the circuit courts agree that a claim arising from the purchase or sale of a security can include a claim predicated on post-issuance conduct, such as breach of contract. They also agree that the term "arising from" is ambiguous, so resort to the legislative history is necessary. For a claim to "arise from" the purchase or sale of a security, there must be some nexus or causal relationship between the claim and the sale. Further, the fact that the claims in the case seek to recover a portion of claimants' equity investment is the most important policy rationale.

SeaQuest, 579 F.3d at 421 (internal citations omitted). In *SeaQuest*, the Fifth Circuit ruled that a settlement that essentially effected a rescission and, when breached, resulted in a judgment, was nonetheless subordinated under section 510(b). *Id*. at 423-26 ("For purposes of § 510(b), we may look behind the state court judgment to determine whether the . . . claim 'arises from' the rescission of a purchase or sale of a security of the debtor.")

30. In *Garrison Municipal Partners*, a redemption claim arising from withdrawal from the partnership was subordinated under section 510(b). The situations identified by the court in which section 510(b) *would not* apply illustrate why it *would* likely apply here:

> Debtor's failure to pay the Greens' claim upon withdrawal is a claim for breach of contract arising from the withdrawal. The Greens are seeking to recover their

> equity investment. Thus, under Section 510(b), their claim is subordinated and has the same priority as the other prepetition investors.
>
> The Greens' argument that their notice of withdrawal is a redemption claim similar to those in *In re Montgomery Ward Holding Co*. 272 B.R. 836 (Bankr. D. Del. 2001), *abrogated on other grounds by In re Telegroup, Inc*., 281 F.3d 133 (3d Cir. 2002) lacks merit. A redemption claim requires a separate note, *see SeaQuest*, 579 F.3d, at 423, and must be independent of the partnership agreement. *See In re American Housing Foundation*, 785 F.3d 143 (5th Cir. 2015). In this case, the notice of withdrawal was not self-executing so as to give the Greens an interest in the assets of the partnership. The partnership agreement required action on the part of the general partner to repay the Greens equity interests.

Garrison Mun. Partners, 2017 Bankr. LEXIS 3765 at *9; *see also Official Comm. of Unsecured Creditors v. FLI Deep Marine LLC (In re Deep Marine Holdings, Inc.)*, 2011 Bankr. LEXIS 579 (Bankr. S.D. Tex. Jan. 19, 2011) (claims for right of appraisal, fraud, and accounting were causally linked to status as shareholders and so were subordinated); *Queen v. Official Comm. of Unsecured Creditors (In re Response U.S.A., Inc.)*, 288 B.R. 88 (D.N.J. 2003) (shareholder cannot avoid subordination under 11 USC § 510(b) by placing risk-limiting provision in stock purchase agreement in order to claim creditor status in bankruptcy proceedings).

31. By comparison, *Stucki v. Orwig*, No. 3:12-CV-1064-L, 2013 U.S. Dist. LEXIS 53139, at *15-19 (N.D. Tex. Apr. 12, 2013) found section 510(b) inapplicable where the claim arose from breach of a settlement agreement by which the shareholders withdrew a lawsuit seeking to compel a shareholders' meeting and election of directors. *Id.* at *17. The court reasoned as follows: "[I]n both *In re SeaQuest* and *In re Deep Marine Holdings*, the claims essentially sought to recover the claimants' equity interests in the debtor. There is no suggestion in the record that the shareholders sought to do the same here. The court therefore concludes that the connection or causal relationship between the Breach Claim and the actual or virtual purchase or sale of any security interests in FirstPlus is too attenuated to bring it within § 510(b)'s reach." *Id*. at *19. That decision seems debatable, but in any event, it is a far cry from

this case, where what Daugherty is effectively demanding is a distribution on account of his partnership interest. Such a claim should fall squarely under section 510(b).

32. Daugherty is asserting a right under the Partnership Agreement to cover the taxes on his distributions from the partnership. To the extent he has such a right, it is an incident of ownership arising from the Partnership Agreement and not from any ancillary transaction such as a loan. It is in the nature of a "partner claim," not a creditor claim, and must be subordinated.

D. The Debtor Does Not Object to Allowance of a Claim for the Amount of the HERA Judgment, but Daugherty Is Not Entitled to a Double Recovery

33. Daugherty was an officer of Strand and a limited partner of the Debtor. On May 28, 2009, his employment by Strand was terminated for cause. On September 28, 2011, he resigned from the Debtor. At the time he resigned, Daugherty owned units of HERA, which was a deferred compensation plan that held interests in certain Highland-related entities. Daugherty owned (and in his view still owns) 19.1% of the HERA units. The other 80.91% is owned by the Debtor.

34. On February 16, 2012, HERA enacted a *Second Amended and Restated LLC Agreement* (the "HERA Agreement"). Section 12.1 provided that legal fees incurred in a lawsuit relating to the HERA Agreement may be offset against the capital balance of the LLC member bringing the lawsuit.

35. After Daugherty filed claims against HERA and the Debtor in the Texas Action, the Debtor bought out all other members of HERA and, based on Section 12.1, issued a capital balance statement of "zero" to Daugherty for his HERA membership units. On April 30, 2013, HERA assigned to the Debtor all of HERA's remaining assets, consisting of (i) $9,527,375 in limited partnership interests in Highland Restoration Capital Partners, L.P. ("RCP"); (ii) 5,424

shares in stock in NexPoint Credit Strategies Fund ("NHF"); and (iii) $6,338,702 in cash[4] (the "Distribution Assets").

36. In December 2013, the Debtor placed in escrow Daugherty's alleged ratable 19.1% share of the Distribution Assets, namely (i) $1,820,050 in RCP units, (ii) the cash equivalent of 1,088 shares of NHF, and (iii) $1,201,502 in cash (the "Escrow Assets"). The escrow agreement stated that if Daugherty prevailed against HERA, the Debtor would return the Escrow Assets to HERA.

37. Daugherty prevailed against HERA in the Texas Action. The jury found that HERA used Section 12.1 to deny Daugherty the value of his HERA units, that this breached HERA's duty of good faith and fair dealing, and that the market value of the HERA units was $2.6 million. On July 14, 2014, the Texas court rendered the HERA Judgment, comprising a judgment against HERA of $2.6 million, plus prejudgment and post-judgment interest at 5%.

38. Daugherty was unable to collect the HERA Judgment from HERA. On December 1, 2016, the escrow agent resigned and returned the Escrow Assets to the Debtor rather than HERA, leaving HERA without assets. In the Delaware Action, Daugherty asserts, *inter alia*, claims against the Debtor, HERA, and Highland ERA Management, LLC for fraudulent transfer, promissory estoppel, and unjust enrichment. Daugherty alleges the Escrow Assets were pledged as security against his claims and should have been transferred to HERA and then to him after confirmation of the HERA Judgment on appeal.

39. The Debtor has defenses to the constructive fraudulent transfer claims. It contends there was no transfer from HERA to the Debtor, because it was the Debtor that placed the Escrow Assets in escrow, not HERA. Second, the Debtor claims it could retain the Escrow

[4] No actual cash moved from HERA to the Debtor on April 30, 2013. Instead, this cash number represents the (i) the cash distributions from HERA to the Debtor in 2013, (ii) HERA's repayment of expenses to the Debtor in 2013, and (iii) the cash distributions from the monetization of RCP assets from April 2013 to December 2013.

Assets because it paid HERA's legal fees after April 30, 2013 in an amount ($9 million) exceeding the amount of the Escrow Assets and, therefore, (i) had a right as a creditor of HERA to recoup those fees and/or (ii) gave reasonably equivalent value. The Debtor contends promissory estoppel and unjust enrichment should not apply because a written contract governed the disposition of the Escrow Assets.[5]

40. Nonetheless, after review of these defenses by the Independent Board and based on rulings in the Delaware Action supportive of Daugherty's actual fraudulent transfer claim, the Debtor has determined not to object to allowance of the Daugherty Claim in the amount of the HERA Judgment ($2.6 million), plus prejudgment interest ($279,500) and post-judgment interest to the Petition Date ($842,519), totaling $3,722,019.

41. However, the Daugherty Claim *also* asserts that Daugherty is entitled to the value of the Distribution Assets, which Daugherty alleges is $26,009,573. This would constitute a double recovery on the HERA Judgment to which the Debtor objects. In addition, the amount is grossly overstated. Under no theory would Daugherty ever be entitled to more than his 19.1% share of the Distribution Assets. Consistent with the opinion of Daugherty's own expert in the Delaware Action, Paul Wazzan, **he would be entitled to 19.1% of the claimed value of $26,009,573, or $4,967,828**.

42. Moreover, any such recovery should be disallowed as a double recovery, because the HERA Judgment was based on Daugherty having been deprived of the value of his interest in HERA. Logically, therefore, that interest had no further value.

[5] *SIGA Techs., Inc. v. Pharmathene, Inc.*, 67 A.3d 330, 348 (Del. Super. 2013) ("Promissory estoppel does not apply… where a fully integrated, enforceable contract governs the promise at issue"); *In re HH Liquidation, LLC*, 590 B.R. 211, 285-87 (Bankr. D. Del. 2018) ("[A] written contract defeats a claim for unjust enrichment even if the defendant is not a signatory to the contract.")

43. Daugherty contends that he retained his former 19.1% interest in HERA notwithstanding the award, because the court struck-through language in the judgment that would have made express that Daugherty had no further interest in HERA:

> Furthermore, the Court, after considering the jury's findings regarding HERA's breach of the implied covenant of good faith and fair dealing, finds and concludes that Daugherty is entitled to relief hereinafter given.
>
> It is therefore further ORDERED that Daugherty have and recover $2,600,000 from HERA, ~~representing the full value of Daugherty's interest in HERA as determined by the jury.~~
>
> It is further ORDERED that Daugherty shall no longer have any ownership or other interest in HERA or any proceeds or accounts arising from Daugherty's prior interest in HERA that were not distributed to Daugherty prior to the entry of this judgment, Daugherty having been awarded the full value of that interest in HERA as determined by the jury.
>
> It is further ORDERED that total amount of the actual damages rendered against HERA herein will bear prejudgment interest at the rate of 5% simple interest from May 22, 2012, until the day before this judgment is signed.
>
> It is further ORDERED that the total amount of the judgment here rendered against HERA will bear interest at the rate of 5% per annum, compounded annually, from the date this judgment is signed until paid.

44. Although Daugherty divines that the Texas court intended to confirm that he still owns 19.1% of HERA, it is far more likely that the court struck the language because it was outside the scope of the jury's findings, concerning instead the prospective effect of the judgment, which was not before the court. The very nature of Daugherty's claim was that the actions that the jury found had breached the implied covenant and fair dealing had deprived him of the value of his membership units in HERA. Even if those membership units were not

extinguished, Daugherty's capital account would have been reduced to zero by the award, entitling him to no further distributions. It would be a double recovery to Daugherty if he also retained that ownership interest and recovered the value of the Distribution Assets *again*. Such an outcome would be fundamentally inequitable to the interests of other creditors in this case and should not be allowed.

E. Daugherty Is Not Entitled to Indemnification of Fees in His Personal Litigation with the Debtor

45. Finally, Daugherty also asserts two indemnification claims against the Debtor for fees incurred defending claims against him by the Debtor in the Texas Action based on his employment performance, which he states were nonsuited, and for "fees on fees" for prosecuting his asserted right to indemnification in the Delaware Action. It appears from the proof of claim that these claims are represented by two line items of $3,139,452 and $3,479,318. These portions of the Daugherty Claim should be disallowed.

46. The claims in the Texas Action for which Daugherty allegedly is entitled to indemnification, as reflected on the jury verdict (referenced as Exhibit O to the Daugherty Claim), are as follows:

Claim	Description of Claim	Outcome
Highland 1	Declaratory judgment that Highland did not owe Daugherty any compensation or payments under Highland's long-term incentive plan ("LTIP") because his conduct forfeited his rights. Ex. O at 8.	Voluntarily dismissed pre-trial
Highland 2	Breach of employment agreement and a buy-sell agreement relating to purported complaints from other Highland employees about Daugherty and purported disclosures of confidential information that "violated his common law duties to Highland, as well as several agreements between him and Highland." Ex. O at 9.	***Jury found Daugherty liable.***

Highland 3	Breach of fiduciary duty and a claim of entitlement to "all compensation paid to Daugherty during the time he was breaching his duties, as well as to an award of exemplary and punitive damages." Ex. O at 9.	***Jury found Daugherty liable.***
Highland 4	A claim for violation of the Texas Theft Liability Act related to purported theft of Highland's trade secrets.	Voluntarily dismissed pre-trial
Highland 5	Tortious interference with Highland's business relations seeking exemplary and punitive damages	Jury found Daugherty not liable.
Highland 6	Defamation related to Daugherty's purported statements about Highland to potential investors	Jury found Daugherty not liable.
Highland 7	Misappropriation of trade secrets and other confidential information, including on behalf of Cornerstone	Voluntarily dismissed pre-trial
Highland 8	Conversion related to purported conversion of confidential information, including on behalf of Cornerstone	Voluntarily dismissed pre-trial
Highland 9	Business disparagement, including on behalf of Cornerstone. *Id*. at 13-15	Voluntarily dismissed pre-trial

47. The Debtor prevailed on claims for breach of the Employment Agreement and for breach of fiduciary duty, which Daugherty minimizes as "only" having to do with confidential information with no compensatory damages, but on which the Debtor was awarded $2.8 million in attorneys' fees. The Debtor was found to have complied with the Employment Agreement and honored all obligations concerning the LTIP Plan, the HERA Agreement, and severance pay.

48. As discussed above in connection with Daugherty's attempt to be indemnified for his personal tax liability, indemnification of limited partners is discretionary under the Debtor's Partnership Agreement; hence, Daugherty relies upon its mandatory indemnification of the general partner, Strand, under Section 4.1(h). He claims to be a "GP Party," which is "any

director, officer, employee, agent, or representative of the General Partner." GP Parties are indemnified for:

> all liabilities, losses, and damages incurred … [including attorneys' fees] by reason of any act performed or omitted to be performed in the name of or on behalf of [the Debtor] or in connection with the Partnership's business … to the fullest extent permitted by the Delaware Act … [except] for any action or inaction that constitutes gross negligence or willful or wanton misconduct.

49. Daugherty claims he is entitled to indemnification as a GP Party because all of his litigation expense was purportedly "in connection with [the Debtor's] business." He contends there is no limitation to defensive litigation expenses, nor any even any requirement that he be successful.

50. Daugherty was a GP Party as an officer of Strand only until May 29, 2009, and he resigned from the Debtor on September 28, 2011. Other than the first non-suited claim, which relates to his personal compensation, all of the claims for which he was not found liable involve actions taken well after he left Strand and even after he left the Debtor, as to which he was not a GP Party. None of the Debtor's claims against Daugherty related to his time as an officer of Strand, when he was a GP Party.

51. Second, Daugherty was not an "agent" for any relevant purpose that would make him an indemnified GP Party for these purposes. None of the actions for which the Debtor sued him were taken at the instruction or on behalf of the General Partner as its "agent or representative." *See Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 163 (Del. Ch. 2003) (in reference to 8 Del. C. §145, governing indemnification of corporate officers, "I read §145 as embracing the more restrictive common law definition of agent, which generally applies only when a person (the agent) acts on behalf of another (the principal) in relations with third parties."). Furthermore, Delaware "[c]ourt[s] limit[] agency in the indemnification context to only those situations when an outside contractor can be said to be acting as an arm of the

corporation vis-à-vis the outside world." *Pasternack v. N.E. Aviation Corp.*, No. 12082-VCMR, 2018 WL 5895827, at *8 (Del. Ch. Nov. 9, 2018).

52. Third, even if Daugherty were to prove he was a GP Party at a relevant time, and even if he were to prove that he was acting in the capacity of an agent—*i.e.*, interacting on behalf of Strand with third parties—decisions under the Delaware General Corporation Law ("DGCL") hold that a director is not entitled to indemnification in respect of employment litigation between the director and the corporation. *See Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 594 (Del. Ch. 1994) (holding that former officer was not entitled to indemnification for claims relating to breach of her employment contract because those claims did not involve the officer's duties to the corporation and its shareholders); *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 562 (Del. 2002) ("Although Cochran's termination is the event that triggered the relevant provisions of the employment contract, Cochran's decision to breach the contract was entirely a personal one, pursued for his sole benefit.")

> When a corporate officer signs an employment contract committing to fill an office, he is acting in a personal capacity in an adversarial, arms-length transaction. To the extent that he binds himself to certain obligations under that contract, he owes a personal obligation to the corporation. When the corporation brings a claim and proves its entitlement to relief because the officer has breached his individual obligations, it is problematic to conclude that the suit has been rendered an "official capacity" suit subject to indemnification under § 145 and implementing bylaws.

Paolino v. Mace Sec. Int'l, Inc., 985 A.2d 392, 404 (Del. Ch. 2009) (citing the *Cochran* Chancery Court decision, 2000 Del. Ch. LEXIS 179, 2000 WL 1847676, at *6 (reversed in part on other grounds).

53. The Daugherty Claim anticipates the defense under *Cochran* that the subject claims were "personal employment-related" claims, and attempts to distinguish it on the basis that the Delaware Revised Uniform Limited Partnership Act ("DRULPA") is more permissive than the DGCL and does not preclude indemnification even when the indemnitee has been

adjudged liable to the partnership (if a court deems it fair in view of all the circumstances). If it provides for coverage to the full extent permitted under the law, then it is to be provided unless the partnership agreement or law provide otherwise.

54. Citing *Paolino*, *supra*, Daugherty specifically argues that *Cochran* is inapplicable because his employment conduct was not "personal" in distinction from the compensation issues in *Cochran*. Regardless, he did not incur losses "by reason of any act performed or omitted to be performed . . . in connection with the Partnership's business" under section 4.1 of the Partnership Agreement. The "by reason of the fact" standard is not met where the claims at issue do not involve the exercise of judgment, discretion, or decision-making authority on behalf of the corporation. *Batty v. UCAR Int'l Inc.*, No. 2018-0376-KSJM, 2019 Del. Ch. LEXIS 114, at *19 (Del. Ch. Apr. 3, 2019) (quoting *Paolino*). Here, the Debtor's Claims 4-9 related solely to conduct after Daugherty left the Debtor's employ. Daugherty was found liable on Claims 2 and 3, and the Partnership Agreement provides that "the Partnership shall have no obligation to indemnity and hold harmless a GP Party for any action or inaction that constitutes gross negligence or willful or wonton misconduct.")

55. Even if Daugherty were to surmount all other hurdles, even under his construction, any rights to fees would be discretionary. The Debtor respectfully submits that the facts do not support penalizing other creditors by awarding Daugherty fees in his personal litigation with the Debtor on account of his status as an officer of Strand, relating to conduct that had nothing to do with actions taken or not taken in his capacity as an officer of Strand, and largely post-dating that tenure.

56. Finally, Daugherty should have to segregate his attorneys' fees between those incurred on any indemnifiable claims and other claims, in particular those on his counter- and third-party claims. Indemnification under Partnership Agreement §4.1(h) relates to acts

performed or not performed by Daugherty (as an agent of Strand) in connection with the Debtor's business. Daugherty's counter- and third-party claims in the Texas Action related to (i) his departure from the Debtor (defamation and breach of employment agreement by the Debtor relating to severance, all of which Daugherty lost), (ii) a separate incentive vehicle called Sierra Verde which was wound down separate from Daugherty's resignation, (iii) claims related to Daugherty's value in HERA, and (iv) claims in relation to his LTIP.[6] Of these, categories (ii) and (iii) related to third-party claims against compensation vehicles, and Daugherty lost claims in categories (i) and (iv). In fact, Daugherty succeeded on only one of his twenty total affirmative claims.

VI. FIRST CLAIM FOR RELIEF

(Subordination under Bankruptcy Code § 510(b))

57. The Debtor repeats and re-alleges as if set forth herein all of the foregoing factual allegations.

58. Even if Daugherty had a claim under the Partnership Agreement, it would be subordinated under Bankruptcy Code § 510(b), which provides:

> (b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

59. Section 510(b) applies to the ownership interests in a limited partnership. *See SeaQuest*, 579 F.3d 411; *Templeton*, 785 F.3d at 154; *Garrison Mun. Partners*, 2017 Bankr. LEXIS 3765 at *8. Accordingly, judgment should issue declaring that the Daugherty Claim is subordinated pursuant to 11 U.S.C. § 510(b) and shall, subject to such other defenses or

[6] Daugherty's *Third Amended and Restated Answer, Counterclaim, and Third-Party Petition* in the Texas Action at ¶¶ 122 – 183.

objections as may exist with respect to the Daugherty Claim, have the same rank and priority as all partnership interests.

VII. RESERVATION OF RIGHTS

60. The Debtor reserves its right to supplement or modify this Complaint to assert such further objections, claims, or arguments as may later become available or apparent.

VIII. PRAYER

WHEREFORE, the Debtor prays for judgment as follows:

(i) For the allowance of the Daugherty Claim in the amount of $3,722,019 (the HERA Judgment and interest to the Petition Date);

(ii) For the disallowance of the remainder of the Daugherty Claim in its entirety;

(iii) For subordination of the Daugherty Claim pursuant to 11 U.S.C. § 510(b);

(iv) For costs of suit incurred herein; and

(v) For such other and further relief as the Court deems just and proper.

Dated: August 31, 2020.

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B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	**ADVERSARY PROCEEDING NUMBER** (Court Use Only)

PLAINTIFFS	**DEFENDANTS**
Highland Capital Management, L.P.	Patrick Hagaman Daugherty
ATTORNEYS (Firm Name, Address, and Telephone No.) Pachulski Stang Ziehl & Jones, LLP, 10100 Santa Monica Blvd, 13th Flr, Los Angeles, CA 90067, (310) 277-6910	**ATTORNEYS** (If Known) Jason Kathman, Pronske & Kathman PC, 2701 Dallas Parkway, Ste 590, Plano, TX 75093
PARTY (Check One Box Only) ■ Debtor □ U.S. Trustee/Bankruptcy Admin □ Creditor □ Other □ Trustee	**PARTY** (Check One Box Only) □ Debtor □ U.S. Trustee/Bankruptcy Admin ■ Creditor □ Other □ Trustee

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

The Debtor objects to Mr. Daugherty's proof of claim in part and seeks subordination of Mr. Daugherty's claim under 11 U.S.C. 510 to the extent allowed.

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
- ☐ 11-Recovery of money/property - §542 turnover of property
- ☐ 12-Recovery of money/property - §547 preference
- ☐ 13-Recovery of money/property - §548 fraudulent transfer
- ☐ 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- ☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- ☐ 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- ☐ 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- ☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- ☐ 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- ☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- ☐ 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- ☐ 61-Dischargeability - §523(a)(5), domestic support
- ☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
- ☐ 63-Dischargeability - §523(a)(8), student loan
- ☐ 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- ☐ 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- ☐ 71-Injunctive relief – imposition of stay
- ☐ 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- ☑ 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- ☐ 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action
- ☐ 01-Determination of removed claim or cause

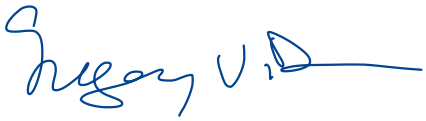
Other
- ☐ SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- ☐ 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

□ Check if this case involves a substantive issue of state law	□ Check if this is asserted to be a class action under FRCP 23
□ Check if a jury trial is demanded in complaint	Demand $ 0.00

Other Relief Sought

Disallowance of Claim No. 77 of Patrick Hagaman Daugherty in part and subordination of claim under 11 U.S.C. 510.

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 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 31, 2020	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Gregory V. Demo	

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.

Appendix Exhibit 52

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CO-COUNSEL FOR PATRICK DAUGHERTY

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.	§	

PATRICK DAUGHERTY'S MOTION TO CONFIRM STATUS OF AUTOMATIC STAY, OR ALTERNATIVELY TO MODIFY AUTOMATIC STAY

PURSUANT TO LOCAL BANKRUPTCY RULE 4001-1(b), A RESPONSE IS REQUIRED TO THIS MOTION, OR THE ALLEGATIONS IN THE MOTION MAY BE DEEMED ADMITTED, AND AN ORDER GRANTING THE RELIEF SOUGH MAY BE ENTERED BY DEFAULT.

ANY RESPONSE SHALL BE IN WRITING AND FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT 1100 COMMERCE STREET, RM. 1254, DALLAS, TEXAS 75242-1496 BEFORE CLOSE OF BUSINESS ON OCTOBER 8, 2020, WHICH IS AT LEAST 14 DAYS FROM THE DATE OF SERVICE HEREOF. A COPY SHALL BE SERVED UPON COUNSEL FOR THE MOVING PARTY AND ANY TRUSTEE OR EXAMINER APPOINTED IN THE CASE. ANY RESPONSE SHALL INCLUDE A DETAILED AND COMPREHENSIVE STATEMENT AS TO HOW THE MOVANT CAN BE "ADEQUATELY PROTECTED" IF THE STAY IS TO BE CONTINUED.

TO THE HONORABLE STACEY G. C. JERNIGAN,

UNITED STATES BANKRUPTCY JUDGE:

Patrick Daugherty ("**Daugherty**"), a creditor and party in interest in the above-referenced bankruptcy case, hereby files this *Motion to Confirm Status of Automatic Stay, or Alternatively to Modify Automatic Stay* (the "**Motion**") pursuant to 11 U.S.C. § 362(d) and would respectfully show the Court as follows:

INTRODUCTION

1. Prior to Highland Capital Management, L.P.'s ("**Highland**" or "**Debtor**") bankruptcy filing, Daugherty sued the Debtor, Highland Employee Retention Assets LLC, Highland ERA Management LLC, and James Dondero ("**Dondero**"), in the Court of Chancery of the State of Delaware (the "**Delaware Court**"). On the third day of trial, the Debtor filed the instant bankruptcy case. In addition to the case involving the Debtor, Daugherty also sued Dondero, Highland ERA Management LLC, Highland Employee Retention Assets LLC, Hunton Andrews Kurth LLP, Marc Katz, Michael Hurst, Scott Ellington, Thomas Surgent, and Isaac Leventon in a separate case pending in the Delaware Court. Recently, the Debtor sued Daugherty and objected to his claim in the adversary proceeding styled: *Highland Capital Management, L.P. v. Patrick Hagaman Daugherty*, Adv. No. 20-03017-sgj (the "**Daugherty Adversary Proceeding**"). Daugherty seeks to sever the Debtor from the pending litigation in Delaware, consolidate the two cases pending in Delaware, and proceed with his claims against the non-debtors. Although case law holds that severance of a debtor post-petition does not violate the automatic stay, Daugherty seeks confirmation from this Court in the form of an order confirming the status of the stay that his acts in Delaware to sever out the Debtor from the Highland Delaware Case (defined below) will not violate the automatic stay. Alternatively, in the event that the Court believes that the stay

needs to be modified to allow for the severance, cause exists to modify the stay to allow Daugherty to proceed in the Delaware Court.

JURISDICTION AND VENUE

2. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334(b).

3. Venue is proper in this district pursuant to 28 U.S.C. § 1408 and 1409.

4. The statutory basis for relief is 11 U.S.C. § 362(d)(1).

I. BACKGROUND

A. The Delaware Cases.

5. Prior to the Petition Date, Daugherty sued the Debtor, Highland Employee Retention Assets LLC, Highland ERA Management LLC, and Dondero in the Delaware Court in a case styled: *Daugherty v. Highland Capital Management, L.P.*, C.A. No. 2017-0488-MTZ (the "**Highland Delaware Case**").[1] In Daugherty's Second Amended Complaint filed in the Highland Delaware Case, Daugherty explains a scheme contrived by the Debtor, Highland Employee Retention Assets LLC, Highland ERA Management LLC, and Dondero to rob and divert assets that were escrowed for Daugherty.

6. During trial of the Highland Delaware Case (and after the Delaware court found that the crime-fraud exception to attorney-client privilege applied to communications with the Debtor's internal and external attorneys), Dondero and his accomplices' scheme became more clear. As a result, Daugherty filed a separate lawsuit against Dondero, Highland ERA Management LLC, Highland Employee Retention Assets LLC, Hunton Andrews Kurth LLP, Marc Katz, Michael Hurst, Scott Ellington, Thomas Surgent, and Isaac Leventon[2] in the Delaware Court in a

[1] *See* Declaration of Patrick Daugherty in Support of Motion to Confirm Status of Automatic Stay ("Daugherty Declaration") at ¶ 3.
[2] Daugherty notes that certain of these attorney defendants are still advising the Debtor, and in the case of Leventon has specifically consulted and advised the Debtor and its counsel on Daugherty's claim.

case styled: *Daugherty v. Dondero et al.*, C.A. No. 2019-0956-MTZ (the "**HERA Delaware Case**") alleging fraudulent transfer and conspiracy.[3]

7. In response to Daugherty's amended complaint in the HERA Delaware Case, the defendants filed motions to dismiss.[4] Daugherty recently filed his Omnibus Brief in Opposition to Defendants' Motion to Dismiss.

8. Daugherty now seeks to sever the Debtor from the Highland Delaware Case and consolidate the Highland Delaware Case and HERA Delaware Case into one case against the non-Debtors.

B. The Bankruptcy Case and Adversary Proceeding.

9. Three days into the trial in the Highland Delaware Case, 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 Bankruptcy Court**").

10. On October 29, 2019, the United States Trustee appointed an Official Committee of Unsecured Creditors.

11. On December 4, 2019, the Delaware Bankruptcy Court entered an order transferring this case to this Court.

12. After the Petition Date, Daugherty filed his proof of claim in an amount not less than $37,483,876.62.

13. On August 31, 2020, the Debtor sued Daugherty in this case, initiating the Daugherty Adversary Proceeding, in which the Debtor objects to Daugherty's claim and seeks subordination of part of the claim.

[3] *See* Daugherty Declaration at ¶ 4.
[4] *See* Daugherty Declaration at ¶ 5.

RELIEF REQUESTED

14. By this Motion, Daugherty seeks an order from the Court that his request to sever the Debtor from the Highland Delaware Case does not violate the automatic stay. Alternatively, in the event that the Court believes that modification of the stay is required in order to sever the Debtor from the Highland Delaware Case, Daugherty seeks a modification of the stay to allow him to sever the Debtor from the Highland Delaware Case so that he may consolidate the two cases in Delaware and pursue his claims against the non-debtor defendants.

BASIS FOR RELIEF REQUESTED

A. The Automatic Stay Does Not Protect Co-Defendants and Does Not Prohibit Severance

15. The Fifth Circuit has consistently held that the automatic stay does not apply to co-defendants and does not preclude severance of a debtor in bankruptcy from prepetition litigation. *See Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 544 (5th Cir. 1983)("the protections of § 362 neither apply to co-defendants nor preclude severance."); *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985); *Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142, 1144 (5th Cir. 1987). In *Wedgeworth*, the Fifth Circuit examined (as other circuits have addressed the issue) the plain language of section 362 and emphasized that the language "clearly focusses on the insolvent party." *See Wedgeworth*, 706 F.2d at 544. The Fifth Circuit continued that its literal interpretation is bolstered by other portions of section 362(a), comparisons to other parts of the bankruptcy code, the statutory text, and similar interpretations by other circuit courts who had analyzed the issue. *See id.* Because the automatic stay does not protect or apply to non-debtors, and Fifth Circuit law expressly authorizes severance of non-debtor and debtors when a debtor files for bankruptcy, Daugherty respectfully requests entry of an order confirming that his actions in

the Highland Delaware Case and HERA Delaware Case to sever the Debtor and proceed against the non-debtors does not violate the automatic stay.

B. In the Alternative, Cause Exists to Modify the Stay.

16. In the alternative, if the Court believes that the automatic stay needs to be modified to in order to sever the Debtor, cause exists to modify the stay. Section 362 of the Bankruptcy Code provides that the court *shall* grant relief from the automatic stay, for cause, including lack of adequate protection. *See* 11 U.S.C. § 362(d)(1). In determining whether "cause" exists to lift the stay, courts should consider "the interests of judicial economy, expeditious and economic resolution of the litigation, comity, jurisdiction, and the balancing of the harms between the parties." *See In re S.H. Leggitt Co.*, 2011 WL 1376772, at *4 (Bankr. W.D. Tex. 2011). Cause exists to lift the stay to allow Daugherty to sever the non-Debtor defendants and continue pursuing his claims against those parties in the Delaware Court because the automatic stay does not apply to those parties and the other factors commonly considered apply. More specifically, the Highland Delaware Case had already completed two days of trial when the Debtor filed the instant bankruptcy case. Thus, judicial resources, the ability to expeditiously resolve the disputes against the non-Debtor defendants, comity and the harms all weigh heavily in favor of modifying the stay to allow Daugherty to sever the non-Debtor defendants and continue his trial against those defendants in the Delaware Court. Furthermore, the consolidation of the two cases in Delaware will also preserve judicial resources and allow for a more efficient trial of the issues that exists in both cases.

WAIVER OF STAY

17. To the extent the stay needs to be modified, Daugherty respectfully requests that the 14-day stay in Rule 4001(a)(c) be waived. Federal Rule of Bankruptcy Procedure 4001(a)(3)

provides that "[a]n order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after the entry of the order, *unless the court orders otherwise*." *See* Fed. Bankr. P. 4001(a)(3)(emphasis added). As outlined above, severance of the Debtor does not violate the statute. Further, the Debtor will not be harmed by a severance, as the action severed against the Debtor will remain stayed by the automatic stay. Accordingly, there is no reason why the 14-day stay should not be waived.

WHEREFORE PREMISES CONSIDERED, Daugherty respectfully requests that this Court enter an order granting the relief requested herein and granting such further relief, whether in law or equity, for which Daugherty may show himself justly entitled.

Dated: September 24, 2020

Respectfully submitted,

/s/ Jason P. Kathman
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COUNSEL FOR
PATRICK DAUGHERTY

CERTIFICATE OF CONFERENCE

I hereby certify that on September 24, 2020, I attempted to confer with Zachary Annable, counsel for the Debtor, but had not received a response as of the filing of this Motion.

/s/ Jason P. Kathman
Jason P. Kathman

CERTIFICATE OF SERVICE

I hereby certify that, on September 24, 2020, a true and correct copy of the foregoing was filed electronically and served upon the Debtor, and upon each of the parties listed on the attached service list, via the Court's electronic notification system and/or First Class United States Mail.

/s/ Jason P. Kathman
Jason P. Kathman

Appendix Exhibit 53

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ATTORNEYS FOR JAMES DONDERO

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

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

JAMES DONDERO'S RESPONSE TO DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH (A) ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP LLC (CLAIM NO. 23), (B) JOSHUA N. TERRY AND JENNIFER G. TERRY (CLAIM NO. 156), AND (C) ACIS CAPITAL MANAGEMENT, L.P. (CLAIM NO. 159), AND AUTHORIZING ACTIONS CONSISTENT THEREWITH
[Relates to Docket No. 1087]

James Dondero ("Respondent"), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files this Response to *Debtor's Motion for Entry of an Order Approving Settlement with (A) Acis Capital Management, L.P. and Acis Capital Management GP LLC (Claim No. 23), (B) Joshua N. Terry and Jennifer G. Terry (Claim No. 156), and (C) Acis Capital Management, L.P. (Claim No. 159), and Authorizing Actions Consistent Therewith* [Docket No. 1087] (the "Motion") filed by Highland Capital Management, L.P. (the "Debtor"). Through the Motion, the Debtor seeks approval of its compromise with Acis Capital

Management, L.P. and Acis Capital Management GP LLC (collectively, "Acis") pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of this response, Respondent respectfully represents as follows:

I. INTRODUCTION

1. Under Bankruptcy Rule 9019, the Bankruptcy Court is tasked with making an independent judgment on the merits of a proposed settlement to ensure that the proposed settlement is "fair, equitable, and in the best interest of the estate."[1] While Respondent appreciates the apparent lengths the Debtor went through in coming to terms of a settlement with Acis, Respondent believes it is critical that the Court be as fully informed as possible concerning why and how the settlement was arrived at. Given that just three months ago the Debtor asserted that Acis's claim "should summarily be disallowed in its entirety"[2] as a "$75 million windfall,"[3] it is appropriate for the Court to independently assess the merits of the settlement to understand why the Debtor now believes paying Acis millions of dollars "from the pockets of the Debtor's innocent creditors"[4] to be in the best interest of the estate.

II. BACKGROUND

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

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

[1] *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).
[2] *See* Debtor Objection, p. 9.
[3] *Id.* p. 3, para. 2.
[4] *Id.*

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

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

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

7. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. *See* Docket No. 854.

8. On December 31, 2019, Acis filed its Proof of Claim Number 23 with the Bankruptcy Court (the "Acis Claim").

9. The Acis Claim incorporates the complaint from litigation commenced by the trustee of the former estate in the Acis bankruptcy case (the "Acis Case").

10. In response, on June 23, 2020, the Debtor filed its *Objection to Proof of Claim of Acis Capital Management, L.P. and Acis Capital Management GP, LLC* [Docket No. 771] (the "Debtor Objection").

11. On July 13, 2020, Respondent filed *James Dondero's (i) Objection to Proof of Claim of Acis Capital Management, L.P. and Acis Capital Management GP, LLC; and (ii) Joinder*

in Support of Highland Capital Management, L.P.'s Objection to Proof of Claim of Acis Capital Management, L.P., and Acis Capital Management GP, LLC [Docket No. 827].

12. On July 23, 2020, UBS Securities LLC and UBS AG, London Branch filed *UBS (i) Objection to Proof of Claim of Acis Capital Management L.P. and Acis Capital Management GP, LLC and (ii) Joinder in the Debtor's Objection* [Docket No. 891].

13. On July 31, 2020, Acis responded to each objection in its *Omnibus Response to Objection to Proof of Claim of Acis Capital Management, L.P. and Acis Capital Management GP, LLC* [Docket No. 908].

14. On September 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the Acis Claim under Rule 9019.

III. STANDING

15. Respondent, as a creditor, indirect equity security holder, and party in interest, has standing to file this response and be heard on the Motion pursuant to section 1109(b) of the Bankruptcy Code and Rule 9019 of the Bankruptcy Rules.

16. While neither section 1109 nor any other section in the Bankruptcy Code specifically defines the term "party in interest," section 1109(b) provides a non-exclusive list of entities that fall within the meaning of "party in interest" for the purposes of a chapter 11 proceeding. *See Kipp Flores Architects, L.L.C. v. Mid-Continent Cas. Co.*, 852 F.3d 405, 413 (5th Cir. 2017) ("The Bankruptcy Code does not provide an exclusive definition of a party in interest, but the Code broadly includes debtors, creditors, trustees, indenture trustees, and equity security holders among the parties entitled, *e.g.*, to notice of proceedings in the case.").

17. Specifically, section 1109(b) provides that "[a] party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an

equity security holder, or any indenture trustee may raise and may appear and be heard on any issue in a case under [Chapter 11]." 11 U.S.C. § 1109(b). This section "has been construed to create a broad right of participation in Chapter 11 cases." *In re Global Industrial Technologies, Inc.*, 645 F.3d 201, 210 (3d Cir. 2011) (quoting *In re Combustion Engineering, Inc.*, 391 F.3d 190, 214 n.21 (3d Cir. 2004)). Parties in interest "include not only the debtor, but anyone who has a legally protected interest that could be affected by a bankruptcy proceeding." *Adair v. Sherman*, 230 F.3d 890, 894 n. 3 (7th Cir. 2000). *See also* 4 COLLIER ON BANKRUPTCY P 502.02 (16th ed. 2020) ("In the context of a chapter 11 case in particular, the term 'party in interest' expressly includes the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee.").

18. Further, in the context of a court's evaluation of a proposed settlement under Rule 9019, the input and interests of creditors are of particular importance. *See In re Foster Mortgage Corp.*, 68 F.3d 914, 917 (5th Cir. 1996).

19. Here, Respondent has standing to be heard on any issue in this Chapter 11 case, including related to the Motion, because he is (i) a creditor; (ii) an indirect equity security holder; and (iii) a party in interest as those terms are interpreted under the Bankruptcy Code.

20. Respondent is a creditor of the Debtor because he has prepetition claims against the Debtor and its estate, including those asserted through proof of claim number 138 filed by Respondent on April 8, 2020. None of those claims has been objected to as of this writing.

21. Respondent is also an indirect equity security holder through his role as the sole shareholder of Debtor's General Partner, Strand Advisors, Inc. ("Strand"). As the Debtor's General Partner, Strand maintains a 0.2508% partnership interest in the Debtor.

22. Accordingly, as both a creditor and equity security holder, Respondent qualifies as a "party in interest" under the Bankruptcy Code and has the right to file this response and be heard on Debtor's Motion.

IV. LEGAL STANDARD

23. The merits of a proposed compromise should be judged under the criteria set forth in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). *TMT Trailer* requires that a compromise must be "fair and equitable." *TMT Trailer*, 390 U.S. at 424; *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984). The terms "fair and equitable," commonly referred to as the "absolute priority rule," mean that (i) senior interests are entitled to full priority over junior interests; and (ii) the compromise is reasonable in relation to the likely rewards of litigation. *In re Cajun Electric Power Coop.*, 119 F.3d 349, 355 (5th Cir. 1997); *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

24. In determining whether a proposed compromise is fair and equitable, a Court should consider the following factors:

(i) the probabilities of ultimate success should the claim be litigated;

(ii) the complexity, expense, and likely duration of litigating the claim;

(iii) the difficulties of collecting a judgment rendered from such litigation; and,

(iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

TMT Trailer, 390 U.S. at 424.

25. In considering whether to approve a proposed compromise, the bankruptcy judge "may not simply accept the trustee's word that the settlement is reasonable, nor may he [or she] merely 'rubber stamp' the trustee's proposal." *In re Am. Res. Corp.*, 841 F.2d 159, 162 (7th Cir. 1987). "[T]he bankruptcy judge must apprise himself of all facts necessary to evaluate the

settlement and make an informed and independent judgment about the settlement." *See TMT Trailer*, 390 U.S. at 424, 434.

26. While the trustee's business judgment is entitled to a certain deference, "business judgment is not alone determinative of the issue of court approval." *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). Further, the business judgment rule does not provide a debtor with "unfettered freedom" to do as it wishes. *See In re Pilgrim's Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) ("[A]s a fiduciary holding its estate in trust and responsible to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight."). The Court must conduct an "intelligent, objective and educated evaluation"[5] of the proposed settlement "to ensure that the settlement is fair, equitable, and in the best interest of the estate and creditors." *See In re Mirant Corp.*, 348 B.R. 725, 739 (Bankr. N.D. Tex. 2006) (quoting *Conn. Gen. Life Ins. Co. v. Foster Mortgage Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995)).

V. ANALYSIS OF PROPOSED COMPROMISE

27. It is Respondent's belief that, in order for the Court to be fully informed regarding the settlement proposed by the Motion, it is critical that the facts be explored through the adversarial process. To that end, Respondent intends to assist the Court by presenting evidence that addresses the advisability of granting or denying the Motion and that, in turn, addresses the merits of the Acis Claim and the merits of the objections to it.

28. First, the Motion appears to rely heavily on the fact that the settlement will resolve complex litigation that has been pending for years. While all parties can appreciate a settlement

[5] *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) ("To assure a proper compromise the bankruptcy judge, must be apprised of all the necessary facts for an intelligent, objective and educated evaluation. He must compare the terms of the compromise with the likely rewards of litigation.").

that resolves a number of long-running disputes, Rule 9019 requires an analysis as to whether the probability of success in litigation is outweighed by the consideration achieved under the settlement. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (The Court must "compare the terms of the compromise with the likely rewards of litigation."). Here, the Debtor's Motion does not appear to address this factor in any detail. If the Acis Claim is indeed based upon a "fallacious premise"[6] as the Debtor and others have asserted in their objections, then there may be a strong chance that the Debtor ultimately succeeds on the merits of the litigation.

29. Further, while the expeditious administration of a claim is a laudable goal, that, standing alone, may not justify a proposed settlement. *See In re Alfonso*, No. 16-51448-RBK, 2019 Bankr. LEXIS 2816, at *11 (Bankr. W.D. Tex. Sep. 6, 2019) ("to the extent that this settlement does facilitate expeditious administration of the remaining claim, such benefits are outweighed by the large discrepancy between the potential significant recovery if the case were to proceed and the $105,000 Proposed Settlement amount").

30. To be sure, as noted by the Debtor in the Motion, the litigation between Acis and the Debtor is complex. But the Motion does not appear to address the fact that many of the claims may be subject to summary adjudication. The Debtor Objection, for example, asserts that many of the causes of action underlying the Acis Claim (at least twenty-five separate counts) are subject to summary adjudication based on the current record before the Court. If that is true, a resolution of at least some of these issues could reduce the Acis Claim substantially. In fact, the parties themselves apparently contemplated that not only would a number of issues be promptly brought before the Court for summary adjudication,[7] but that there would be an "expeditious trial setting"

[6] *See* Debtor Objection, p. 3, para. 3 ("Attempted windfalls usually have a fallacious premise, and this one is a $75 million whopper.").
[7] *See* HCMLP Hearing Transcript, July 21, 2020, p. 111, lines 6-8, 10-14.

where the remaining issues would be determined by the Court.[8] In late July, the Debtor anticipated that such trial setting could even happen before Plan confirmation.[9] And this Court previously entered a scheduling order directing the parties to file motions for summary judgment by September 17, 2020.

31. Even if not all claims are subject to summary disposition, because of this Court's familiarity with the litigation, an adjudication of the Acis Claim may not be needlessly lengthy. There is no question that this Court already has a unique understanding of the claims and facts underlying the litigation. For example, prior to the Debtor's bankruptcy filing, the Court prepared a lengthy report and recommendations to the District Court as to the pending motions to withdraw the reference.[10] While the Debtor Objection raises new legal theories and defenses to the Acis Claim, the Court should be able to analyze those relatively promptly due to its familiarity with the parties, facts, and causes of action involved.

32. Another factor not directly addressed by the Debtor in the Motion is the expense of litigating the claim. The amount to be paid on account of the Acis Claim—as much as approximately $27 million—is likely exponentially higher than the cost to litigate the claim. If indeed many of the claims can be adjudicated through the summary judgment process, the initial cost to trim down the basis of the Acis Claim should not be substantial relative to the potential benefit.

33. Based on the foregoing issues, Respondent believes it is appropriate for the Court to independently address the merits of the proposed settlement.

[8] *See* HCMLP Hearing Transcript, July 21, 2020, p. 113, lines 19-20.
[9] *Id.* at lines 22-24.
[10] *See* HCMLP Hearing Transcript, July 21, 2020, p. 117, lines 21-24.

CONCLUSION

Respondent respectfully requests that the Court independently assess the merits of the proposed settlement and provide him such other and further relief to which he may be justly entitled.

Dated: October 5, 2020

Respectfully submitted,

/s/ D. Michael Lynn

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ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on October 5, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Debtor and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink
Bryan C. Assink

Appendix Exhibit 54

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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]	§	Case No. 19-34054-sgj11
Debtor.	§	**Related to Docket No. 1099**

DEBTOR'S (I) OBJECTION TO PATRICK DAUGHERTY'S MOTION TO CONFIRM STATUS OF AUTOMATIC STAY, OR ALTERNATIVELY TO MODIFY AUTOMATIC STAY AND (II) CROSS-MOTION TO EXTEND THE AUTOMATIC STAY TO, OR OTHERWISE ENJOIN, THE DELAWARE CASES

Highland Capital Management, L.P., the debtor and debtor-in-possession ("Debtor" or "HCMLP") in the above-captioned chapter 11 case ("Bankruptcy Case"), submits this objection

[1] The last four digits of the Debtor's taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

to the *Motion to Confirm Status of Automatic Stay, or Alternatively, to Modify Automatic Stay* [Docket No. 1099] ("Motion") filed by Patrick Daugherty ("Daugherty"), and, to the extent necessary, cross-moves to extend the automatic stay to, or otherwise enjoin, the Delaware Cases (the "Objection"). In support of the Objection, the Debtor states as follows:

PRELIMINARY STATEMENT

1. Almost a year after the Debtor filed for bankruptcy protection, and less than two months before the Debtor seeks to confirm its plan of reorganization, Daugherty asks this Court for permission to pursue claims against certain non-debtor affiliates and individuals arising from the same set of facts and causes of action that form the basis of Daugherty's $37 million disputed claim against the Debtor.[2]

2. Specifically, Daugherty seeks to (a) sever the Debtor from the Highland Delaware Case, (b) consolidate the Highland Delaware Case with the HERA Delaware Case, (c) proceed with the claims against the non-debtors in Delaware, while (d) simultaneously prosecuting virtually identical claims against the Debtor in this Court.[3] For the reasons set forth below, the Motion should be denied and the automatic stay should be extended to the Delaware Cases (as defined below), or they should otherwise be enjoined from proceeding.

3. ***First***, as described in detail below, there can be no credible dispute that the allegations in the Delaware Cases are inextricably interwoven with Daugherty's Claim. Indeed, according to Daugherty, his Second Amended Complaint filed in the Highland Delaware Case "explains a scheme contrived *by the Debtor*, Highland Employee Retention Assets LLC, Highland ERA Management LLC, and Dondero *to rob and divert assets that were escrowed for*

[2] The Debtor does not dispute the entirety of Daugherty's Claim (defined below). *See Debtor's (I) Objection to Claim No. 77 of Patrick Hagaman Daugherty and (II) Complaint to Subordinate Claim of Patrick Hagaman Daugherty* (the "Claim Objection"), filed on August 31, 2020. Specifically, the Debtor has stated that it "will not object to allowance of Daugherty's claim for the value of his HERA Judgment (as defined in the Claim Objection) plus interest to the Petition Date–totaling $3,722,019." Claim Objection ¶ 3.

[3] Capitalized terms not defined herein shall have the meanings ascribed to them in the Motion.

Daugherty." Motion ¶ 5 (emphasis added). While the Debtor is not a named defendant in the HERA Delaware Case (as Daugherty admits, solely because it was filed post-petition), the Debtor is prominently featured in the factual recitation that supports the fraudulent transfer and conspiracy claims, which are themselves derived from the same facts and claims asserted in the Highland Delaware Case. Completing the circle, Daugherty's Claim is expressly based on the Highland Delaware Case. Thus, there can be no credible dispute that the allegations in the Delaware Cases are inextricably interwoven with Daugherty's Claim.

4. ***Second***, based on Daugherty's allegations, there is an identity of interests between the Debtor and the non-debtor defendants with respect to the Delaware Cases, because Daugherty alleges in myriad ways that Highland actively participated in the conspiracy with the non-debtor defendants to fraudulently transfer asserts and aided and abetted the other Defendants in harming Daugherty. Moreover, as alleged by Daugherty, all of the corporate defendants were "controlled" by Dondero.

5. ***Third,*** if the Motion is granted, the Debtor will inevitably face substantial discovery burdens in the to-be-consolidated action in Delaware. The Debtor is alleged to have been the recipient of the fraudulent transfers; its employees and in-house and outside counsel are alleged to have structured the alleged fraud; and the Debtor was allegedly the vehicle through which Dondero seized control of HERA. Having allegedly played these roles, it is inconceivable that Daugherty will not seek substantial documentary and testimonial discovery from the Debtor even if the Debtor is severed from the Highland Delaware Case.

6. ***Finally,*** Daugherty's pursuit of the Delaware Cases is likely to have a preclusive effect on the Debtor as witnesses testify, facts are adduced, and rulings are rendered by the Delaware Court. If these matters are permitted to proceed without the Debtor, the estate will be at risk of inconsistent rulings and that adverse factual findings are determined. This is exactly the type of prejudice that the stay is designed to prevent.

7. For these reasons, and those set forth below, the Motion should be denied in its entirety and Daugherty should be prevented from prosecuting the Delaware Cases until the Daugherty Claim is finally adjudicated in this Court.

STATEMENT OF FACTS[4]

I. Daugherty was employed by HCMLP, became a Member of HERA in 2009, and resigned from HCMLP in September 2011

8. Daugherty was a partner and senior executive of HCMLP from 1998 until 2011. Daugherty Dec. Exhibit A ¶ 10.[5]

9. Following the financial crisis in 2008, HCMLP created HERA as a compensation vehicle to retain, reward, and incentivize HCMLP's employees. Id. ¶¶ 14-15.

10. Daugherty became a member of HERA in October 2009, subject to a vesting schedule requiring Daugherty to remain an employee of HCMLP until May 2011; Daugherty later became a director of HERA. Id. ¶¶ 18, 21.

11. Under his award agreement, Daugherty received certain "units" in HERA and was HERA's largest interest holder. Id. ¶ 19.

12. Daugherty resigned from HCMLP on September 28, 2011. *Id.* ¶ 21.

II. Dondero sues Daugherty, takes control of HERA, and transfers HERA's assets to HCMLP

13. In 2012, Highland commenced an action against Daugherty in the District Court of Dallas County, Texas, 68th Judicial District (Dallas), captioned *Highland Capital Management L.P. v. Daugherty*, 12-04005 (the "Texas Action"). *Id.* ¶¶ 1, 25.

14. Daugherty interposed certain counterclaims. *Id.* ¶ 26.

15. While the Texas Action was pending, Dondero caused Highland to purchase the units held by all of the members of HERA except Daugherty. After obtaining control of HERA,

[4] The Debtor accepts the allegations set forth in Daugherty's Motion and supporting documentation as true solely for purposes of the Objection and reserves its right to contest any such allegations in any other procedural context.

[5] "Daugherty Dec." refers to the *Declaration of Patrick Daugherty to Confirm Status of Automatic Stay, or Alternatively to Modify Automatic Stay* [Docket No. 1099-1], executed on September 24, 2020.

Dondero then orchestrated changes in HERA's governing documents to Daugherty's detriment. *Id.* ¶¶ 29-33, 37.

16. As a further exercise of control, Dondero then caused HERA to transfer all of its assets to HCMLP. *Id.* ¶¶ 38-39.

III. Daugherty obtained a judgment against HERA in the Texas Action but could not collect because HERA's assets, and the Escrow assets, were transferred to HCMLP

17. One month prior to trial, HCMLP placed cash equal to the value of Daugherty's interest in HERA—$3.1 million—in escrow. Dondero and others testified that the escrowed assets would be available to satisfy any judgment that Daugherty might obtain on his counterclaims in the Texas Action. *Id.* ¶¶ 41-44.

18. After a three-week trial, Daugherty obtained a judgment against HCMLP for $2.6 million, plus interest. *Id.* ¶ 45.[6]

19. The Texas Action was the subject of a lengthy appeal. On December 1, 2016, the appellate court affirmed the judgments of the trial court. *Id.* ¶ 49.

20. In the ensuing days, Dondero and others working at his direction caused the Escrow Agent to resign and to have the assets held in Escrow transferred to HCMLP in order to deprive Daugherty of the ability to collect on his judgment. *Id.* ¶¶ 51-52.

21. In February 2017, Daugherty learned that the assets held in Escrow were transferred to HCMLP and that HERA was insolvent. *Id.* ¶¶ 60-61.

IV. Daugherty commences the Highland Delaware Case but HCMLP files for bankruptcy

22. Later in 2017, Daugherty commenced the Highland Delaware Case against the Debtor, HERA, HERAM, and Dondero in order to "undo the transfer of assets in the Escrow and any other fraudulent transfers from" HERA. *Id.* ¶ 63.

[6] HCMLP also obtained a judgment against Daugherty in the Texas Action, but HCMLP's judgment is not relevant to the Motion or the Objection. *See* Daugherty Dec. Ex. A ¶ 46.

23. In support of the Highland Delaware Case, Daugherty alleged, among other things, that (a) Dondero, HERAM, and HCMLP caused HERA "to fraudulently or otherwise transfer its assets to" HCMLP, leaving HERA insolvent (*Id.* ¶ 5); (b) HCMLP was the beneficiary of the alleged self-dealing transactions (*Id.* ¶ 8); (c) HCMLP was the vehicle that Dondero used to wrest control of HERA, a critical step in the execution of the alleged scheme (*Id.* ¶¶ 31-32, 37); and (d) all of HERA's assets were transferred to HCMLP (*Id.* ¶¶ 38-39).

24. In reliance on the allegations set forth above (and others at set forth in his Second Amended Complaint), Daugherty sued all of the defendants in the Highland Delaware Case for the fraudulent transfer of assets (*Id.* ¶¶ 73-80), and he sued HCMLP for aiding and abetting HERAM and Dondero in the breach of their fiduciary duties (*Id.* ¶¶ 100-107); indemnification (*Id.* ¶¶ 114-117); "fees on fees" (*Id.* ¶¶ 118-119); unjust enrichment (*Id.* ¶¶ 120-125); and promissory estoppel (*Id.* ¶¶ 126-138).

25. Three days into the trial in the Highland Delaware Case, on October 19, 2019, the Debtor filed for bankruptcy in the United States Bankruptcy Court for the District of Delaware; the Debtor's bankruptcy case was subsequently transferred to this Court. Motion ¶¶ 9-10.

V. Daugherty commences the HERA Delaware Case

26. According to Daugherty, "[d]uring [the] trial of the Highland Delaware Case . . . Dondero and his accomplices' scheme became more clear. As a result, Daugherty filed a separate lawsuit against Dondero, [HERA, HERAM], Hunton Andrews Kurth LLP, Marc Katz, Michael Hurst, Scott Ellington, Thomas Surgent, and Isaac Leventon in the Delaware [Chancery] Court in a case styled: *Daugherty v. Dondero, et al.*, C.A. No. 2019-0956-MTZ (the "**HERA Delaware Case**" [and together with the Highland Delaware Case, the "Delaware Cases"]) alleging fraudulent transfer and conspiracy." *Id.* ¶ 6.

27. Daugherty's claims in the HERA Delaware Case are based on the same facts as the claims asserted in the Highland Delaware Case. Indeed, in his Introduction to the Verified

Amended Complaint, Daugherty alleges that the Defendants "engaged in fraud, a conspiracy to defraud Daugherty, and civil conspiracy with the goal of defrauding Daugherty and never paying him the compensation he had earned." Daugherty Exhibit B ¶ 3.

28. According to Daugherty, the specific goal of the fraud and conspiracy was to transfer HERA's assets, and the assets in the Escrow, to HCMLP, and that goal was accomplished by the "Defendants *and Highland*." *Id.* ¶¶ 4-6 (emphasis added).

29. Highland is implicated by other specific allegations that echo those made in the Highland Delaware Case, including, by way of example only, that (a) the Defendants and HCMLP caused HERA to fraudulently or otherwise transfer its assets to HCMLP, leaving HERA insolvent (*Id.* ¶ 6); (b) HCMLP was the beneficiary of the alleged self-dealing transactions (*Id.* ¶ 8); (c) HCMLP was the vehicle that Dondero used to wrest control of HERA, a critical step in the execution of the alleged scheme (*Id.* ¶¶ 31-32, 34); (d) all of HERA's assets were transferred to HCMLP (*Id.* ¶¶ 38); and (e) HCMLP participated in the scheme to create the Escrow, and later to transfer the assets in Escrow to HCMLP (*Id.* ¶¶ 51, 74-79).[7]

30. Indeed, Daugherty summarized the scheme as follows: "Through a series of transactions in early 2013, HERA Management (controlled by Dondero) emptied HERA (controlled by Dondero) of all its underlying assets and transferred those assets to Highland (controlled by Dondero)" for the purpose of defrauding Daugherty. *Id.* ¶ 38.

31. The factual allegations in the HERA Delaware Case echo those alleged in the Highland Delaware Case, and the same is true with respect to the causes of action asserted. Thus, for example, Daugherty asserts fraudulent-transfer claims in both cases, and each such claim seeks to recover the assets allegedly transferred to HCMLP. The fraud and conspiracy claims also relate to the transfer of assets to HCMLP; as stated by Daugherty in the HERA

[7] In a curious but apparent effort to prove he was defrauded, Daugherty also cites to, and relies upon, unrelated fraud claims asserted against the Debtor by third parties. *Id.* ¶¶ 99-102.

Delaware Case, the "Defendants aided and abetted the unjust enrichment of [HCMLP] . . . [and] were part of the conspiracy to unjustly enrich [HCMLP] at the expense of Daugherty." *Id.* ¶ 123.

32. Clearly, the HERA Delaware Case mimics the Highland Delaware Case in most material respects and was brought in an attempt to evade the automatic stay. Daugherty all but admitted as much: As a result of the Debtor's bankruptcy filing, the Highland Delaware Case "is currently stayed and Daugherty is currently not able to bring the causes of action set forth in this complaint against [HCMLP] outside the bankruptcy proceedings." *Id.* at 4, n.1.

VI. Daugherty's Proof of Claim is based largely on the Highland Delaware Case

33. On April 1, 2020, Daugherty filed a general unsecured, non-priority proof of claim in the amount of "at least" $37,483,876.59, and the Debtor's claim agent denoted it as claim number 67 ("Daugherty's Claim"). Morris Dec. Exhibit 1.[8] There are three parts to Daugherty's Claim.

34. In reverse order, the last part of Daugherty's Claim relates to an unliquidated defamation claim. *Id.* (Addendum ¶ 3(iii)). That claim is unrelated to the Delaware Cases and the Debtor asserts that it is time-barred. Claim Objection ¶¶ 17-19.

35. The second part of Daugherty's Claim concerns a dispute over an IRS audit; Daugherty appears to claim damages of $992,790.40. Morris Dec. Exhibit 1 (Addendum ¶ 3(ii)). The Debtor contests the amount and validity of Daugherty's Claim or, alternatively, contends that it is subject to subordination under Bankruptcy Code section 510(b). *See* Claim Objection ¶¶ 20-32.

36. The lion's share of Daugherty's Claim (*i.e.*, all but about $1 million of the $37 million claim) is expressly based on the Highland Delaware Case. Morris Dec. Exhibit 1

[8] "Morris Dec." refers to the *Declaration of John A. Morris in Support of Debtor's (I) Objection to Patrick Daugherty's Motion to Confirm Status of Automatic Stay, or Alternatively to Modify Automatic Stay and (II) Cross-Motion to Extend the Automatic Stay in Connection with the Delaware Cases*, executed on October 8, 2020, and filed contemporaneously with the Objection.

(Addendum ¶ 3(i)) ("The Claim arises pursuant to . . . [t]he causes of action asserted in the Second Amended Verified Complaint filed by Daugherty in The Court of Chancery of the State of Delaware C.A. No. 2017-0488-MTZ including all attachments referenced therein.")

ARGUMENT

37. Daugherty argues that the automatic stay does not protect co-defendants and does not prohibit severance. Although the stay under Bankruptcy Code section 362 ("Section 362") generally does not apply to non-debtors, the circumstances here warrant an extension of the stay to the non-debtor defendants in the Delaware Cases. In the alternative, the Court should enjoin the prosecution of the Delaware Cases pending resolution of the Daugherty Claim in this Court.[9]

I. The Court should deny the Motion and exercise its discretion to extend the automatic stay to the non-Debtor defendants in the Delaware Cases

38. Section 362 provides for an automatic stay of any judicial "proceeding against the debtor." 11 U.S.C. § 362(a)(1). The purpose of the stay is to protect creditors from unequal treatment and provide debtors with a "breathing spell." *See In re Pointer*, 952 F.2d 82, 86 (5th Cir. 1992) ("One of the principal purposes behind the automatic stay is to protect creditors from unequal treatment"); *In re Cajun Elec. Power Coop., Inc.*, 185 F.3d 446, 459 (5th Cir. 1999) (citing *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175, 1182 (5th Cir. 1986) (recognizing that the automatic stay is designed to give debtors a breathing spell from collectors)).

39. Courts have the discretion to extend the stay to non-debtors as well. *See Nat'l Oilwell Varco, L.P. v. Mud King Prods., Inc.*, 2013 WL 1948766, No. 12-3120, at *3 (S.D. Tex. May 9, 2013) ("[C]ourts may also exercise their discretion to stay a proceeding against non-bankrupt co-defendants 'in the interests of justice and in control of their dockets'") (quoting

[9] If the Court declines to extend the automatic stay to the non-debtor defendants in the Delaware Cases pursuant to Bankruptcy Code section 362, the Debtor will rely on its complaint against Daugherty for injunctive relief that it is filing contemporaneously herewith.

Wedgeworth v. Fibreboard Corp., 706 F.2d 451, 545 (5th Cir. 1983)); *Mooney v. Gill*, 310 B.R. 543, 547 (N.D. Tex. 2002).

40. Courts have found that the stay under Section 362 should be extended to non-debtor defendants if it would "further[] the purposes behind the stay." *In re Jefferson County, Ala.*, 491 B.R. 277, 285 (Bankr. N.D. Ala. 2013). Such circumstances are found where, for instance: (1) there is an identity of interests between the non-debtors and debtor, (2) the proceeding imposes a substantial burden of discovery on the debtor, or (3) the proceeding would have a potential preclusive effect that forces the debtor to participate in the proceeding as if the debtor were a party. *See id.* at 285.

41. Specifically, "a bankruptcy court may invoke § 362 to stay proceedings against non-bankrupt codefendants where there is 'such an identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor.'" *Nat'l Oilwell Varco, L.P.*, 2013 WL 1948766, at *2 (quoting *Reliant Energy Servs., Inc. v. Enron Can. Corp.*, 349 F.3d 816, 825 (5th Cir. 2003)) (internal quotations omitted). Thus, an extension of the stay to non-debtors is applicable where there is "an actual relationship with the debtor such that any judgment would actually apply to the bankrupt party." *Blundell v. Home Quality Care Home Health Care, Inc.*, No. 3:17-cv-19900-L-BN, 2017 WL 5889715, at *2 (N.D. Tex. Nov. 29, 2017) (internal quotations omitted); *see also Reliant Energy Servs., Inc.*, 349 F.3d at 825 (same).

42. A stay of proceedings as to non-debtor co-defendants is also warranted where, for instance, the allegations raised against co-defendants are "***inextricably interwoven***" with claims against the debtor. *Fed. Life Ins. Co. (Mut.) v. First Fin. Group of Tex., Inc.*, 3 B.R. 375, 376 (S.D. Tex. 1980) (emphasis added). In other words, the automatic stay applies to both the debtor and its codefendants where "the allegations against them arise from the same factual and legal

basis." *Id.* Thus, in such situations, severance is not appropriate. *See Abrams v. Integrated Pro Servs., LLC*, CV 07-8426, 2015 WL 7458604, at *4 (E.D. La. Nov. 24, 2015) ("Severance or separate trials are not suitable options here due to the fact that the claims by and against [debtor] are inextricably interwoven with the claims by and against his non-debtor co-defendants. Consequently, an extension of the automatic stay to all co-defendants is the most sensible option in this case.")

43. Moreover, severance of claims against the debtor and non-debtor co-defendants is not warranted where, as here, such claims are so inextricably linked such that proceeding separately against the non-debtors would "unduly hinder the efforts of the Bankruptcy Court." *Fed. Life Ins. Co.*, 3 B.R. at 376. As such, any "resulting delay or prejudice" to the plaintiff arising from extension of the stay to co-defendants is "outweighed" by the prejudice that would result to a debtor defendant resulting from severance. *Id.*

44. Based on the facts and the foregoing case law, the Court should deny the Motion and grant the Debtor's cross-motion by exercising its discretion under Section 362 to extend the stay to the non-debtor defendants in the Delaware Cases.

45. ***First***, as described in detail above, there can be no credible dispute that the allegations in the Delaware Cases are inextricably interwoven with Daugherty's Claim. A plain reading of the relevant documents show that all three disputes are generally based on Daugherty's allegations that the Debtor and the non-debtor defendants conspired to transfer HERA's assets to HCMLP and to otherwise prevent Daugherty from realizing the value of his interest in HERA.

46. ***Second***, Daugherty alleges there is an identity of interests between the Debtor and the non-debtor defendants with respect to the Delaware Cases, because Daugherty alleges in myriad ways that Highland actively participated in the conspiracy with the non-debtor defendants to fraudulently transfer asserts and aided and abetted the other Defendants in harming

Daugherty. Daugherty also alleges that all of the corporate defendants were "controlled" by Dondero. *See* Daugherty Exhibit B ¶ 38. Finally, if Daugherty obtains a judgment against the non-debtor defendants, one or more is likely to assert that the Debtor has an obligation to indemnify because their actions were undertaken within the scope of their employment and duties and that the Debtor's governing document provides such indemnification.[10]

47. ***Third***, if the Motion is granted, the Debtor will inevitably face substantial discovery burdens in the to-be-consolidated action in Delaware and will therefore be forced to simultaneously participate in two separate proceedings concerning the same facts and claims.

48. ***Fourth***, Daugherty's pursuit of the Delaware Cases is likely to have a preclusive effect on the Debtor as witnesses testify, facts are adduced, and rulings are rendered by the Delaware Court. If these matters are permitted to proceed without the Debtor, the estate will be at risk of inconsistent rulings and that adverse factual findings are determined. This is exactly the type of prejudice that the stay under Section 362 is designed to prevent.

49. For the foregoing reasons, the Court should deny the Motion and grant the Debtor's cross-motion by extending the stay under Section 362 to prevent Daugherty from prosecuting the Delaware Cases until the Daugherty Claim is finally adjudicated in this Court.

II. Alternatively, the Court should exercise its discretion under Section 105 to enjoin Daugherty from prosecuting the Delaware Cases

50. In addition to their power to extend the stay under Section 362, bankruptcy courts also have broad powers to protect the bankruptcy process and, where appropriate, to enjoin actions against non-debtors under section 105(a) of the Bankruptcy Code ("Section 105"), which provides that a court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title . . . ." 11 U.S.C. § 105(a).

[10] The Debtor reserves the right to contest any such indemnification claim, but the Court should expect such claims to arise if the Motion is granted and Daugherty obtains a judgment against the non-debtor defendants.

51. Section 105 empowers bankruptcy courts "to enjoin suits that might impede the reorganization process." *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89, 93 (2d Cir. 1988) (citations omitted). Courts in the Fifth Circuit have held that Section 105 is to be "interpret[ed] liberally," so long as any action taken pursuant to Section 105 is "consistent with the rest of the Bankruptcy Code." *Feld v. Zale Corp (In re Zale Corp.)*, 62 F.3d 746, 760 (5th Cir. 1995); *see also In re Choice ATM Enters.*, No. 14-44982-DML, 2015 Bankr. LEXIS 689, at *18 (Bankr. N.D. Tex. Mar. 4, 2015) (denying relief from stay and enjoining prosecution of lawsuit collateral to a claim proceeding); *Nev. Power Co. v. Calpine Corp. (In re Calpine Corp.)*, 365 B.R. 401, 409 n.20 (S.D.N.Y. 2007) ("Courts consistently have found that section 105 may be used to stay actions against non-debtors even where section 362 otherwise would not provide such relief . . . .")

52. Courts in the Fifth Circuit apply the following traditional four factors to determine whether a preliminary injunction should issue under Section 105: (a) a likelihood of success on the merits, (b) irreparable injury, (c) a balancing of the equities, and (d) the public interest. *See FiberTower Network Servs. Corp. v. FCC (In re FiberTower Network Servs. Corp.)*, 482 B.R. 169, 182 (Bankr. N.D. Tex. 2012). These factors weigh in favor of issuing injunctive relief.

53. First, in the bankruptcy context, the "likelihood of success" factor has been understood to require consideration of "the debtor's ability to successfully reorganize." *Lane v. Phila. Newspapers*, LLC, 423 B.R. 98, 106 (E.D. Pa. 2010); *see also W.R. Grace I*, 386 B.R. at 33; *Lyondell Chem. Co. v. CenterPoint Energy Gas Servs., Inc. (In re Lyondell Chem. Co.)*, 402 B.R. 571, 589 (Bankr. S.D.N.Y 2009). The Debtor easily meets that prong here as it has a plan and disclosure statement on file with dates for the disclosure statement and confirmation hearings secure.

54. Nor can there be a serious dispute that the Debtor faces irreparable injury if the Delaware Cases are permitted to proceed without it. As set forth above, the Daugherty Claim is

asserted for over $37 million, nearly all of which is derivative of the Highland Delaware Case. If the Debtor is severed from that case and it is consolidated with the HERA Delaware Case, the Debtor will be irreparably harmed. Specifically, because the underlying factual allegations against the Debtor and non-debtors are so intertwined, testimony and facts will be adduced that inevitably implicate the Debtor. There is also a significant risk that the court's rulings will have a preclusive effect on the Debtor. An injunction is, therefore, warranted to prevent the risk of an adverse record or collateral estoppel issues against the Debtor. *See In re W.R. Grace & Co.*, 386 B.R. at 35 (taking into account "the risks of collateral estoppel and record taint" in issuing injunction to stay claims against third parties); *Union Tr. Phila., LLC v. Singer Equip. Co. (In re Union Tr. Phila., LLC)*, 460 B.R. 644, 657 (E.D. Pa. 2011) (in subsequent suits, debtor could be bound by "critical factual and legal issues" determined in the proceedings against non-debtor).

55. The Debtor would also suffer irreparable harm in the form of burdensome litigation. For instance, the Debtor's directors, officers, and employees (particularly those who are defendants) will be forced to devote significant time to the Delaware Cases rather than the Debtor's reorganization, and the Debtor's resources will be diverted to that endeavor as well as it will likely be the subject of burdensome discovery requests. Courts routinely enjoin such actions against third-party non-debtor co-defendants in such circumstances. *See In re Calpine*, 365 B.R. at 412 (enjoining actions against a non-debtor where in the absence of a stay, the debtor "would suffer irreparable harm if [a key employee] were distracted from his responsibilities in [debtor's] day-to-day operations as well as its restructuring effort"); *Haw. Structural Ironworkers Pension Tr. Fund v. Calpine Corp.*, No. 06-CV-5358, 2006 WL 3755175, at *5 (S.D.N.Y. Dec. 20, 2006) (affirming the injunction of actions against a non-debtor where "the logistical stress on [the debtor] from attempting to simultaneously undertake a massive reorganization while monitoring and producing documents in the [s]tate [c]ourt [a]ction threatened to irreparably impair the company's reorganization process"); *see also A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994,

998 (4th Cir. 1986) (among other things, the purpose of the stay is "to provide the debtor and its executives with a reasonable respite from protracted litigation, during which they may have an opportunity to formulate a plan of reorganization").

56. For these same reasons, the balance of the equities also weighs decidedly in favor of the Debtor. Allowing the Delaware Cases to proceed will risk potentially adverse and conflicting findings against the Debtor and divert the Debtor's attention from its Chapter 11 proceedings and instead to forced involvement in this litigation, all to the detriment of the Debtor's estate. By contrast, Daugherty will not be materially prejudiced as a result of a stay of the Delaware Cases.

57. Finally, granting injunctive relief here is in the public interest because enjoining litigation in the Delaware Cases promotes judicial economy and prevents a substantial risk of inconsistent findings and results. Severance of virtually identically claims against the Debtor and its co-defendants could result in the same witnesses testifying multiple times in two separate courts with respect to the same issues. *See Saxby's Coffee Worldwide, LLC v. Larson (In re Saxby's Coffee Worldwide, LLC)*, 440 B.R. 369, 383 (Bankr. E.D. Pa. 2009) (public interest served where injunction protects claims resolution process by preventing entry of judgment in other cases that would "effectively determine Debtor's rights and obligations" and where issuance of injunction "may lead to the concentration of litigation in the bankruptcy court . . . .") Any hardship that may be caused to Daugherty by enjoining him from litigating the Delaware Cases is, therefore, outweighed by public interest and fairness of judicial economy.

58. For the foregoing reasons, the Court should exercise its discretion to enjoin the prosecution of the Delaware Cases until (i) a plan is confirmed in the Highland Bankruptcy Case or (ii) pursuant to further order of this Court.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court deny the Motion in its entirety, grant the Debtor's cross-motion, and grant such other and further relief as the Court deems just and proper.

Dated: October 8, 2020.

PACHULSKI STANG ZIEHL & JONES LLP

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-and-

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Appendix Exhibit 55

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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]	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	_____
	§	
PATRICK HAGAMAN DAUGHERTY,	§	
	§	
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 TO EXTEND THE AUTOMATIC STAY OR, IN THE ALTERNATIVE, FOR PRELIMINARY INJUNCTIVE RELIEF

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession (the "Plaintiff" or the "Debtor"), by its undersigned counsel, as and for its complaint (the "Complaint") against defendant Patrick Hagaman Daugherty (the "Defendant" or "Daugherty"), alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

NATURE OF THE ACTION AND THE NEED FOR RELIEF

1. This is an adversary proceeding brought pursuant to Rules 7001(7) and 7065 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and sections 105 and 362 of title 11 of the United States Code (the "Bankruptcy Code"), to enjoin the Defendant from prosecuting the Delaware Cases brought against the Non-Debtor Defendants (as that term is defined below). Daugherty's Claim against the Debtor is based on the same facts, circumstances and claims asserted in the Delaware Cases.[2]

2. As set forth in detail in the Objection, the Highland Delaware Case, the HERA Delaware Case, and Daugherty's Claim are all based on the same central allegations and claims that James Dondero used Plaintiff to take control of HERA and transfer its assets (including the assets in Escrow that were allegedly earmarked for Daugherty if he prevailed in the Texas Action) to the Debtor so as to deprive Daugherty of what was rightfully his. Daugherty alleges in all three matters that the Debtor was a participant in the conspiracy, a vehicle that was used to execute the conspiratorial plan, and the beneficiary of the conspiracy.

[2] Capitalized terms not defined herein shall have the meanings ascribed to them in the *Debtor's (I) Objection to Patrick Daugherty's Motion To Confirm Status of Automatic Stay, or Alternatively, to Modify Automatic Stay, and (II) Cross-Motion to Extend the Automatic Stay to, or Otherwise Enjoin, the Delaware Cases* being filed simultaneously herewith (the "Objection").

3. Despite the central role Daugherty alleges that the Debtor played, he wants to pursue claims against others arising from the exact same set of facts that form the basis for his claim against the Debtor that must be resolved in this Court. Such a scatter-shot litigation approach will disrupt the Debtor's (and its employee's) ability to focus on its restructuring; risks binding the Debtor to adverse factual finding and rulings; creates the possibility of inconsistent results; is a waste of the Debtor's resources; and undermines judicial economy—all to the detriment of the Debtor and its stakeholders.

4. Because the litigation of the Delaware Cases is likely to materially affect the Debtor (and may do so adversely) and its efforts to restructure, and because many of the issues they raise have been presented to this Court by Daugherty's filing of his proof of claim and will have to be addressed here, extending the automatic stay under Bankruptcy Code section 362(a) or, in the alternative, enjoining these actions pursuant to section 105(a) of the Bankruptcy Code, is plainly warranted.

JURISDICTION AND VENUE

5. 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.

6. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.

7. 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.

8. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

THE PARTIES

9. Plaintiff is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

10. Upon information and belief, Defendant Patrick Daugherty is an individual residing in Dallas, Texas. Daugherty was a partner and senior executive at the Debtor until his resignation in September 2011.

CASE BACKGROUND

11. On October 16, 2019 (the "Petition Date"), 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").

12. 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 (collectively, "UBS"), and (d) Acis Capital Management, L.P. and Acis Capital Management GP LLC (collectively, "Acis").

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

14. On January 9, 2020, this Court entered an Order [Docket No. 339] (the "Settlement Order") which resolved that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281]. Pursuant to the Settlement Order, an

[3] All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

independent board of directors (the "Independent Board") was appointed at the Debtor's general partner, Strand Advisors, Ltd.

15. 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[4]

A. Daugherty was employed by HCMLP, became a Member of HERA in 2009, and resigned from HCMLP in September 2011

16. Daugherty was a partner and senior executive of HCMLP from 1998 until 2011. Daugherty Dec. Exhibit A ¶ 10.[5]

17. Following the financial crisis in 2008, HCMLP created HERA as a compensation vehicle to retain, reward, and incentivize HCMLP's employees. *Id.* ¶¶ 14-15.

18. Daugherty became a member of HERA in October 2009, subject to a vesting schedule requiring Daugherty to remain an employee of HCMLP until May 2011; Daugherty later became a director of HERA. *Id.* ¶¶ 18, 21.

19. Under his award agreement, Daugherty received certain "units" in HERA and was HERA's largest interest holder. *Id.* ¶ 19.

20. Daugherty resigned from HCMLP on September 28, 2011. *Id.* ¶ 21.

[4] The Debtor accepts the allegations set forth in Daugherty's Motion and supporting documentation as true solely for purposes of the Objection and reserves its right to contest any such allegations in any other procedural context.

[5] "Daugherty Dec." refers to the *Declaration of Patrick Daugherty to Confirm Status of Automatic Stay, or Alternatively to Modify Automatic Stay* [Docket No. 1099-1], executed on September 24, 2020.

B. Dondero sues Daugherty, takes control of HERA, and transfers HERA's assets to HCMLP

21. In 2012, Highland commenced an action against Daugherty in the District Court of Dallas County, Texas, 68th Judicial District (Dallas), captioned *Highland Capital Management L.P. v. Daugherty*, 12-04005 (the "Texas Action"). *Id.* ¶¶ 1, 25.

22. Daugherty interposed certain counterclaims. *Id.* ¶ 26.

23. While the Texas Action was pending, Dondero caused Highland to purchase the units held by all of the members of HERA except Daugherty. After obtaining control of HERA, Dondero then orchestrated changes in HERA's governing documents to Daugherty's detriment. *Id.* ¶¶ 29-33, 37.

24. As a further exercise of control, Dondero then caused HERA to transfer all of its assets to HCMLP. *Id.* ¶¶ 38-39.

C. Daugherty obtained a judgment against HERA in the Texas Action but could not collect because HERA's assets, and the Escrow assets, were transferred to HCMLP

25. One month prior to trial, HCMLP placed cash equal to the value of Daugherty's interest in HERA—$3.1 million—in escrow. Dondero and others testified that the escrowed assets would be available to satisfy any judgment that Daugherty might obtain on his counterclaims in the Texas Action. *Id.* ¶¶ 41-44.

26. After a three-week trial, Daugherty obtained a judgment against HCMLP for $2.6 million, plus interest. *Id.* ¶ 45.[6]

27. The Texas Action was the subject of a lengthy appeal. On December 1, 2016, the appellate court affirmed the judgments of the trial court. *Id.* ¶ 49.

[6] HCMLP also obtained a judgment against Daugherty in the Texas Action, but HCMLP's judgment is not relevant to the Motion or the Objection. *See* Daugherty Dec. Ex. A ¶ 46.

28. In the ensuing days, Dondero and others working at his direction caused the Escrow Agent to resign and to have the assets held in Escrow transferred to HCMLP in order to deprive Daugherty of the ability to collect on his judgment. *Id.* ¶¶ 51-52.

29. In February 2017, Daugherty learned that the assets held in Escrow were transferred to HCMLP and that HERA was insolvent. *Id.* ¶¶ 60-61.

D. Daugherty commences the Highland Delaware Case but HCMLP files for bankruptcy

30. Later in 2017, Daugherty commenced the Highland Delaware Case against the Debtor, HERA, HERAM, and Dondero in order to "undo the transfer of assets in the Escrow and any other fraudulent transfers from" HERA. *Id.* ¶ 63.

31. In support of the Highland Delaware Case, Daugherty alleged, among other things, that (a) Dondero, HERAM, and HCMLP caused HERA "to fraudulently or otherwise transfer its assets to" HCMLP, leaving HERA insolvent (*Id.* ¶ 5); (b) HCMLP was the beneficiary of the alleged self-dealing transactions (*Id.* ¶ 8); (c) HCMLP was the vehicle that Dondero used to wrest control of HERA, a critical step in the execution of the alleged scheme (*Id.* ¶¶ 31-32, 37); and (d) all of HERA's assets were transferred to HCMLP (*Id.* ¶¶ 38-39).

32. In reliance on the allegations set forth above (and others at set forth in his Second Amended Complaint), Daugherty sued all of the defendants in the Highland Delaware Case for the fraudulent transfer of assets (*Id.* ¶¶ 73-80), and he sued HCMLP for aiding and abetting HERAM and Dondero in the breach of their fiduciary duties (*Id.* ¶¶ 100-107); indemnification (*Id.* ¶¶ 114-117); "fees on fees" (*Id.* ¶¶ 118-119); unjust enrichment (*Id.* ¶¶ 120-125); and promissory estoppel (*Id.* ¶¶ 126-138).

33. Three days into the trial in the Highland Delaware Case, on October 19, 2019, the Debtor filed for bankruptcy in the United States Bankruptcy Court for the District of Delaware; the Debtor's bankruptcy case was subsequently transferred to this Court. Motion ¶¶ 9-10.

E. Daugherty commences the HERA Delaware Case

34. According to Daugherty, "[d]uring [the] trial of the Highland Delaware Case . . . Dondero and his accomplices' scheme became more clear. As a result, Daugherty filed a separate lawsuit against Dondero, [HERA, HERAM], Hunton Andrews Kurth LLP, Marc Katz, Michael Hurst, Scott Ellington, Thomas Surgent, and Isaac Leventon in the Delaware [Chancery] Court in a case styled: *Daugherty v. Dondero, et al.*, C.A. No. 2019-0956-MTZ (the "**HERA Delaware Case**" [and together with the Highland Delaware Case, the "Delaware Cases"]) alleging fraudulent transfer and conspiracy." *Id.* ¶ 6.

35. Daugherty's claims in the HERA Delaware Case are based on the same facts as the claims asserted in the Highland Delaware Case. Indeed, in his Introduction to the Verified Amended Complaint, Daugherty alleges that the Defendants "engaged in fraud, a conspiracy to defraud Daugherty, and civil conspiracy with the goal of defrauding Daugherty and never paying him the compensation he had earned." Daugherty Exhibit B ¶ 3.

36. According to Daugherty, the specific goal of the fraud and conspiracy was to transfer HERA's assets, and the assets in the Escrow, to HCMLP, and that goal was accomplished by the "Defendants *and Highland*." *Id.* ¶¶ 4-6 (emphasis added).

37. Highland is implicated by other specific allegations that echo those made in the Highland Delaware Case, including, by way of example only, that (a) the Defendants and HCMLP caused HERA to fraudulently or otherwise transfer its assets to HCMLP, leaving HERA insolvent (*Id.* ¶ 6); (b) HCMLP was the beneficiary of the alleged self-dealing transactions (*Id.* ¶ 8); (c) HCMLP was the vehicle that Dondero used to wrest control of HERA, a critical step in the

execution of the alleged scheme (*Id.* ¶¶ 31-32, 34); (d) all of HERA's assets were transferred to HCMLP (*Id.* ¶¶ 38); and (e) HCMLP participated in the scheme to create the Escrow, and later to transfer the assets in Escrow to HCMLP (*Id.* ¶¶ 51, 74-79).[7]

38. Indeed, Daugherty summarized the scheme as follows: "Through a series of transactions in early 2013, HERA Management (controlled by Dondero) emptied HERA (controlled by Dondero) of all its underlying assets and transferred those assets to Highland (controlled by Dondero)" for the purpose of defrauding Daugherty. *Id.* ¶ 38.

39. The factual allegations in the HERA Delaware Case echo those alleged in the Highland Delaware Case, and the same is true with respect to the causes of action asserted. Thus, for example, Daugherty asserts fraudulent-transfer claims in both cases, and each such claim seeks to recover the assets allegedly transferred to HCMLP. The fraud and conspiracy claims also relate to the transfer of assets to HCMLP; as stated by Daugherty in the HERA Delaware Case, the "Defendants aided and abetted the unjust enrichment of [HCMLP] . . . [and] were part of the conspiracy to unjustly enrich [HCMLP] at the expense of Daugherty." *Id.* ¶ 123.

40. Clearly, the HERA Delaware Case mimics the Highland Delaware Case in most material respects and was brought in an attempt to evade the automatic stay. Daugherty all but admitted as much: As a result of the Debtor's bankruptcy filing, the Highland Delaware Case "is currently stayed and Daugherty is currently not able to bring the causes of action set forth in this complaint against [HCMLP] outside the bankruptcy proceedings." *Id.* at 4, n.1.

[7] In a curious but apparent effort to prove he was defrauded, Daugherty also cites to, and relies upon, unrelated fraud claims asserted against the Debtor by third parties. *Id.* ¶¶ 99-102.

F. Daugherty's Proof of Claim is based largely on the Highland Delaware Case

41. On April 1, 2020, Daugherty filed a general unsecured, non-priority proof of claim in the amount of "at least" $37,483,876.59, and the Debtor's claim agent denoted it as claim number 67 ("Daugherty's Claim"). Morris Dec. Exhibit 1.[8] There are three parts to Daugherty's Claim.

42. In reverse order, the last part of Daugherty's Claim relates to an unliquidated defamation claim. *Id.* (Addendum ¶ 3(iii)). That claim is unrelated to the Delaware Cases and the Debtor asserts that it is time-barred. Claim Objection ¶¶ 17-19.

43. The second part of Daugherty's Claim concerns a dispute over an IRS audit; Daugherty appears to claim damages of $992,790.40. Morris Dec. Exhibit 1 (Addendum ¶ 3(ii)). The Debtor contests the amount and validity of Daugherty's Claim or, alternatively, contends that it is subject to subordination under Bankruptcy Code section 510(b). *See* Claim Objection ¶¶ 20-32.

44. The lion's share of Daugherty's Claim (*i.e.*, all but about $1 million of the $37 million claim) is expressly based on the Highland Delaware Case. Morris Dec. Exhibit 1 (Addendum ¶ 3(i)) ("The Claim arises pursuant to . . . [t]he causes of action asserted in the Second Amended Verified Complaint filed by Daugherty in The Court of Chancery of the State of Delaware C.A. No. 2017-0488-MTZ including all attachments referenced therein.")

[8] "Morris Dec." refers to the *Declaration of John A. Morris in Support of Debtor's (I) Objection to Patrick Daugherty's Motion to Confirm Status of Automatic Stay, or Alternatively to Modify Automatic Stay and (II) Cross-Motion to Extend the Automatic Stay in Connection with the Delaware Cases*, executed on October 8, 2020, and filed contemporaneously with the Objection.

FIRST CLAIM FOR RELIEF
(For Injunctive Relief)

45. The Plaintiff repeats and realleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

46. Plaintiff seeks to extend the automatic stay to enjoin the continued prosecution of the Delaware Cases pursuant to Bankruptcy Code section 362, or in the alternative, pursuant to Bankruptcy Code section 105(a) and Bankruptcy Rule 7065.

47. Bankruptcy Code section 362 automatically stays, among other things, (1) "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title," 11 U.S.C. § 362(a)(1); and (2) "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," 11 U.S.C. § 362(a)(3).

48. Bankruptcy Code section 105(a) authorizes the Court to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a).

49. As set forth above, this Court has the jurisdiction and authority to enjoin the Delaware Cases because prosecution of those actions will have a direct and substantial impact on the Debtor's estate.

50. The Debtor is developing a path towards restructuring, and a stay of the Delaware Cases will increase the chances that the Debtor will successfully restructure.

51. If the prosecution of the Delaware Cases is not stayed, the Debtor and its creditors will likely suffer irreparable harm, including the following:

a. Because the Delaware Cases and the Daugherty Claim depend on the same set of operative facts, there is a material risk that (i) there could be adverse findings of law or fact in the Delaware Cases, (ii) Daugherty may argue that the Debtor is bound by any such adverse findings in connection with the adjudication of the Daugherty Claim and/or the Claim Objection, and (iii) the Debtor's right to fully adjudicate the Claim Objection before this Court might otherwise be prejudiced or compromised;

b. Some or all of the Debtor's employees who are non-debtor Defendants are likely to claim that the Debtor has indemnification obligations, and any such claim could adversely affect the Debtor and its estate; and

c. The diversion of the Debtor's directors, offices, and employees who are necessary to the Debtor's efforts to restructure, if such individuals are required to participate in pre-trial and trial proceedings in connection with the Delaware Cases.

52. The harm to the Debtor clearly outweighs any alleged harm to Daugherty from waiting to prosecute the Delaware Cases. Ironically, staying these actions would preserve *both* Daugherty's and the estate's assets because by adjudicating the Daugherty Claim, certain facts will be resolved.

53. Granting the requested relief would be in the public interest because it would (a) further the Debtor's chapter 11 case by minimizing distractions, (b) vindicate the goals of chapter 11 of the Bankruptcy Code by providing a stay of pending litigation, (c) preserve the Debtor's assets for the benefit of all creditors, (d) eliminate the possibility of different courts rendering inconsistent findings, orders, and decisions, and (e) promote judicial economy.

54. An injunction staying the Delaware Cases until the Daugherty Claim is finally determined is therefore appropriate.

PRAYER

WHEREFORE, Plaintiff prays for judgment as follows:

(a) For a determination and judgment that the Debtor is entitled to an extension of the automatic stay pursuant to Bankruptcy Code section 362 and/or an injunction

pursuant to Bankruptcy Code section 105(a) and Bankruptcy Rule 7065 enjoining and staying the Delaware Cases until the Claim Objection is adjudicated or pursuant to further order of this Court;

(b) For costs of suit incurred herein; and

(c) For such other and further relief as this Court deems just and proper.

[*Remainder of Page Intentionally Left Blank*]

Dated: October 8, 2020.

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B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	**ADVERSARY PROCEEDING NUMBER** (Court Use Only)

PLAINTIFFS	**DEFENDANTS**
HIGHLAND CAPITAL MANAGEMENT, L.P.	PATRICK HAGAMAN DAUGHERTY
ATTORNEYS (Firm Name, Address, and Telephone No.) Melissa S. Hayward, Texas Bar No. 24044908 Zachery Z. Annable, Texas Bar No. 24053075 HAYWARD & ASSOCIATES PLLC 10501 N. Central Expy, Ste. 106 Dallas, Texas 75231 Tel: (972) 755-7100	**ATTORNEYS** (If Known) Jason Kathman Pronske & Kathman, P.C. 2701 Dallas Parkway, Suite 590 Plano, Texas 75093 Tel.: (214) 658-6511
PARTY (Check One Box Only) ☒ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☒ Creditor ☐ Other ☐ Trustee

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

Complaint to Extend the Automatic Stay or, in the Alternative, for Preliminary Injunctive Relief

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 70 01(1) – Recovery of Money/Property
- ☐ 11-Recovery of money/propert y - §542 turnover of property
- ☐ 12-Recovery of money/property - §547 preference
- ☐ 13-Recovery of money/property - §548 fraudulent transfer
- ☐ 14-Recovery of money/property - other

FRBP 70 01 (2) – Validity, Priority or Extent of Lien
- ☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- ☐ 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/ Revocation of Discharge
- ☐ 41-Objection/re vocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- ☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- ☐ 6 6 -Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- ☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- ☐ 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 70 01(6) – Dischargeability (continued)
- ☐ 61 -Dischargeability- §523(a)(5), domestic support
- ☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
- ☐ 63-Dischargeability - §523(a)(8), student loan
- ☐ 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- ☐ 6 5 -Dischargeability - other

FRBP 70 01(7) – Injunctive Relief
- ☒ 71 -Injunctive relief- imposition of stay
- ☐ 72-Injunctive relief - other

FRBP 70 01(8) Subordination of Claim or Interest
- ☐ 81 -Subordination of claim or interest

FRBP 70 01(9) Declaratory Judgment
- ☐ 91 -Declaratory judgment

FRBP 70 01(10) Deter mi nation of Remove d Act ion
- ☐ 01 -Determination of removed claim or cause

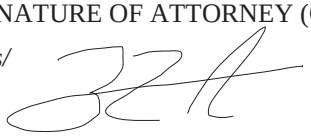
Other
- ☐ SS-SIPA Case - 15 U.S.C. §§78aaa *et.seq.*
- ☐ 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

☐ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ Check if a jury trial is demanded in complaint	☐ Demand $0

Other Relief Sought

Extension of the automatic stay or, in the alternative, for preliminary injunctive relief

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 Division	NAME OF JUDGE Hon. Stacey G. C. Jernigan
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF Highland Capital Management, L.P.	DEFENDANT Patrick Hagaman Daugherty	ADVERSARY PROCEEDING NO. 20-03107-sgj
DISTRICT IN WHICH ADVERSARY IS PENDING Northern District of Texas	DIVISION OFFICE Dallas Division	NAME OF JUDGE Hon. Stacey G. C. Jernigan
SIGNATURE OF ATTORNEY (OR PLAINTIFF) /s/ 		
DATE October 8, 2020	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.

Appendix Exhibit 56

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

RESPONSE OF THE DUGABOY INVESTMENT TRUST TO THE DEBTOR'S FIRST OMNIBUS OBJECTION TO CERTAIN PROOFS OF CLAIM
[Relates to Claim Nos. 131 and 177 and Docket No. 906]

The Dugaboy Investment Trust ("Dugaboy"), a creditor, equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files this Response to *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906] (the "Omnibus Claim Objection") filed by Highland Capital Management, L.P. (the "Debtor"). In support thereof, Dugaboy respectfully represents as follows:

I. BACKGROUND

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

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

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

4. On March 2, 2020, the Court issued a bar date order which set the general proof of claim bar date as April 8, 2020. The order also established April 23, 2020 as the bar date for fund investors to file proofs of claim against the Debtor. *See* Docket No. 488.

5. On April 8, 2020, Dugaboy timely filed its Proof of Claim 131, asserting a claim against the Debtor related to a loan made by Dugaboy to Highland Select Equity Master Fund, LP. As set forth in greater detail below, Dugaboy believes that the Debtor is obligated to repay the loans made by Dugaboy to Highland Select Equity Master Fund, L.P.

6. On April 23, 2020, Dugaboy timely filed its Proof of Claim 177, asserting a claim against the Debtor related to Dugaboy's investments in certain funds managed by the Debtor and the Debtor's actions or inactions in managing these funds.

7. On July 30, 2020, the Debtor filed the Omnibus Claim Objection. Through the objection, the Debtor asserts that a large number of claims identified on Schedules 5 and 6 attached to the Omnibus Claim Objection, including the claims of Dugaboy, should be disallowed in their entirety as purported "no liability" claims. The Debtor asserts that the claims should be disallowed solely on the basis that the Debtor does not show the liabilities in its books and records.

8. The deadline for parties to respond to the Omnibus Claim Objection was initially set for September 1, 2020. Dugaboy and the Debtor thereafter agreed that Dugaboy's response to the Omnibus Claim Objection would not be due until October 8, 2020.

II. SUMMARY OF PROOFS OF CLAIM

A. Dugaboy Proof of Claim Number 131

9. Dugaboy's Proof of Claim Number 131 arises out of a lending transaction that Dugaboy entered into with an entity controlled and substantially owned by the Debtor, Highland Select Equity Master Fund, L.P. ("Select").

10. Specifically, on October 2014, Dugaboy and Select entered into that certain Master Securities Loan Agreement, dated as of October 14, 2014 (the "2014 MSLA"). A true and correct copy of the 2014 MSLA is attached hereto as "**Exhibit A**."

11. In March 2015, Dugaboy and Select entered into that certain Master Securities Loan Agreement, dated as of March 10, 2015 (the "2015 MSLA", and collectively with the 2014 MSLA, the "Loan Agreements").

12. Pursuant to the Loan Agreements, commencing in October 2014 and continuing until termination of the Loan Agreements in July 2019, Dugaboy made various loans to Select in shares of NexPoint Credit Strategies Fund. The total shares loaned by Dugaboy to Select under the Loan Agreements have a current market value of approximately $29,461,089.

13. From 2015 to the termination of the Loan Agreements in 2019, Select and/or the Debtor partially repaid Dugaboy in shares that have a total market value of approximately $17,419,651. Thus, the total market value of the shares now owed to Dugaboy is approximately $12,041,438.

14. On or about July 23, 2019, Dugaboy and Select executed the Termination of Loan, effective as of July 23, 2019. Pursuant to the Termination of Loan, Select and Dugaboy agreed to terminate the Loan Agreements and commemorate that a large number of shares remained due and owing to Dugaboy under the Loan Agreements.

15. As of the Petition Date, Dugaboy has not been repaid the outstanding shares and remains owed approximately $12,041,438 as of approximately October 1, 2020. A summary of the loan account is attached hereto as "**Exhibit B**."

16. The Debtor effectively utilizes Select as a brokerage account. In essence, the funds and other assets held by Select are, and have been, utilized by the Debtor in the ordinary course of its business. Accordingly, loans that were made by Dugaboy to or for the benefit of Select have also been made to or for the benefit of the Debtor. Dugaboy believes that the loans made by it under the Loan Agreements were utilized by the Debtor and the Debtor is obligated to repay them as a result.

B. Dugaboy Proof of Claim Number 177

17. Dugaboy's claim number 177 was filed to preserve prepetition damages resulting from post-petition treatment of the contracts and the Debtor's post-petition actions or inactions in managing certain funds in which Dugaboy is invested. Depending on how the contracts are dealt with in the bankruptcy the prepetition and post-petition claim amounts will vary. It is estimated that Dugaboy's damages are not less than $700,000. These damages relate directly to Dugaboy's role as an investor in certain funds managed by the Debtor, including, without limitation, Highland Multi-Strategy Credit Fund, L.P. and Highland Multi-Strategy Credit Fund, Ltd.

18. The filed proof of claim makes clear that Dugaboy's potential claim relates primarily to the "post-petition actions or inactions of the fund investment manager" in managing

the funds to which Dugaboy is invested, including the Multi-Strat funds. Specifically, Dugaboy may have claims against the Debtor relating to the Debtor's sale of certain assets, namely life settlement policies and Omnimax, held by Highland Multi-Strategy Credit Fund, L.P. and Highland Multi-Strategy Credit Fund, Ltd. Dugaboy believes that the sale of these assets was improper, did not maximize value, was detrimental to the investors in these funds, and not in the best interest of the Debtor or its estate. As a result of these actions by the Debtor, Dugaboy and the other fund investors have been significantly damaged. Dugaboy's damages as a result of this transaction are not less than $700,000.

19. The filing of this proof of claim was necessary to preserve any prepetition damages that may result from post-petition activity, including the Multi-Strat transaction. In addition, Dugaboy filed this claim to protect its claims and ensure the Debtor is on notice of its potential claims, to ensure satisfaction of the "fund investor" bar date, and to preserve all of its rights, remedies, and potential claims as a fund investor in the Debtor, including as those rights relate to the prepetition Fourth Amended and Restated Limited Partnership Agreement and that certain Third Amended Restated Investment Management Agreement by and between Highland Multi-Strategy Credit Fund, L.P., Highland Multi-Strategy Credit Fund, Ltd., and the Debtor.

20. Dugaboy continues to research and analyze these claims to determine whether asserting an adversary proceeding against the Debtor is proper. Because the potential claims have accrued post-petition, Dugaboy may be authorized to pursue these claims through the filing of an adversary proceeding which, when filed, may ultimately render the filed proof of claim redundant. Notwithstanding, the proof of claim was filed to preserve Dugaboy's rights regarding these and other, similar claims that are accruing against the Debtor related to its actions or inactions as fund investment manager.

III. LEGAL STANDARD

21. Section 502 of the Bankruptcy Code provides, in pertinent part, as follows: "[a] claim or interest, proof of which is filed under section 501 of [the Bankruptcy Code], is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502.

22. The Bankruptcy Code establishes a burden-shifting framework for proving the validity and amount of a claim. "A proof of claim executed and filed in accordance with the [Bankruptcy Rules] shall constitute *prima facie* evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f); *see also In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006). A proof of claim loses the presumption of *prima facie* validity under Rule 3001(f) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") if an objecting party produces evidence sufficient to rebut at least one of the allegations that is essential to the claim's legal sufficiency. *See In re Fidelity Holding Co.*, Ltd., 837 F.2d 696, 698 (5th Cir. 1988); *McGee v. O'Connor (In re O'Connor)*, 153 F.3d 258, 260 (5th Cir. 1998). Once such allegations are rebutted, the burden shifts back to the claimant to prove its claim by a preponderance of the evidence. *In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006).

IV. RESPONSE TO OMNIBUS CLAIM OBJECTION

A. The Omnibus Claim Objection Should be Overruled Because it is Procedurally Improper and Unauthorized Under the Bankruptcy Code

23. First, the Omnibus Claim Objection should be overruled in full because it is procedurally improper and not authorized under the Bankruptcy Code. While styled as an "omnibus" objection pursuant to Bankruptcy Rule 3007(d), the basis for Debtor's "no liability" objection is not found in the rule.

24. Rule 3007(d) specifies a limited number of grounds for which the omnibus claim objection procedure can be utilized. Those grounds are limited to the following:

(1) they duplicate other claims;

(2) they have been filed in the wrong case;

(3) they have been amended by subsequently filed proofs of claim;

(4) they were not timely filed;

(5) they have been satisfied or released during the case in accordance with the Code, applicable rules, or a court order;

(6) they were presented in a form that does not comply with applicable rules, and the objection states that the objector is unable to determine the validity of the claim because of the noncompliance;

(7) they are interests, rather than claims; or

(8) they assert priority in an amount that exceeds the maximum amount under §507 of the Code.

Fed R. Bankr. P. 3007(d).[1]

25. As is evident, so-called "no liability" claims are not included in Rule 3007(d) as a basis for which the omnibus claim objection process can be utilized.

26. Here, without authority or justification, the Debtor is attempting to utilize the omnibus claim objection procedure to potentially rid itself of a number of claims without following proper procedures or allowing for due process for the individual claimants.

27. Allowing a debtor to bypass the procedural safeguards of the Bankruptcy Rules to obtain the disallowance of a proof of claim based solely on an unsupported conclusory statement violates due process and conflicts with the burden-shifting framework provided by the Bankruptcy Code and Rules. If the Debtor desires to dispute the validity of a proof of claim, it should be required to file individual substantive objections as required by the Bankruptcy Code and Bankruptcy Rules.

[1] The applicable local rule, L.B.R. 3007-2, outlines additional procedures for the making of omnibus objections to claims but does not include any additional grounds on which omnibus claim objections can be brought.

28. Because the Omnibus Claim Objection is procedurally improper and not authorized under the Bankruptcy Code, it should be overruled in its entirety.

B. The Debtor has Failed to Rebut the *Prima Facie* Validity of Dugaboy's Claims, and Evidence in Support of the Claims has been Provided

29. Even if the Omnibus Claim Objection can be maintained as currently put forth, the Debtor has failed to meet its initial burden to rebut the *prima facie* validity of Dugaboy's Claims. Accordingly, the Omnibus Claim Objection should be overruled.

30. Debtor's Omnibus Claim Objection fails to put forward any evidence regarding Dugaboy's Claims. Instead, the Omnibus Claim Objection contains a conclusory denial of the validity of the Dugaboy's Claims. It fails to refute or address the legal sufficiency of Dugaboy's claims. It is improper for the Debtor to attempt to avoid legitimate claims with a one-sentence, unsupported denial that does not respond to the merits of the claims. The Omnibus Claim Objection should be overruled as to Dugaboy's Proofs of Claim as failing to satisfy the minimum legal requirements to object to a claim.

31. Even if the Debtor has rebutted the *prima facie* validity of Dugaboy's claims, Dugaboy's claims, as described in detail above, are valid and Dugaboy can prove its claims by a preponderance of the evidence.

32. First, as to Claim Number 131, Dugaboy has provided evidence of the lending transaction with Select and of the amounts owed Dugaboy under the loan. Further, because of the Debtor's ownership and control of Select, and of Debtor's utilization of Select and Select's funds and other assets, including the shares and/or funds loaned by Dugaboy, the Debtor is liable to repay the loans made by Dugaboy. The current market value of the shares owed to Dugaboy is $12,041,438.

33. Second, as to Claim Number 177, Dugaboy has explained that this claim primarily relates to the post-petition actions or inactions of the Debtor in managing certain funds in which Dugaboy is invested, including Highland Multi-Strategy Credit Fund, L.P. and Highland Multi-Strategy Credit Fund, Ltd.

34. Specifically, Dugaboy may have claims against the Debtor relating to the Debtor's sale of certain assets, namely life settlement policies and Omnimax, held by Highland Multi-Strategy Credit Fund, L.P. and Highland Multi-Strategy Credit Fund, Ltd. Dugaboy believes that the sale of these assets was improper, did not maximize value, was detrimental to the investors in these funds, and not in the best interest of the Debtor or its estate. As a result of these actions by the Debtor, Dugaboy and the other fund investors have been significantly damaged. Dugaboy's damages are not less than $700,000.

35. Dugaboy filed Claim 177 to protect these claims and ensure the Debtor is on notice of its potential claims, to ensure satisfaction of the "fund investor" bar date, and to preserve all of its rights, remedies, and potential claims as a fund investor in the Debtor, including as those rights relate to the prepetition Fourth Amended and Restated Limited Partnership Agreement and that certain Third Amended Restated Investment Management Agreement by and between Highland Multi-Strategy Credit Fund, L.P., Highland Multi-Strategy Credit Fund, Ltd., and the Debtor.

36. As stated above, Dugaboy continues to research and analyze these claims to determine whether the filing of an adversary proceeding against the Debtor for these post-petition actions is proper.

37. Because both of Dugaboy's claims are *prima facie* valid and sufficient evidence has been advanced in support of these claims, the Omnibus Claim Objection should be overruled.

C. In the Alternative, the Court Should Grant Dugaboy Leave to Amend the Proofs of Claim and to Conduct Discovery

38. In the alternative, Dugaboy requests that the Court (i) provide Dugaboy with leave to amend its proofs of claim; and (ii) grant Dugaboy the opportunity to conduct discovery, as necessary, concerning its claims. Alongside the filing of this response, Dugaboy will be filing a Motion for Leave to Amend its Proofs of Claim. It is hoped that by amending its claims to include greater particularity that the Debtor and Dugaboy can ultimately reach a consensual resolution of the claims.

39. "Amendments to timely creditor proofs of claim have been liberally permitted to cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim." *United States (IRS) v. Kolstad (In re Kolstad)*, 928 F.2d 171, 175 (5th Cir. 1991) (internal quotations omitted).

40. In this case, while Dugaboy believes its claims are *prima facie* valid as filed, and that Dugaboy can prove its claims by a preponderance of the evidence at any claim objection hearing, Dugaboy seeks leave of Court to amend its proofs of claim to describe the claims with greater particularity and cure any ministerial defects in the claims. Dugaboy believes that amending the claims may provide greater clarity and ultimately assist the parties in narrowing down the disputed issues and resolving the claim objections.

41. To the extent that the claim objection process goes forward, Dugaboy further requests that the Court allow ample time for Dugaboy to conduct discovery concerning its claims. Given the potential legal and factual issues involved, it is likely that significant discovery will be required by both parties.

CONCLUSION AND PRAYER

Dugaboy respectfully requests that the Court enter an order (i) overruling the Omnibus Claim Objection; and/or (ii) providing Dugaboy with leave to amend its claims and to take discovery concerning its claims; and (iii) providing Dugaboy with such further relief to which it may be justly entitled.

Dated: October 8, 2020

Respectfully submitted,

/s/ Bryan C. Assink

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ATTORNEYS FOR THE DUGABOY INVESTMENT TRUST

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on October 8, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Debtor and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink
Bryan C. Assink

EXHIBIT A

Master Securities Loan Agreement

2000 Version

Dated as of: October 14, 2014

Between: The Dugaboy Investment Trust

and Highland Select Equity Master Fund, L.P.

1. Applicability.

From time to time the parties hereto may enter into transactions in which one party ("Lender") will lend to the other party ("Borrower") certain Securities (as defined herein) against a transfer of Collateral (as defined herein). Each such transaction shall be referred to herein as a "Loan" and, unless otherwise agreed in writing, shall be governed by this Agreement, including any supplemental terms or conditions contained in an Annex or Schedule hereto and in any other annexes identified herein or therein as applicable hereunder. Capitalized terms not otherwise defined herein shall have the meanings provided in Section 25.

2. Loans of Securities.

2.1 Subject to the terms and conditions of this Agreement, Borrower or Lender may, from time to time, seek to initiate a transaction in which Lender will lend Securities to Borrower. Borrower and Lender shall agree on the terms of each Loan (which terms may be amended during the Loan), including the issuer of the Securities, the amount of Securities to be lent, the basis of compensation, the amount of Collateral to be transferred by Borrower, and any additional terms. Such agreement shall be confirmed (a) by a schedule and receipt listing the Loaned Securities provided by Borrower to Lender in accordance with Section 3.2, (b) through any system that compares Loans and in which Borrower and Lender are participants, or (c) in such other manner as may be agreed by Borrower and Lender in writing. Such confirmation (the "Confirmation"), together with the Agreement, shall constitute conclusive evidence of the terms agreed between Borrower and Lender with respect to the Loan to which the Confirmation relates, unless with respect to the Confirmation specific objection is made promptly after receipt thereof. In the event of any inconsistency between the terms of such Confirmation and this Agreement, this Agreement shall prevail unless each party has executed such Confirmation.

2.2 Notwithstanding any other provision in this Agreement regarding when a Loan commences, unless otherwise agreed, a Loan hereunder shall not occur until the Loaned Securities and the Collateral therefor have been transferred in accordance with Section 15.

3. Transfer of Loaned Securities.

3.1 Unless otherwise agreed, Lender shall transfer Loaned Securities to Borrower hereunder on or before the Cutoff Time on the date agreed to by Borrower and Lender for the commencement of the Loan.

3.2 Unless otherwise agreed, Borrower shall provide Lender, for each Loan in which Lender is a Customer, with a schedule and receipt listing the Loaned Securities. Such schedule and receipt may consist of (a) a schedule provided to Borrower by Lender and executed and returned by Borrower when the Loaned Securities are received, (b) in the case of Securities transferred through a Clearing Organization which provides transferors with a notice evidencing such transfer, such notice, or (c) a confirmation or other document provided to Lender by Borrower.

3.3 Notwithstanding any other provision in this Agreement, the parties hereto agree that they intend the Loans hereunder to be loans of Securities. If, however, any Loan is deemed to be a loan of money by Borrower to Lender, then Borrower shall have, and Lender shall be deemed to have granted, a security interest in the Loaned Securities and the proceeds thereof.

4. Collateral.

4.1 Unless otherwise agreed, Borrower shall, prior to or concurrently with the transfer of the Loaned Securities to Borrower, but in no case later than the Close of Business on the day of such transfer, transfer to Lender Collateral with a Market Value at least equal to the Margin Percentage of the Market Value of the Loaned Securities.

4.2 The Collateral transferred by Borrower to Lender, as adjusted pursuant to Section 9, shall be security for Borrower's obligations in respect of such Loan and for any other obligations of Borrower to Lender hereunder. Borrower hereby pledges with, assigns to, and grants Lender a continuing first priority security interest in, and a lien upon, the Collateral, which shall attach upon the transfer of the Loaned Securities by Lender to Borrower and which shall cease upon the transfer of the Loaned Securities by Borrower to Lender. In addition to the rights and remedies given to Lender hereunder, Lender shall have all the rights and remedies of a secured party under the UCC. It is understood that Lender may use or invest the Collateral, if such consists of cash, at its own risk, but that (unless Lender is a Broker-Dealer) Lender shall, during the term of any Loan hereunder, segregate Collateral from all securities or other assets in its possession. Lender may Retransfer Collateral only (a) if Lender is a Broker-Dealer or (b) in the event of a Default by Borrower. Segregation of Collateral may be accomplished by appropriate identification on the books and records of Lender if it is a "securities intermediary" within the meaning of the UCC.

4.3 Except as otherwise provided herein, upon transfer to Lender of the Loaned Securities on the day a Loan is terminated pursuant to Section 6, Lender shall be obligated to transfer the Collateral (as adjusted pursuant to Section 9) to Borrower no later than the Cutoff Time on such day or, if such day is not a day on which a transfer of such Collateral may be effected under Section 15, the next day on which such a transfer may be effected.

4.4 If Borrower transfers Collateral to Lender, as provided in Section 4.1, and Lender does not transfer the Loaned Securities to Borrower, Borrower shall have the absolute right to the return of the Collateral; and if Lender transfers Loaned Securities to Borrower and

Borrower does not transfer Collateral to Lender as provided in Section 4.1, Lender shall have the absolute right to the return of the Loaned Securities.

4.5 Borrower may, upon reasonable notice to Lender (taking into account all relevant factors, including industry practice, the type of Collateral to be substituted, and the applicable method of transfer), substitute Collateral for Collateral securing any Loan or Loans; provided, however, that such substituted Collateral shall (a) consist only of cash, securities or other property that Borrower and Lender agreed would be acceptable Collateral prior to the Loan or Loans and (b) have a Market Value such that the aggregate Market Value of such substituted Collateral, together with all other Collateral for Loans in which the party substituting such Collateral is acting as Borrower, shall equal or exceed the agreed upon Margin Percentage of the Market Value of the Loaned Securities.

4.6 Prior to the expiration of any letter of credit supporting Borrower's obligations hereunder, Borrower shall, no later than the Extension Deadline, (a) obtain an extension of the expiration of such letter of credit, (b) replace such letter of credit by providing Lender with a substitute letter of credit in an amount at least equal to the amount of the letter of credit for which it is substituted, or (c) transfer such other Collateral to Lender as may be acceptable to Lender.

5. Fees for Loan.

5.1 Unless otherwise agreed, (a) Borrower agrees to pay Lender a loan fee (a "Loan Fee"), computed daily on each Loan to the extent such Loan is secured by Collateral other than cash, based on the aggregate Market Value of the Loaned Securities on the day for which such Loan Fee is being computed, and (b) Lender agrees to pay Borrower a fee or rebate (a "Cash Collateral Fee") on Collateral consisting of cash, computed daily based on the amount of cash held by Lender as Collateral, in the case of each of the Loan Fee and the Cash Collateral Fee at such rates as Borrower and Lender may agree. Except as Borrower and Lender may otherwise agree (in the event that cash Collateral is transferred by clearing house funds or otherwise), Loan Fees shall accrue from and including the date on which the Loaned Securities are transferred to Borrower to, but excluding, the date on which such Loaned Securities are returned to Lender, and Cash Collateral Fees shall accrue from and including the date on which the cash Collateral is transferred to Lender to, but excluding, the date on which such cash Collateral is returned to Borrower.

5.2 Unless otherwise agreed, any Loan Fee or Cash Collateral Fee payable hereunder shall be payable:

(a) in the case of any Loan of Securities other than Government Securities, upon the earlier of (i) the fifteenth day of the month following the calendar month in which such fee was incurred and (ii) the termination of all Loans hereunder (or, if a transfer of cash in accordance with Section 15 may not be effected on such fifteenth day or the day of such termination, as the case may be, the next day on which such a transfer may be effected); and

(b) in the case of any Loan of Government Securities, upon the termination of such Loan and at such other times, if any, as may be customary in accordance with market practice.

Notwithstanding the foregoing, all Loan Fees shall be payable by Borrower immediately in the event of a Default hereunder by Borrower and all Cash Collateral Fees shall be payable immediately by Lender in the event of a Default by Lender.

6. Termination of the Loan.

6.1 (a) Unless otherwise agreed, either party may terminate a Loan on a termination date established by notice given to the other party prior to the Close of Business on a Business Day. The termination date established by a termination notice shall be a date no earlier than the standard settlement date that would apply to a purchase or sale of the Loaned Securities (in the case of a notice given by Lender) or the non-cash Collateral securing the Loan (in the case of a notice given by Borrower) entered into at the time of such notice, which date shall, unless Borrower and Lender agree to the contrary, be (i) in the case of Government Securities, the next Business Day following such notice and (ii) in the case of all other Securities, the third Business Day following such notice.

(b) Notwithstanding paragraph (a) and unless otherwise agreed, Borrower may terminate a Loan on any Business Day by giving notice to Lender and transferring the Loaned Securities to Lender before the Cutoff Time on such Business Day if (i) the Collateral for such Loan consists of cash or Government Securities or (ii) Lender is not permitted, pursuant to Section 4.2, to Retransfer Collateral.

6.2 Unless otherwise agreed, Borrower shall, on or before the Cutoff Time on the termination date of a Loan, transfer the Loaned Securities to Lender; provided, however, that upon such transfer by Borrower, Lender shall transfer the Collateral (as adjusted pursuant to Section 9) to Borrower in accordance with Section 4.3.

7. Rights in Respect of Loaned Securities and Collateral.

7.1 Except as set forth in Sections 8.1 and 8.2 and as otherwise agreed by Borrower and Lender, until Loaned Securities are required to be redelivered to Lender upon termination of a Loan hereunder, Borrower shall have all of the incidents of ownership of the Loaned Securities, including the right to transfer the Loaned Securities to others. Lender hereby waives the right to vote, or to provide any consent or to take any similar action with respect to, the Loaned Securities in the event that the record date or deadline for such vote, consent or other action falls during the term of the Loan.

7.2 Except as set forth in Sections 8.3 and 8.4 and as otherwise agreed by Borrower and Lender, if Lender may, pursuant to Section 4.2, Retransfer Collateral, Borrower hereby waives the right to vote, or to provide any consent or take any similar action with respect to, any such Collateral in the event that the record date or deadline for such vote, consent or other action falls during the term of a Loan and such Collateral is not required to be returned to Borrower pursuant to Section 4.5 or Section 9.

8. Distributions.

8.1 Lender shall be entitled to receive all Distributions made on or in respect of the Loaned Securities which are not otherwise received by Lender, to the full extent it would be so entitled if the Loaned Securities had not been lent to Borrower.

8.2 Any cash Distributions made on or in respect of the Loaned Securities, which Lender is entitled to receive pursuant to Section 8.1, shall be paid by the transfer of cash to Lender by Borrower, on the date any such Distribution is paid, in an amount equal to such cash Distribution, so long as Lender is not in Default at the time of such payment. Non-cash Distributions that Lender is entitled to receive pursuant to Section 8.1 shall be added to the Loaned Securities on the date of distribution and shall be considered such for all purposes, except that if the Loan has terminated, Borrower shall forthwith transfer the same to Lender.

8.3 Borrower shall be entitled to receive all Distributions made on or in respect of non-cash Collateral which are not otherwise received by Borrower, to the full extent it would be so entitled if the Collateral had not been transferred to Lender.

8.4 Any cash Distributions made on or in respect of such Collateral, which Borrower is entitled to receive pursuant to Section 8.3, shall be paid by the transfer of cash to Borrower by Lender, on the date any such Distribution is paid, in an amount equal to such cash Distribution, so long as Borrower is not in Default at the time of such payment. Non-cash Distributions that Borrower is entitled to receive pursuant to Section 8.3 shall be added to the Collateral on the date of distribution and shall be considered such for all purposes, except that if each Loan secured by such Collateral has terminated, Lender shall forthwith transfer the same to Borrower.

8.5 Unless otherwise agreed by the parties:

(a) If (i) Borrower is required to make a payment (a "Borrower Payment") with respect to cash Distributions on Loaned Securities under Sections 8.1 and 8.2 ("Securities Distributions"), or (ii) Lender is required to make a payment (a "Lender Payment") with respect to cash Distributions on Collateral under Sections 8.3 and 8.4 ("Collateral Distributions"), and (iii) Borrower or Lender, as the case may be ("Payor"), shall be required by law to collect any withholding or other tax, duty, fee, levy or charge required to be deducted or withheld from such Borrower Payment or Lender Payment ("Tax"), then Payor shall (subject to subsections (b) and (c) below), pay such additional amounts as may be necessary in order that the net amount of the Borrower Payment or Lender Payment received by the Lender or Borrower, as the case may be ("Payee"), after payment of such Tax equals the net amount of the Securities Distribution or Collateral Distribution that would have been received if such Securities Distribution or Collateral Distribution had been paid directly to the Payee.

(b) No additional amounts shall be payable to a Payee under subsection (a) above to the extent that Tax would have been imposed on a Securities Distribution or Collateral Distribution paid directly to the Payee.

(c) No additional amounts shall be payable to a Payee under subsection (a) above to the extent that such Payee is entitled to an exemption from, or reduction in the rate of, Tax on a Borrower Payment or Lender Payment subject to the provision of a certificate or other documentation, but has failed timely to provide such certificate or other documentation.

(d) Each party hereto shall be deemed to represent that, as of the commencement of any Loan hereunder, no Tax would be imposed on any cash Distribution paid to it with respect to (i) Loaned Securities subject to a Loan in which it is acting as

Lender or (ii) Collateral for any Loan in which it is acting as Borrower, unless such party has given notice to the contrary to the other party hereto (which notice shall specify the rate at which such Tax would be imposed). Each party agrees to notify the other of any change that occurs during the term of a Loan in the rate of any Tax that would be imposed on any such cash Distributions payable to it.

8.6 To the extent that, under the provisions of Sections 8.1 through 8.5, (a) a transfer of cash or other property by Borrower would give rise to a Margin Excess or (b) a transfer of cash or other property by Lender would give rise to a Margin Deficit, Borrower or Lender (as the case may be) shall not be obligated to make such transfer of cash or other property in accordance with such Sections, but shall in lieu of such transfer immediately credit the amounts that would have been transferable under such Sections to the account of Lender or Borrower (as the case may be).

9. Mark to Market.

9.1 If Lender is a Customer, Borrower shall daily mark to market any Loan hereunder and in the event that at the Close of Trading on any Business Day the Market Value of the Collateral for any Loan to Borrower shall be less than 100% of the Market Value of all the outstanding Loaned Securities subject to such Loan, Borrower shall transfer additional Collateral no later than the Close of Business on the next Business Day so that the Market Value of such additional Collateral, when added to the Market Value of the other Collateral for such Loan, shall equal 100% of the Market Value of the Loaned Securities.

9.2 In addition to any rights of Lender under Section 9.1, if at any time the aggregate Market Value of all Collateral for Loans by Lender shall be less than the Margin Percentage of the Market Value of all the outstanding Loaned Securities subject to such Loans (a "Margin Deficit"), Lender may, by notice to Borrower, demand that Borrower transfer to Lender additional Collateral so that the Market Value of such additional Collateral, when added to the Market Value of all other Collateral for such Loans, shall equal or exceed the Margin Percentage of the Market Value of the Loaned Securities.

9.3 Subject to Borrower's obligations under Section 9.1, if at any time the Market Value of all Collateral for Loans to Borrower shall be greater than the Margin Percentage of the Market Value of all the outstanding Loaned Securities subject to such Loans (a "Margin Excess"), Borrower may, by notice to Lender, demand that Lender transfer to Borrower such amount of the Collateral selected by Borrower so that the Market Value of the Collateral for such Loans, after deduction of such amounts, shall thereupon not exceed the Margin Percentage of the Market Value of the Loaned Securities.

9.4 Borrower and Lender may agree, with respect to one or more Loans hereunder, to mark the values to market pursuant to Sections 9.2 and 9.3 by separately valuing the Loaned Securities lent and the Collateral given in respect thereof on a Loan-by-Loan basis.

9.5 Borrower and Lender may agree, with respect to any or all Loans hereunder, that the respective rights of Lender and Borrower under Sections 9.2 and 9.3 may be exercised only where a Margin Excess or Margin Deficit exceeds a specified dollar amount or a specified percentage of the Market Value of the Loaned Securities under such Loans (which amount or percentage shall be agreed to by Borrower and Lender prior to entering into any such Loans).

9.6 If any notice is given by Borrower or Lender under Sections 9.2 or 9.3 at or before the Margin Notice Deadline on any day on which a transfer of Collateral may be effected in accordance with Section 15, the party receiving such notice shall transfer Collateral as provided in such Section no later than the Close of Business on such day. If any such notice is given after the Margin Notice Deadline, the party receiving such notice shall transfer such Collateral no later than the Close of Business on the next Business Day following the day of such notice.

10. Representations.

The parties to this Agreement hereby make the following representations and warranties, which shall continue during the term of any Loan hereunder:

10.1 Each party hereto represents and warrants that (a) it has the power to execute and deliver this Agreement, to enter into the Loans contemplated hereby and to perform its obligations hereunder, (b) it has taken all necessary action to authorize such execution, delivery and performance, and (c) this Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with its terms.

10.2 Each party hereto represents and warrants that it has not relied on the other for any tax or accounting advice concerning this Agreement and that it has made its own determination as to the tax and accounting treatment of any Loan and any dividends, remuneration or other funds received hereunder.

10.3 Each party hereto represents and warrants that it is acting for its own account unless it expressly specifies otherwise in writing and complies with Section 11.1(b).

10.4 Borrower represents and warrants that it has, or will have at the time of transfer of any Collateral, the right to grant a first priority security interest therein subject to the terms and conditions hereof.

10.5 (a) Borrower represents and warrants that it (or the person to whom it relends the Loaned Securities) is borrowing or will borrow Loaned Securities that are Equity Securities for the purpose of making delivery of such Loaned Securities in the case of short sales, failure to receive securities required to be delivered, or as otherwise permitted pursuant to Regulation T as in effect from time to time.

(b) Borrower and Lender may agree, as provided in Section 24.2, that Borrower shall not be deemed to have made the representation or warranty in subsection (a) with respect to any Loan. By entering into any such agreement, Lender shall be deemed to have represented and warranted to Borrower (which representation and warranty shall be deemed to be repeated on each day during the term of the Loan) that Lender is either (i) an "exempted borrower" within the meaning of Regulation T or (ii) a member of a national securities exchange or a broker or dealer registered with the U.S. Securities and Exchange Commission that is entering into such Loan to finance its activities as a market maker or an underwriter.

10.6 Lender represents and warrants that it has, or will have at the time of transfer of any Loaned Securities, the right to transfer the Loaned Securities subject to the terms and conditions hereof.

11. Covenants.

11.1 Each party agrees either (a) to be liable as principal with respect to its obligations hereunder or (b) to execute and comply fully with the provisions of Annex I (the terms and conditions of which Annex are incorporated herein and made a part hereof).

11.2 Promptly upon (and in any event within seven (7) Business Days after) demand by Lender, Borrower shall furnish Lender with Borrower's most recent publicly-available financial statements and any other financial statements mutually agreed upon by Borrower and Lender. Unless otherwise agreed, if Borrower is subject to the requirements of Rule 17a-5(c) under the Exchange Act, it may satisfy the requirements of this Section by furnishing Lender with its most recent statement required to be furnished to customers pursuant to such Rule.

12. Events of Default.

All Loans hereunder may, at the option of the non-defaulting party (which option shall be deemed to have been exercised immediately upon the occurrence of an Act of Insolvency), be terminated immediately upon the occurrence of any one or more of the following events (individually, a "Default"):

12.1 if any Loaned Securities shall not be transferred to Lender upon termination of the Loan as required by Section 6;

12.2 if any Collateral shall not be transferred to Borrower upon termination of the Loan as required by Sections 4.3 and 6;

12.3 if either party shall fail to transfer Collateral as required by Section 9;

12.4 if either party (a) shall fail to transfer to the other party amounts in respect of Distributions required to be transferred by Section 8, (b) shall have been notified of such failure by the other party prior to the Close of Business on any day, and (c) shall not have cured such failure by the Cutoff Time on the next day after such Close of Business on which a transfer of cash may be effected in accordance with Section 15;

12.5 if an Act of Insolvency occurs with respect to either party;

12.6 if any representation made by either party in respect of this Agreement or any Loan or Loans hereunder shall be incorrect or untrue in any material respect during the term of any Loan hereunder;

12.7 if either party notifies the other of its inability to or its intention not to perform its obligations hereunder or otherwise disaffirms, rejects or repudiates any of its obligations hereunder; or

12.8 if either party (a) shall fail to perform any material obligation under this Agreement not specifically set forth in clauses 12.1 through 12.7, above, including but not limited to the payment of fees as required by Section 5, and the payment of transfer taxes as required by Section 14, (b) shall have been notified of such failure by the other party prior to the Close of Business on any day, and (c) shall not have cured such failure by the Cutoff Time on the next day after such Close of Business on which a transfer of cash may be effected in accordance with Section 15.

The non-defaulting party shall (except upon the occurrence of an Act of Insolvency) give notice as promptly as practicable to the defaulting party of the exercise of its option to terminate all Loans hereunder pursuant to this Section 12.

13. Remedies.

13.1 Upon the occurrence of a Default under Section 12 entitling Lender to terminate all Loans hereunder, Lender shall have the right, in addition to any other remedies provided herein, (a) to purchase a like amount of Loaned Securities ("Replacement Securities") in the principal market for such Loaned Securities in a commercially reasonable manner, (b) to sell any Collateral in the principal market for such Collateral in a commercially reasonable manner and (c) to apply and set off the Collateral and any proceeds thereof (including any amounts drawn under a letter of credit supporting any Loan) against the payment of the purchase price for such Replacement Securities and any amounts due to Lender under Sections 5, 8, 14 and 16. In the event that Lender shall exercise such rights, Borrower's obligation to return a like amount of the Loaned Securities shall terminate. Lender may similarly apply the Collateral and any proceeds thereof to any other obligation of Borrower under this Agreement, including Borrower's obligations with respect to Distributions paid to Borrower (and not forwarded to Lender) in respect of Loaned Securities. In the event that (i) the purchase price of Replacement Securities (plus all other amounts, if any, due to Lender hereunder) exceeds (ii) the amount of the Collateral, Borrower shall be liable to Lender for the amount of such excess together with interest thereon at a rate equal to (A) in the case of purchases of Foreign Securities, LIBOR, (B) in the case of purchases of any other Securities (or other amounts, if any, due to Lender hereunder), the Federal Funds Rate or (C) such other rate as may be specified in Schedule B, in each case as such rate fluctuates from day to day, from the date of such purchase until the date of payment of such excess. As security for Borrower's obligation to pay such excess, Lender shall have, and Borrower hereby grants, a security interest in any property of Borrower then held by or for Lender and a right of setoff with respect to such property and any other amount payable by Lender to Borrower. The purchase price of Replacement Securities purchased under this Section 13.1 shall include, and the proceeds of any sale of Collateral shall be determined after deduction of, broker's fees and commissions and all other reasonable costs, fees and expenses related to such purchase or sale (as the case may be). In the event Lender exercises its rights under this Section 13.1, Lender may elect in its sole discretion, in lieu of purchasing all or a portion of the Replacement Securities or selling all or a portion of the Collateral, to be deemed to have made, respectively, such purchase of Replacement Securities or sale of Collateral for an amount equal to the price therefor on the date of such exercise obtained from a generally recognized source or the last bid quotation from such a source at the most recent Close of Trading. Subject to Section 18, upon the satisfaction of all obligations hereunder, any remaining Collateral shall be returned to Borrower.

13.2 Upon the occurrence of a Default under Section 12 entitling Borrower to terminate all Loans hereunder, Borrower shall have the right, in addition to any other remedies provided herein, (a) to purchase a like amount of Collateral ("Replacement Collateral") in the principal market for such Collateral in a commercially reasonable manner, (b) to sell a like amount of the Loaned Securities in the principal market for such Loaned Securities in a commercially reasonable manner and (c) to apply and set off the Loaned Securities and any proceeds thereof against (i) the payment of the purchase price for such Replacement Collateral, (ii) Lender's obligation to return any cash or other Collateral, and (iii) any amounts due to Borrower under Sections 5, 8 and 16. In such event, Borrower may treat the Loaned Securities as its own and Lender's obligation to return a

like amount of the Collateral shall terminate; provided, however, that Lender shall immediately return any letters of credit supporting any Loan upon the exercise or deemed exercise by Borrower of its termination rights under Section 12. Borrower may similarly apply the Loaned Securities and any proceeds thereof to any other obligation of Lender under this Agreement, including Lender's obligations with respect to Distributions paid to Lender (and not forwarded to Borrower) in respect of Collateral. In the event that (i) the sales price received from such Loaned Securities is less than (ii) the purchase price of Replacement Collateral (plus the amount of any cash or other Collateral not replaced by Borrower and all other amounts, if any, due to Borrower hereunder), Lender shall be liable to Borrower for the amount of any such deficiency, together with interest on such amounts at a rate equal to (A) in the case of Collateral consisting of Foreign Securities, LIBOR, (B) in the case of Collateral consisting of any other Securities (or other amounts due, if any, to Borrower hereunder), the Federal Funds Rate or (C) such other rate as may be specified in Schedule B, in each case as such rate fluctuates from day to day, from the date of such sale until the date of payment of such deficiency. As security for Lender's obligation to pay such deficiency, Borrower shall have, and Lender hereby grants, a security interest in any property of Lender then held by or for Borrower and a right of setoff with respect to such property and any other amount payable by Borrower to Lender. The purchase price of any Replacement Collateral purchased under this Section 13.2 shall include, and the proceeds of any sale of Loaned Securities shall be determined after deduction of, broker's fees and commissions and all other reasonable costs, fees and expenses related to such purchase or sale (as the case may be). In the event Borrower exercises its rights under this Section 13.2, Borrower may elect in its sole discretion, in lieu of purchasing all or a portion of the Replacement Collateral or selling all or a portion of the Loaned Securities, to be deemed to have made, respectively, such purchase of Replacement Collateral or sale of Loaned Securities for an amount equal to the price therefor on the date of such exercise obtained from a generally recognized source or the last bid quotation from such a source at the most recent Close of Trading. Subject to Section 18, upon the satisfaction of all Lender's obligations hereunder, any remaining Loaned Securities (or remaining cash proceeds thereof) shall be returned to Lender.

13.3 Unless otherwise agreed, the parties acknowledge and agree that (a) the Loaned Securities and any Collateral consisting of Securities are of a type traded in a recognized market, (b) in the absence of a generally recognized source for prices or bid or offer quotations for any security, the non-defaulting party may establish the source therefor in its sole discretion, and (c) all prices and bid and offer quotations shall be increased to include accrued interest to the extent not already included therein (except to the extent contrary to market practice with respect to the relevant Securities).

13.4 In addition to its rights hereunder, the non-defaulting party shall have any rights otherwise available to it under any other agreement or applicable law.

14. Transfer Taxes.

All transfer taxes with respect to the transfer of the Loaned Securities by Lender to Borrower and by Borrower to Lender upon termination of the Loan and with respect to the transfer of Collateral by Borrower to Lender and by Lender to Borrower upon termination of the Loan or pursuant to Section 4.5 or Section 9 shall be paid by Borrower.

15. Transfers.

15.1 All transfers by either Borrower or Lender of Loaned Securities or Collateral consisting of "financial assets" (within the meaning of the UCC) hereunder shall be by (a) in the case of certificated securities, physical delivery of certificates representing such securities together with duly executed stock and bond transfer powers, as the case may be, with signatures guaranteed by a bank or a member firm of the New York Stock Exchange, Inc., (b) registration of an uncertificated security in the transferee's name by the issuer of such uncertificated security, (c) the crediting by a Clearing Organization of such financial assets to the transferee's "securities account" (within the meaning of the UCC) maintained with such Clearing Organization, or (d) such other means as Borrower and Lender may agree.

15.2 All transfers of cash hereunder shall be by (a) wire transfer in immediately available, freely transferable funds or (b) such other means as Borrower and Lender may agree.

15.3 All transfers of letters of credit from Borrower to Lender shall be made by physical delivery to Lender of an irrevocable letter of credit issued by a "bank" as defined in Section 3(a)(6)(A)-(C) of the Exchange Act. Transfers of letters of credit from Lender to Borrower shall be made by causing such letters of credit to be returned or by causing the amount of such letters of credit to be reduced to the amount required after such transfer.

15.4 A transfer of Securities, cash or letters of credit may be effected under this Section 15 on any day except (a) a day on which the transferee is closed for business at its address set forth in Schedule A hereto or (b) a day on which a Clearing Organization or wire transfer system is closed, if the facilities of such Clearing Organization or wire transfer system are required to effect such transfer.

15.5 For the avoidance of doubt, the parties agree and acknowledge that the term "securities," as used herein (except in this Section 15), shall include any "security entitlements" with respect to such securities (within the meaning of the UCC). In every transfer of "financial assets" (within the meaning of the UCC) hereunder, the transferor shall take all steps necessary (a) to effect a delivery to the transferee under Section 8-301 of the UCC, or to cause the creation of a security entitlement in favor of the transferee under Section 8-501 of the UCC, (b) to enable the transferee to obtain "control" (within the meaning of Section 8-106 of the UCC), and (c) to provide the transferee with comparable rights under any applicable foreign law or regulation.

16. Contractual Currency.

16.1 Borrower and Lender agree that (a) any payment in respect of a Distribution under Section 8 shall be made in the currency in which the underlying Distribution of cash was made, (b) any return of cash shall be made in the currency in which the underlying transfer of cash was made, and (c) any other payment of cash in connection with a Loan under this Agreement shall be in the currency agreed upon by Borrower and Lender in connection with such Loan (the currency established under clause (a), (b) or (c) hereinafter referred to as the "Contractual Currency"). Notwithstanding the foregoing, the payee of any such payment may, at its option, accept tender thereof in any other currency; provided, however, that, to the extent permitted by applicable law, the obligation of the payor to make such payment will be discharged only to the extent of the amount of Contractual Currency that such payee may, consistent with normal banking

procedures, purchase with such other currency (after deduction of any premium and costs of exchange) on the banking day next succeeding its receipt of such currency.

16.2 If for any reason the amount in the Contractual Currency received under Section 16.1, including amounts received after conversion of any recovery under any judgment or order expressed in a currency other than the Contractual Currency, falls short of the amount in the Contractual Currency due in respect of this Agreement, the party required to make the payment will (unless a Default has occurred and such party is the non-defaulting party) as a separate and independent obligation and to the extent permitted by applicable law, immediately pay such additional amount in the Contractual Currency as may be necessary to compensate for the shortfall.

16.3 If for any reason the amount in the Contractual Currency received under Section 16.1 exceeds the amount in the Contractual Currency due in respect of this Agreement, then the party receiving the payment will (unless a Default has occurred and such party is the non-defaulting party) refund promptly the amount of such excess.

17. ERISA.

Lender shall, if any of the Securities transferred to the Borrower hereunder for any Loan have been or shall be obtained, directly or indirectly, from or using the assets of any Plan, so notify Borrower in writing upon the execution of this Agreement or upon initiation of such Loan under Section 2.1. If Lender so notifies Borrower, then Borrower and Lender shall conduct the Loan in accordance with the terms and conditions of Department of Labor Prohibited Transaction Exemption 81-6 (46 Fed. Reg. 7527, Jan. 23, 1981; as amended, 52 Fed. Reg. 18754, May 19, 1987), or any successor thereto (unless Borrower and Lender have agreed prior to entering into a Loan that such Loan will be conducted in reliance on another exemption, or without relying on any exemption, from the prohibited transaction provisions of Section 406 of the Employee Retirement Income Security Act of 1974, as amended, and Section 4975 of the Internal Revenue Code of 1986, as amended). Without limiting the foregoing and notwithstanding any other provision of this Agreement, if the Loan will be conducted in accordance with Prohibited Transaction Exemption 81-6, then:

17.1 Borrower represents and warrants to Lender that it is either (a) a bank subject to federal or state supervision, (b) a broker-dealer registered under the Exchange Act or (c) exempt from registration under Section 15(a)(1) of the Exchange Act as a dealer in Government Securities.

17.2 Borrower represents and warrants that, during the term of any Loan hereunder, neither Borrower nor any affiliate of Borrower has any discretionary authority or control with respect to the investment of the assets of the Plan involved in the Loan or renders investment advice (within the meaning of 29 C.F.R. Section 2510.3-21(c)) with respect to the assets of the Plan involved in the Loan. Lender agrees that, prior to or at the commencement of any Loan hereunder, it will communicate to Borrower information regarding the Plan sufficient to identify to Borrower any person or persons that have discretionary authority or control with respect to the investment of the assets of the Plan involved in the Loan or that render investment advice (as defined in the preceding sentence) with respect to the assets of the Plan involved in the Loan. In the event Lender fails to communicate and keep current during the term of any Loan such information, Lender rather than Borrower shall be deemed to have made the representation and warranty in the first sentence of this Section 17.2.

17.3 Borrower shall mark to market daily each Loan hereunder pursuant to Section 9.1 as is required if Lender is a Customer.

17.4 Borrower and Lender agree that:

(a) the term "Collateral" shall mean cash, securities issued or guaranteed by the United States government or its agencies or instrumentalities, or irrevocable bank letters of credit issued by a person other than Borrower or an affiliate thereof;

(b) prior to the making of any Loans hereunder, Borrower shall provide Lender with (i) the most recent available audited statement of Borrower's financial condition and (ii) the most recent available unaudited statement of Borrower's financial condition (if more recent than the most recent audited statement), and each Loan made hereunder shall be deemed a representation by Borrower that there has been no material adverse change in Borrower's financial condition subsequent to the date of the latest financial statements or information furnished in accordance herewith;

(c) the Loan may be terminated by Lender at any time, whereupon Borrower shall deliver the Loaned Securities to Lender within the lesser of (i) the customary delivery period for such Loaned Securities, (ii) five Business Days, and (iii) the time negotiated for such delivery between Borrower and Lender; provided, however, that Borrower and Lender may agree to a longer period only if permitted by Prohibited Transaction Exemption 81-6; and

(d) the Collateral transferred shall be security only for obligations of Borrower to the Plan with respect to Loans, and shall not be security for any obligation of Borrower to any agent or affiliate of the Plan.

18. Single Agreement.

Borrower and Lender acknowledge that, and have entered into this Agreement in reliance on the fact that, all Loans hereunder constitute a single business and contractual relationship and have been entered into in consideration of each other. Accordingly, Borrower and Lender hereby agree that payments, deliveries and other transfers made by either of them in respect of any Loan shall be deemed to have been made in consideration of payments, deliveries and other transfers in respect of any other Loan hereunder, and the obligations to make any such payments, deliveries and other transfers may be applied against each other and netted. In addition, Borrower and Lender acknowledge that, and have entered into this Agreement in reliance on the fact that, all Loans hereunder have been entered into in consideration of each other. Accordingly, Borrower and Lender hereby agree that (a) each shall perform all of its obligations in respect of each Loan hereunder, and that a default in the performance of any such obligation by Borrower or by Lender (the "Defaulting Party") in any Loan hereunder shall constitute a default by the Defaulting Party under all such Loans hereunder, and (b) the non-defaulting party shall be entitled to set off claims and apply property held by it in respect of any Loan hereunder against obligations owing to it in respect of any other Loan with the Defaulting Party.

19. APPLICABLE LAW.

THIS AGREEMENT SHALL BE GOVERNED AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK WITHOUT GIVING EFFECT TO THE CONFLICT OF LAW PRINCIPLES THEREOF.

20. Waiver.

The failure of a party to this Agreement to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement. All waivers in respect of a Default must be in writing.

21. Survival of Remedies.

All remedies hereunder and all obligations with respect to any Loan shall survive the termination of the relevant Loan, return of Loaned Securities or Collateral and termination of this Agreement.

22. Notices and Other Communications.

Any and all notices, statements, demands or other communications hereunder may be given by a party to the other by telephone, mail, facsimile, e-mail, electronic message, telegraph, messenger or otherwise to the individuals and at the facsimile numbers and addresses specified with respect to it in Schedule A hereto, or sent to such party at any other place specified in a notice of change of number or address hereafter received by the other party. Any notice, statement, demand or other communication hereunder will be deemed effective on the day and at the time on which it is received or, if not received, on the day and at the time on which its delivery was in good faith attempted; provided, however, that any notice by a party to the other party by telephone shall be deemed effective only if (a) such notice is followed by written confirmation thereof and (b) at least one of the other means of providing notice that are specifically listed above has previously been attempted in good faith by the notifying party.

23. SUBMISSION TO JURISDICTION; WAIVER OF JURY TRIAL.

23.1 EACH PARTY HERETO IRREVOCABLY AND UNCONDITIONALLY (A) SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF ANY UNITED STATES FEDERAL OR NEW YORK STATE COURT SITTING IN NEW YORK CITY, AND ANY APPELLATE COURT FROM ANY SUCH COURT, SOLELY FOR THE PURPOSE OF ANY SUIT, ACTION OR PROCEEDING BROUGHT TO ENFORCE ITS OBLIGATIONS HEREUNDER OR RELATING IN ANY WAY TO THIS AGREEMENT OR ANY LOAN HEREUNDER AND (B) WAIVES, TO THE FULLEST EXTENT IT MAY EFFECTIVELY DO SO, ANY DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF SUCH ACTION OR PROCEEDING IN ANY SUCH COURT AND ANY RIGHT OF JURISDICTION ON ACCOUNT OF ITS PLACE OF RESIDENCE OR DOMICILE.

23.2 EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES ANY RIGHT THAT IT MAY HAVE TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

24. Miscellaneous.

24.1 Except as otherwise agreed by the parties, this Agreement supersedes any other agreement between the parties hereto concerning loans of Securities between Borrower and Lender. This Agreement shall not be assigned by either party without the prior written consent of the other party and any attempted assignment without such consent shall be null and void. Subject to the foregoing, this Agreement shall be binding upon

and shall inure to the benefit of Borrower and Lender and their respective heirs, representatives, successors and assigns. This Agreement may be terminated by either party upon notice to the other, subject only to fulfillment of any obligations then outstanding. This Agreement shall not be modified, except by an instrument in writing signed by the party against whom enforcement is sought. The parties hereto acknowledge and agree that, in connection with this Agreement and each Loan hereunder, time is of the essence. Each provision and agreement herein shall be treated as separate and independent from any other provision herein and shall be enforceable notwithstanding the unenforceability of any such other provision or agreement.

24.2 Any agreement between Borrower and Lender pursuant to Section 10.5(b) or Section 25.37 shall be made (a) in writing, (b) orally, if confirmed promptly in writing or through any system that compares Loans and in which Borrower and Lender are participants, or (c) in such other manner as may be agreed by Borrower and Lender in writing.

25. Definitions.

For the purposes hereof:

25.1 "Act of Insolvency" shall mean, with respect to any party, (a) the commencement by such party as debtor of any case or proceeding under any bankruptcy, insolvency, reorganization, liquidation, moratorium, dissolution, delinquency or similar law, or such party's seeking the appointment or election of a receiver, conservator, trustee, custodian or similar official for such party or any substantial part of its property, or the convening of any meeting of creditors for purposes of commencing any such case or proceeding or seeking such an appointment or election, (b) the commencement of any such case or proceeding against such party, or another seeking such an appointment or election, or the filing against a party of an application for a protective decree under the provisions of the Securities Investor Protection Act of 1970, which (i) is consented to or not timely contested by such party, (ii) results in the entry of an order for relief, such an appointment or election, the issuance of such a protective decree or the entry of an order having a similar effect, or (iii) is not dismissed within 15 days, (c) the making by such party of a general assignment for the benefit of creditors, or (d) the admission in writing by such party of such party's inability to pay such party's debts as they become due.

25.2 "Bankruptcy Code" shall have the meaning assigned in Section 26.1

25.3 "Borrower" shall have the meaning assigned in Section 1.

25.4 "Borrower Payment" shall have the meaning assigned in Section 8.5(a).

25.5 "Broker-Dealer" shall mean any person that is a broker (including a municipal securities broker), dealer, municipal securities dealer, government securities broker or government securities dealer as defined in the Exchange Act, regardless of whether the activities of such person are conducted in the United States or otherwise require such person to register with the U.S. Securities and Exchange Commission or other regulatory body.

25.6 "Business Day" shall mean, with respect to any Loan hereunder, a day on which regular trading occurs in the principal market for the Loaned Securities subject to such Loan, provided, however, that for purposes of determining the Market Value of any Securities hereunder, such term shall mean a day on which regular trading occurs in the principal market for the Securities whose value is being determined. Notwithstanding the

foregoing, (a) for purposes of Section 9, "Business Day" shall mean any day on which regular trading occurs in the principal market for any Loaned Securities or for any Collateral consisting of Securities under any outstanding Loan hereunder and "next Business Day" shall mean the next day on which a transfer of Collateral may be effected in accordance with Section 15, and (b) in no event shall a Saturday or Sunday be considered a Business Day.

25.7 "Cash Collateral Fee" shall have the meaning assigned in Section 5.1.

25.8 "Clearing Organization" shall mean (a) The Depository Trust Company, or, if agreed to by Borrower and Lender, such other "securities intermediary" (within the meaning of the UCC) at which Borrower (or Borrower's agent) and Lender (or Lender's agent) maintain accounts, or (b) a Federal Reserve Bank, to the extent that it maintains a book-entry system.

25.9 "Close of Business" shall mean the time established by the parties in Schedule B or otherwise orally or in writing or, in the absence of any such agreement, as shall be determined in accordance with market practice.

25.10 "Close of Trading" shall mean, with respect to any Security, the end of the primary trading session established by the principal market for such Security on a Business Day, unless otherwise agreed by the parties.

25.11 "Collateral" shall mean, whether now owned or hereafter acquired and to the extent permitted by applicable law, (a) any property which Borrower and Lender agree prior to the Loan shall be acceptable collateral and which is transferred to Lender pursuant to Sections 4 or 9 (including as collateral, for definitional purposes, any letters of credit mutually acceptable to Lender and Borrower), (b) any property substituted therefor pursuant to Section 4.5, (c) all accounts in which such property is deposited and all securities and the like in which any cash collateral is invested or reinvested, and (d) any proceeds of any of the foregoing; *provided, however*, that if Lender is a Customer, "Collateral" shall (subject to Section 17.4(a), if applicable) be limited to cash, U.S. Treasury bills and notes, an irrevocable letter of credit issued by a "bank" (as defined in Section 3(a)(6)(A)-(C) of the Exchange Act), and any other property permitted to serve as collateral securing a loan of securities under Rule 15c3-3 under the Exchange Act or any comparable regulation of the Secretary of the Treasury under Section 15C of the Exchange Act (to the extent that Borrower is subject to such Rule or comparable regulation) pursuant to exemptive, interpretive or no-action relief or otherwise. If any new or different Security shall be exchanged for any Collateral by recapitalization, merger, consolidation or other corporate action, such new or different Security shall, effective upon such exchange, be deemed to become Collateral in substitution for the former Collateral for which such exchange is made. For purposes of return of Collateral by Lender or purchase or sale of Securities pursuant to Section 13, such term shall include Securities of the same issuer, class and quantity as the Collateral initially transferred by Borrower to Lender, as adjusted pursuant to the preceding sentence.

25.12 "Collateral Distributions" shall have the meaning assigned in Section 8.5(a).

25.13 "Confirmation" shall have the meaning assigned in Section 2.1.

25.14 "Contractual Currency" shall have the meaning assigned in Section 16.1.

25.15 "Customer" shall mean any person that is a customer of Borrower under Rule 15c3-3 under the Exchange Act or any comparable regulation of the Secretary of the Treasury under Section 15C of the Exchange Act (to the extent that Borrower is subject to such Rule or comparable regulation).

25.16 "Cutoff Time" shall mean a time on a Business Day by which a transfer of cash, securities or other property must be made by Borrower or Lender to the other, as shall be agreed by Borrower and Lender in Schedule B or otherwise orally or in writing or, in the absence of any such agreement, as shall be determined in accordance with market practice.

25.17 "Default" shall have the meaning assigned in Section 12.

25.18 "Defaulting Party" shall have the meaning assigned in Section 18.

25.19 "Distribution" shall mean, with respect to any Security at any time, any distribution made on or in respect of such Security, including, but not limited to: (a) cash and all other property, (b) stock dividends, (c) Securities received as a result of split ups of such Security and distributions in respect thereof, (d) interest payments, (e) all rights to purchase additional Securities, and (f) any cash or other consideration paid or provided by the issuer of such Security in exchange for any vote, consent or the taking of any similar action in respect of such Security (regardless of whether the record date for such vote, consent or other action falls during the term of the Loan). In the event that the holder of a Security is entitled to elect the type of distribution to be received from two or more alternatives, such election shall be made by Lender, in the case of a Distribution in respect of the Loaned Securities, and by Borrower, in the case of a Distribution in respect of Collateral.

25.20 "Equity Security" shall mean any security (as defined in the Exchange Act) other than a "nonequity security," as defined in Regulation T.

25.21 "Exchange Act" shall mean the Securities Exchange Act of 1934, as amended.

25.22 "Extension Deadline" shall mean, with respect to a letter of credit, the Cutoff Time on the Business Day preceding the day on which the letter of credit expires.

25.23 "FDIA" shall have the meaning assigned in Section 26.4.

25.24 "FDICIA" shall have the meaning assigned in Section 26.5.

25.25 "Federal Funds Rate" shall mean the rate of interest (expressed as an annual rate), as published in Federal Reserve Statistical Release H.15(519) or any publication substituted therefor, charged for federal funds (dollars in immediately available funds borrowed by banks on an overnight unsecured basis) on that day or, if that day is not a banking day in New York City, on the next preceding banking day.

25.26 "Foreign Securities" shall mean, unless otherwise agreed, Securities that are principally cleared and settled outside the United States.

25.27 "Government Securities" shall mean government securities as defined in Section 3(a)(42)(A)-(C) of the Exchange Act.

25.28 "Lender" shall have the meaning assigned in Section 1.

25.29 "Lender Payment" shall have the meaning assigned in Section 8.5(a).

25.30 "LIBOR" shall mean for any date, the offered rate for deposits in U.S. dollars for a period of three months which appears on the Reuters Screen LIBO page as of 11:00 a.m., London time, on such date (or, if at least two such rates appear, the arithmetic mean of such rates).

25.31 "Loan" shall have the meaning assigned in Section 1.

25.32 "Loan Fee" shall have the meaning assigned in Section 5.1.

25.33 "Loaned Security" shall mean any Security transferred in a Loan hereunder until such Security (or an identical Security) is transferred back to Lender hereunder, except that, if any new or different Security shall be exchanged for any Loaned Security by recapitalization, merger, consolidation or other corporate action, such new or different Security shall, effective upon such exchange, be deemed to become a Loaned Security in substitution for the former Loaned Security for which such exchange is made. For purposes of return of Loaned Securities by Borrower or purchase or sale of Securities pursuant to Section 13, such term shall include Securities of the same issuer, class and quantity as the Loaned Securities, as adjusted pursuant to the preceding sentence.

25.34 "Margin Deficit" shall have the meaning assigned in Section 9.2.

25.35 "Margin Excess" shall have the meaning assigned in Section 9.3.

25.36 "Margin Notice Deadline" shall mean the time agreed to by the parties in the relevant Confirmation, Schedule B hereto or otherwise as the deadline for giving notice requiring same-day satisfaction of mark-to-market obligations as provided in Section 9 hereof (or, in the absence of any such agreement, the deadline for such purposes established in accordance with market practice).

25.37 "Margin Percentage" shall mean, with respect to any Loan as of any date, a percentage agreed by Borrower and Lender, which shall be not less than 100%, unless (a) Borrower and Lender agree otherwise, as provided in Section 24.2, and (b) Lender is not a Customer. Notwithstanding the previous sentence, in the event that the writing or other confirmation evidencing the agreement described in clause (a) does not set out such percentage with respect to any such Loan, the Margin Percentage shall not be a percentage less than the percentage obtained by dividing (i) the Market Value of the Collateral required to be transferred by Borrower to Lender with respect to such Loan at the commencement of the Loan by (ii) the Market Value of the Loaned Securities required to be transferred by Lender to Borrower at the commencement of the Loan.

25.38 "Market Value" shall have the meaning set forth in Annex II or otherwise agreed to by Borrower and Lender in writing. Notwithstanding the previous sentence, in the event that the meaning of Market Value has not been set forth in Annex II or in any other writing, as described in the previous sentence, Market Value shall be determined in accordance with market practice for the Securities, based on the price for such Securities as of the most recent Close of Trading obtained from a generally recognized source agreed to by the parties or the closing bid quotation at the most recent Close of Trading obtained from such source, plus accrued interest to the extent not included therein (other than any interest credited or transferred to, or applied to the obligations of, the other party pursuant to Section 8, unless market practice with respect to the valuation of such Securities in

connection with securities loans is to the contrary). If the relevant quotation did not exist at such Close of Trading, then the Market Value shall be the relevant quotation on the next preceding Close of Trading at which there was such a quotation. The determinations of Market Value provided for in Annex II or in any other writing described in the first sentences of this Section 25.38 or, if applicable, in the preceding sentence shall apply for all purposes under this Agreement, except for purposes of Section 13.

25.39 "Payee" shall have the meaning assigned in Section 8.5(a).

25.40 "Payor" shall have the meaning assigned in Section 8.5(a).

25.41 "Plan" shall mean: (a) any "employee benefit plan" as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974 which is subject to Part 4 of Subtitle B of Title I of such Act; (b) any "plan" as defined in Section 4975(e)(1) of the Internal Revenue Code of 1986; or (c) any entity the assets of which are deemed to be assets of any such "employee benefit plan" or "plan" by reason of the Department of Labor's plan asset regulation, 29 C.F.R. Section 2510.3-101.

25.42 "Regulation T" shall mean Regulation T of the Board of Governors of the Federal Reserve System, as in effect from time to time.

25.43 "Retransfer" shall mean, with respect to any Collateral, to pledge, repledge, hypothecate, rehypothecate, lend, relend, sell or otherwise transfer such Collateral, or to re-register any such Collateral evidenced by physical certificates in any name other than Borrower's.

25.44 "Securities" shall mean securities or, if agreed by the parties in writing, other assets.

25.45 "Securities Distributions" shall have the meaning assigned in Section 8.5(a).

25.46 "Tax" shall have the meaning assigned in Section 8.5(a).

25.47 "UCC" shall mean the New York Uniform Commercial Code.

26. Intent.

26.1 The parties recognize that each Loan hereunder is a "securities contract," as such term is defined in Section 741 of Title 11 of the United States Code (the "Bankruptcy Code"), as amended (except insofar as the type of assets subject to the Loan would render such definition inapplicable).

26.2 It is understood that each and every transfer of funds, securities and other property under this Agreement and each Loan hereunder is a "settlement payment" or a "margin payment," as such terms are used in Sections 362(b)(6) and 546(e) of the Bankruptcy Code.

26.3 It is understood that the rights given to Borrower and Lender hereunder upon a Default by the other constitute the right to cause the liquidation of a securities contract and the right to set off mutual debts and claims in connection with a securities contract, as such terms are used in Sections 555 and 362(b)(6) of the Bankruptcy Code.

26.4 The parties agree and acknowledge that if a party hereto is an "insured depository institution," as such term is defined in the Federal Deposit Insurance Act, as amended ("FDIA"), then each Loan hereunder is a "securities contract" and "qualified financial

contract," as such terms are defined in the FDIA and any rules, orders or policy statements thereunder (except insofar as the type of assets subject to the Loan would render such definitions inapplicable).

26.5 It is understood that this Agreement constitutes a "netting contract" as defined in and subject to Title IV of the Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA") and each payment obligation under any Loan hereunder shall constitute a "covered contractual payment entitlement" or "covered contractual payment obligation," respectively, as defined in and subject to FDICIA (except insofar as one or both of the parties is not a "financial institution" as that term is defined in FDICIA).

26.6 Except to the extent required by applicable law or regulation or as otherwise agreed, Borrower and Lender agree that Loans hereunder shall in no event be "exchange contracts" for purposes of the rules of any securities exchange and that Loans hereunder shall not be governed by the buy-in or similar rules of any such exchange, registered national securities association or other self-regulatory organization.

27. DISCLOSURE RELATING TO CERTAIN FEDERAL PROTECTIONS.

27.1 WITHOUT WAIVING ANY RIGHTS GIVEN TO LENDER HEREUNDER, IT IS UNDERSTOOD AND AGREED THAT THE PROVISIONS OF THE SECURITIES INVESTOR PROTECTION ACT OF 1970 MAY NOT PROTECT LENDER WITH RESPECT TO LOANED SECURITIES HEREUNDER AND THAT, THEREFORE, THE COLLATERAL DELIVERED TO LENDER MAY CONSTITUTE THE ONLY SOURCE OF SATISFACTION OF BORROWER'S OBLIGATIONS IN THE EVENT BORROWER FAILS TO RETURN THE LOANED SECURITIES.

27.2 LENDER ACKNOWLEDGES THAT, IN CONNECTION WITH LOANS OF GOVERNMENT SECURITIES AND AS OTHERWISE PERMITTED BY APPLICABLE LAW, SOME SECURITIES PROVIDED BY BORROWER AS COLLATERAL UNDER THIS AGREEMENT MAY NOT BE GUARANTEED BY THE UNITED STATES.

The Dugaboy Investment Trust

By:
Title: TRUSTEE
Date:

Highland Select Equity Master Fund, L.P.

By:
Title:
Date:

President of Strand Advisors, Inc., the general partner of Highland Capital Management L.P., the sole member of Highland Select Equity GP, LLC, the general partner of Highland Select Equity Fund GP, L.P., the general partner of Highland Select Equity Master Fund, L.P.

Annex I

Party Acting as Agent

This Annex sets forth the terms and conditions governing all transactions in which a party lending or borrowing Securities, as the case may be ("Agent"), in a Loan is acting as agent for one or more third parties (each, a "Principal"). Unless otherwise defined, capitalized terms used but not defined in this Annex shall have the meanings assigned in the Securities Loan Agreement of which it forms a part (such agreement, together with this Annex and any other annexes, schedules or exhibits, referred to as the "Agreement") and, unless otherwise specified, all section references herein are intended to refer to sections of such Securities Loan Agreement.

1. **Additional Representations and Warranties.** In addition to the representations and warranties set forth in the Agreement, Agent hereby makes the following representations and warranties, which shall continue during the term of any Loan: Principal has duly authorized Agent to execute and deliver the Agreement on its behalf, has the power to so authorize Agent and to enter into the Loans contemplated by the Agreement and to perform the obligations of Lender or Borrower, as the case may be, under such Loans, and has taken all necessary action to authorize such execution and delivery by Agent and such performance by it.

2. **Identification of Principals.** Agent agrees (a) to provide the other party, prior to any Loan under the Agreement, with a written list of Principals for which it intends to act as Agent (which list may be amended in writing from time to time with the consent of the other party), and (b) to provide the other party, before the Close of Business on the next Business Day after agreeing to enter into a Loan, with notice of the specific Principal or Principals for whom it is acting in connection with such Loan. If (i) Agent fails to identify such Principal or Principals prior to the Close of Business on such next Business Day or (ii) the other party shall determine in its sole discretion that any Principal or Principals identified by Agent are not acceptable to it, the other party may reject and rescind any Loan with such Principal or Principals, return to Agent any Collateral or Loaned Securities, as the case may be, previously transferred to the other party and refuse any further performance under such Loan, and Agent shall immediately return to the other party any portion of the Loaned Securities or Collateral, as the case may be, previously transferred to Agent in connection with such Loan; *provided*, *however*, that (A) the other party shall promptly (and in any event within one Business Day of notice of the specific Principal or Principals) notify Agent of its determination to reject and rescind such Loan and (B) to the extent that any performance was rendered by any party under any Loan rejected by the other party, such party shall remain entitled to any fees or other amounts that would have been payable to it with respect to such performance if such Loan had not been rejected. The other party acknowledges that Agent shall not have any obligation to provide it with confidential information regarding the financial status of its Principals; Agent agrees, however, that it will assist the other party in obtaining from Agent's Principals such information regarding the financial status of such Principals as the other party may reasonably request.

3. **Limitation of Agent's Liability.** The parties expressly acknowledge that if the representations and warranties of Agent under the Agreement, including this Annex, are true and correct in all material respects during the term of any Loan and Agent otherwise complies with the provisions of this Annex, then (a) Agent's obligations under the Agreement shall not include a guarantee of performance by its Principal or Principals and (b) the other party's remedies shall not include a right of setoff against obligations, if any, of Agent arising in other transactions in which Agent is acting as principal.

4. Multiple Principals.

(a) In the event that Agent proposes to act for more than one Principal hereunder, Agent and the other party shall elect whether (i) to treat Loans under the Agreement as transactions entered into on behalf of separate Principals or (ii) to aggregate such Loans as if they were transactions by a single Principal. Failure to make such an election in writing shall be deemed an election to treat Loans under the Agreement as transactions on behalf of separate Principals.

(b) In the event that Agent and the other party elect (or are deemed to elect) to treat Loans under the Agreement as transactions on behalf of separate Principals, the parties agree that (i) Agent will provide the other party, together with the notice described in Section 2(b) of this Annex, notice specifying the portion of each Loan allocable to the account of each of the Principals for which it is acting (to the extent that any such Loan is allocable to the account of more than one Principal), (ii) the portion of any individual Loan allocable to each Principal shall be deemed a separate Loan under the Agreement, (iii) the mark to market obligations of Borrower and Lender under the Agreement shall be determined on a Loan-by-Loan basis (unless the parties agree to determine such obligations on a Principal-by-Principal basis), and (iv) Borrower's and Lender's remedies under the Agreement upon the occurrence of a Default shall be determined as if Agent had entered into a separate Agreement with the other party on behalf of each of its Principals.

(c) In the event that Agent and the other party elect to treat Loans under the Agreement as if they were transactions by a single Principal, the parties agree that (i) Agent's notice under Section 2(b) of this Annex need only identify the names of its Principals but not the portion of each Loan allocable to each Principal's account, (ii) the mark to market obligations of Borrower and Lender under the Agreement shall, subject to any greater requirement imposed by applicable law, be determined on an aggregate basis for all Loans entered into by Agent on behalf of any Principal, and (iii) Borrower's and Lender's remedies upon the occurrence of a Default shall be determined as if all Principals were a single Lender or Borrower, as the case may be.

(d) Notwithstanding any other provision of the Agreement (including, without limitation, this Annex), the parties agree that any transactions by Agent on behalf of a Plan shall be treated as transactions on behalf of separate Principals in accordance with Section 4(b) of this Annex (and all mark to market obligations of the parties shall be determined on a Loan-by-Loan basis).

5. Interpretation of Terms. All references to "Lender" or "Borrower," as the case may be, in the Agreement shall, subject to the provisions of this Annex (including, among other provisions, the limitations on Agent's liability in Section 3 of this Annex), be construed to reflect that (i) each Principal shall have, in connection with any Loan or Loans entered into by Agent on its behalf, the rights, responsibilities, privileges and obligations of a "Lender" or "Borrower," as the case may be, directly entering into such Loan or Loans with the other party under the Agreement, and (ii) Agent's Principal or Principals have designated Agent as their sole agent for performance of Lender's obligations to Borrower or Borrower's obligations to Lender, as the case may be, and for receipt of performance by Borrower of its obligations to Lender or Lender of its obligations to Borrower, as the case may be, in connection with any Loan or Loans under the Agreement (including, among other things, as Agent for each Principal in connection with transfers of securities, cash or other property and as agent for giving and receiving all notices under the Agreement). Both Agent and its Principal or Principals shall be deemed "parties" to the Agreement and all references to a "party" or "either party" in the Agreement shall be deemed revised accordingly (and any

Default by Agent under the Agreement shall be deemed a Default by Lender or Borrower, as the case may be).

By: The Dugaboy Investment Trust
Title: TRUSTEE
Date:

By: Highland Select Equity Master Fund, L.P.
Title:
Date:

President of Strand Advisors, Inc., the general partner of Highland Capital Management L.P., the sole member of Highland Select Equity GP, LLC, the general partner of Highland Select Equity Fund GP, L.P., the general partner of Highland Select Equity Master Fund, L.P.

Annex II

Market Value

Unless otherwise agreed by Borrower and Lender:

1. If the principal market for the Securities to be valued is a national securities exchange in the United States, their Market Value shall be determined by their last sale price on such exchange at the most recent Close of Trading or, if there was no sale on the Business Day of the most recent Close of Trading, by the last sale price at the Close of Trading on the next preceding Business Day on which there was a sale on such exchange, all as quoted on the Consolidated Tape or, if not quoted on the Consolidated Tape, then as quoted by such exchange.

2. If the principal market for the Securities to be valued is the over-the-counter market, and the Securities are quoted on The Nasdaq Stock Market ("Nasdaq"), their Market Value shall be the last sale price on Nasdaq at the most recent Close of Trading or, if the Securities are issues for which last sale prices are not quoted on Nasdaq, the last bid price at such Close of Trading. If the relevant quotation did not exist at such Close of Trading, then the Market Value shall be the relevant quotation on the next preceding Close of Trading at which there was such a quotation.

3. Except as provided in Section 4 of this Annex, if the principal market for the Securities to be valued is the over-the-counter market, and the Securities are not quoted on Nasdaq, their Market Value shall be determined in accordance with market practice for such Securities, based on the price for such Securities as of the most recent Close of Trading obtained from a generally recognized source agreed to by the parties or the closing bid quotation at the most recent Close of Trading obtained from such a source. If the relevant quotation did not exist at such Close of Trading, then the Market Value shall be the relevant quotation on the next preceding Close of Trading at which there was such a quotation.

4. If the Securities to be valued are Foreign Securities, their Market Value shall be determined as of the most recent Close of Trading in accordance with market practice in the principal market for such Securities.

5. The Market Value of a letter of credit shall be the undrawn amount thereof.

6. All determinations of Market Value under Sections 1 through 4 of this Annex shall include, where applicable, accrued interest to the extent not already included therein (other than any interest credited or transferred to, or applied to the obligations of, the other party pursuant to Section 8 of the Agreement), unless market practice with respect to the valuation of such Securities in connection with securities loans is to the contrary.

7. The determinations of Market Value provided for in this Annex shall apply for all purposes under the Agreement, except for purposes of Section 13 of the Agreement.

By: The Dugaboy Investment Trust
Title: TRUSTEE
Date:

By: Highland Select Equity Master Fund, L.P.
Title: President of Strand Advisors, Inc., the general partner of Highland Capital Management L.P., the sole member of Highland Select Equity GP, LLC, the general partner of Highland Select Equity Fund GP, L.P., the general partner of Highland Select Equity Master Fund, L.P.
Date:

Annex III

Term Loans

This Annex sets forth additional terms and conditions governing Loans designated as "Term Loans" in which Lender lends to Borrower a specific amount of Loaned Securities ("Term Loan Amount") against a pledge of cash Collateral by Borrower for an agreed upon Cash Collateral Fee until a scheduled termination date ("Termination Date"). Unless otherwise defined, capitalized terms used but not defined in this Annex shall have the meanings assigned in the Securities Loan Agreement of which it forms a part (such agreement, together with this Annex and any other annexes, schedules or exhibits, referred to as the "Agreement").

1. The terms of this Annex shall apply to Loans of Equity Securities only if they are designated as Term Loans in a Confirmation therefor provided pursuant to the Agreement and executed by each party, in a schedule to the Agreement or in this Annex. All Loans of Securities other than Equity Securities shall be "Term Loans" subject to this Annex, unless otherwise agreed in a Confirmation or other writing.

2. The Confirmation for a Term Loan shall set forth, in addition to any terms required to be set forth therein under the Agreement, the Term Loan Amount, the Cash Collateral Fee and the Termination Date. Lender and Borrower agree that, except as specifically provided in this Annex, each Term Loan shall be subject to all terms and conditions of the Agreement, including, without limitation, any provisions regarding the parties' respective rights to terminate a Loan.

3. In the event that either party exercises its right under the Agreement to terminate a Term Loan on a date (the "Early Termination Date") prior to the Termination Date, Lender and Borrower shall, unless otherwise agreed, use their best efforts to negotiate in good faith a new Term Loan (the "Replacement Loan") of comparable or other Securities, which shall be mutually agreed upon by the parties, with a Market Value equal to the Market Value of the Term Loan Amount under the terminated Term Loan (the "Terminated Loan") as of the Early Termination Date. Such agreement shall, in accordance with Section 2 of this Annex, be confirmed in a new Confirmation at the commencement of the Replacement Loan and be executed by each party. Each Replacement Loan shall be subject to the same terms as the corresponding Terminated Loan, other than with respect to the commencement date and the identity of the Loaned Securities. The Replacement Loan shall commence on the date on which the parties agree which Securities shall be the subject of the Replacement Loan and shall be scheduled to terminate on the scheduled Termination Date of the Terminated Loan.

4. Borrower and Lender agree that, except as provided in Section 5 of this Annex, if the parties enter into a Replacement Loan, the Collateral for the related Terminated Loan need not be returned to Borrower and shall instead serve as Collateral for such Replacement Loan.

5. If the parties are unable to negotiate and enter into a Replacement Loan for some or all of the Term Loan Amount on or before the Early Termination Date, (a) the party requesting termination of the Terminated Loan shall pay to the other party a Breakage Fee computed in accordance with Section 6 of this Annex with respect to that portion of the Term Loan Amount for which a Replacement Loan is not entered into and (b) upon the transfer by Borrower to Lender of the Loaned Securities subject to the Terminated Loan, Lender shall transfer to Borrower Collateral for the Terminated Loan in accordance with and to the extent required under the Agreement, provided that no Default has occurred with respect to Borrower.

6. For purposes of this Annex, the term "Breakage Fee" shall mean a fee agreed by Borrower and Lender in the Confirmation or otherwise orally or in writing. In the absence of any such agreement, the term "Breakage Fee" shall mean, with respect to Loans of Government Securities, a fee equal to the sum of (a) the cost to the non-terminating party (including all fees, expenses and commissions) of entering into replacement transactions and entering into or terminating hedge transactions in connection with or as a result of the termination of the Terminated Loan, and (b) any other loss, damage, cost or expense directly arising or resulting from the termination of the Terminated Loan that is incurred by the non-terminating party (other than consequential losses or costs for lost profits or lost opportunities), as determined by the non-terminating party in a commercially reasonable manner, and (c) any other amounts due and payable by the terminating party to the non-terminating party under the Agreement on the Early Termination Date.

By: The Dugaboy Investment Trust
Title: TRUSTEE
Date:

By: Highland Select Equity Master Fund, L.P.
Title: President of Strand Advisors, Inc., the general partner of Highland Capital Management L.P., the sole member of Highland Select Equity GP, LLC, the general partner of Highland Select Equity Fund GP, L.P., the general partner of Highland Select Equity Master Fund, L.P.
Date:

Schedule A

Names and Addresses for Communications

Schedule B

Defined Terms and Supplemental Provisions

A. IDENTIFICATION AND AMOUNT OF LOANED SECURITIES:

Issuer: NexPoint Credit Strategies Fund

Amount: 2,015,000 shares of common stock of the Issuer ("Shares")

B. COLLATERAL

None

C. FEES

Loan Fee: the short term Applicable Federal Rate, equal to 0.38%

Cash Collateral Fee: None

Notwithstanding anything to the contrary contained in the attached Agreement, the Loan Fee shall be computed daily on the Loan based on the aggregate Market Value of the Loaned Securities on the date of transfer of the Loaned Securities from the Lender to the Borrower.

The Loan Fee shall be payable upon the termination of the Loan.

D. Section 8.2 shall be deleted and replaced with the following: "8.2 Any cash Distributions made on or in respect of the Loaned Securities, which Lender is entitled to receive pursuant to Section 8.1, shall be paid by the transfer of cash to Lender by Borrower, upon termination of the Loan, in an amount equal to such cash Distributions, so long as Lender is not in Default at the time of such payment. Non-cash Distributions that Lender is entitled to receive pursuant to Section 8.1 shall be added to the Loaned Securities on the date of distribution and shall be considered such for all purposes, except that if the Loan has terminated, Borrower shall forthwith transfer the same to Lender."

E. As used in Section 8.2(d), "Tax" shall mean "withholding tax."

F. Section 10.5 of the Agreement shall be deleted in its entirety.

G. Notwithstanding anything herein or in the attached Agreement to the contrary, Borrower shall be permitted to pledge the Loaned Securities as security in favor of any other creditors or financial counterparties of Borrower.

EXHIBIT B

Select owed to Dugaboy NHF Securities
Lending As of 9/29/2020

Market Value

	Date		**Amount (Market Value)**
Original Loan	10/14/2014	$	20,270,900
NXRT Spin	4/1/2015		(10,348,380)
Div Reinv	various		9,190,189
Loan Repayment	7/23/2019		(7,071,271)
Ending Loan Market Value		**$**	**12,041,438**

Appendix Exhibit 57

Joseph M. Coleman (State Bar No. 04566100)
John J. Kane (State Bar No. 24066794)
KANE RUSSELL COLEMAN LOGAN PC
Bank of America Plaza
901 Main Street, Suite 5200
Dallas, Texas 75202
Telephone - (214) 777-4200
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ATTORNEYS FOR CLO HOLDCO, LTD.

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-SGJ**
DEBTOR.	§	

CLO HOLDCO, LTD.'S RESERVATION OF RIGHTS AND RESPONSE TO DEBTOR'S MOTION FOR ENTRY OF ORDER APPROVING SETTLEMENT WITH (A) ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP LLC; (B) JOSHUA N. TERRY AND JENNIFER G. TERRY; AND (C) ACIS CAPITAL MANAGEMENT, LP

CLO Holdco, Ltd. ("**CLO**"), a creditor and party-in-interest in this case, files this *Reservation of Rights and Response* (the "**Response**") to the Debtor's *Motion for Entry of an Order Approving Settlement with (A) Acis Capital Management, L.P. and Acis Capital Management GP LLC, (B) Joshua N. Terry and Jennifer G. Terry, and (C) Acis Capital Management, L.P., and Authorizing Actions Consistent Therewith* (the "**Acis Settlement Motion**") [Dkt. No. 1087]. In support of this Response, CLO states:

RESERVATION OF RIGHTS & RESPONSE

1. CLO's Response is limited in scope. CLO does not generally oppose the Debtor's settlement of claims and causes of action involving the Acis parties. CLO notes, however, that the

Acis Settlement Motion fails to reference a portion of the proposed settlement that could materially affect numerous non-debtor parties who may not have received notice of the proposed settlement.

2. Exhibit 1 to the *Declaration of Gregory V. Demo* in support of the Acis Settlement Motion (the "**Settlement Agreement**") [Dkt. No. 1088-1] contains the following material provision:

> On the effective date of a plan of reorganization proposed by HCMLP and confirmed by the Bankruptcy Court, if HCMLP receives written advise of nationally recognized external counsel that it is legally permissible consistent with HCMLP's contractual and legal duties to transfer all of its direct and indirect right, title and interest in Highland HCF Advisor, Ltd. to Acis or its nominee and that doing so would not reasonably subject HCMLP to liability, HCMLP shall transfer all of its right, title and interest in Highland HCF Advisor, Ltd., whether its ownership is direct or indirect, to Acis or its nominee, subject at all times to Acis's right to unilaterally reject the transfer in its sole and absolute discretion;

Settlement Agreement, ¶ 1.(c).

3. Highland HCF Advisor, Ltd. serves as a fund advisor and portfolio manager to numerous parties-in-interest, including funds in which CLO owns a material interest. The Debtor's representatives have noted, on many occasions, Acis's atrocious performance managing CLO funds during the period following Acis' plan confirmation in February, 2019. From CLO's perspective, Acis's performance conclusively validates the Debtor's representatives' allegations. CLO has suffered dearly from Acis's mismanagement of CLO funds in which it owns an interest, and has seen its interests decline in value by tens of millions of dollars since Acis began managing certain fund portfolios.

4. By this Response, CLO reserves its rights against the Debtor should the Debtor effectuate a transfer of Highland HCF Advisor, Ltd. to Acis or its nominee. Given the Debtor's prior representations, CLO questions how the Debtor could effectuate such a transfer in good faith and whether such a transfer would violate its fiduciary duties. Moreover, given the potential change-in-control of Highland HCF Advisor, Ltd., CLO reserves the right to exercise all rights and remedies against Highland HCF Advisor, Ltd., any proposed successor-in-interest, and against the Debtor

arising from any breach of any applicable advisory or portfolio management agreement to which CLO, the Debtor, and Highland HCF Advisor, Ltd. are parties.

WHEREFORE, CLO reserves all rights against the Debtor, Highland HCF Advisor, Ltd., and Acis or its nominee should the Debtor attempt to or effectuate a transfer of its interests in Highland HCF Advisor, Ltd. to Acis or its nominee.

DATED: October 16, 2020

Respectfully submitted,

KANE RUSSELL COLEMAN LOGAN PC

By: */s/ John J. Kane*

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ATTORNEYS FOR CLO HOLDCO, LTD.

CERTIFICATE OF SERVICE

This is to certify that service of the foregoing document was effected through the Court's Electronic Case Filing system, and, has been sent to counsel for the Debtor and Committee by e-mail on the 16th day of October, 2020.

/s/ John J. Kane
John J. Kane

Appendix Exhibit 58

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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.	§	

REDEEMER COMMITTEE OF THE HIGHLAND CRUSADER FUND AND THE CRUSADER FUNDS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND JOINDER IN THE DEBTOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PROOF OF CLAIM NOS. 190 AND 191 OF UBS AG, LONDON BRANCH AND UBS SECURITIES LLC

Pursuant to Federal Rule of Bankruptcy Procedure 7056, and Local Bankruptcy Rule 7056-1(c), (i) the Redeemer Committee of the Highland Crusader Funds (the "Redeemer Committee") and (ii) Highland Crusader Offshore Partners, L.P., Highland Crusader Fund, L.P., Highland Crusader Fund, Ltd. and Highland Crusader Fund II, Ltd. (collectively, the "Crusader Funds") respectfully move (the "Motion") for entry of an order granting summary judgment in favor of the Redeemer Committee and the Crusader Funds and against UBS AG London Branch and UBS Securities, LLC (together, "UBS") with respect to the relief requested in the Objection to Proof of Claim Nos. 190 and 191 ("Crusader Objection") [ECF No. 933], with respect to Proof of Claim Nos. 190 and 191 submitted by UBS (such claims, the "UBS Claim"), and join the Motion for Partial Summary Judgment on the UBS Claim submitted by Highland Capital Management, L.P. ("Highland" or the "Debtor").[1] For the reasons set forth in the accompanying Memorandum of Law, partial summary judgment in the Redeemer Committee and the Crusader Funds' favor concerning the Crusader Objection should be granted. Among other reasons, the majority of the UBS Claim is barred by res judicata and UBS released the Debtor from much of the relief that UBS now seeks in the UBS Claim. *See* Crusader Objection, ECF No. 933 at 17-25.

Contemporaneously herewith and in support hereof, the Redeemer Committee and the Crusader Funds are filing (a) the Memorandum of Law; and (b) the Appendix.

Each of the matters required by Local Bankruptcy Rule 7056-1(c)(1) shall be set forth in the accompanying Memorandum of Law.

Notice hereof has been provided to the Debtor and UBS and all parties of interest participating in the CM/ECF system. The Redeemer Committee and the Crusader Funds submit that no other or further notice need be provided.

[1] *See* Debtor's Motion for Partial Summary Judgment on Proof of Claim Nos. 190 and 191 of UBS Securities, LLC and UBS AG, London Branch, *In re Highland Capital Mgmt., L.P.*, 19-34054-sgj11 (N.D. Tex. Oct. 16, 2020)

WHEREFORE, the Redeemer Committee and Crusader Funds respectfully request that the Court enter summary judgment as to the Crusader Objection in the form of the proposed order attached hereto as Exhibit A and grant to the Redeemer Committee and Crusader Funds such other and further relief as the Court may deem proper.

Dated this 16th day of October, 2020

Respectfully submitted,

/s/ Mark A. Platt

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Counsel for the Redeemer Committee of the Highland Crusader Fund and the Crusader Funds[2]

[2] Frost Brown Todd LLC is counsel only for the Redeemer Committee and Jenner & Block, LLP is counsel to the Redeemer Committee, and for the limited purpose of this Motion, the Crusader Funds.

CERTIFICATE OF SERVICE

The undersigned hereby certifies, that on this 16th day of October, 2020, he caused to be served a true and correct copy of the *Redeemer Committee of the Highland Crusader Fund and the Crusader Funds' Motion For Partial Summary Judgment And Joinder In The Debtor's Motion For Partial Summary Judgment On Proof Of Claim Nos. 190 And 191*, by electronically filing it with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system.

/s/ Mark A. Platt
Mark A. Platt

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.	§	

ORDER GRANTING REDEEMER COMMITTEE OF THE HIGHLAND CRUSADER FUND AND THE CRUSADER FUNDS' MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came before the court on the motion (the "Motion") of (i) the Redeemer Committee of the Highland Crusader Funds (the "Redeemer Committee") and (ii) Highland Crusader Offshore Partners, L.P., Highland Crusader Fund, L.P., Highland Crusader Fund, Ltd. and Highland Crusader Fund II, Ltd. (collectively, the "Crusader Funds") for summary judgment concerning their Objection to Proof of Claim Nos. 190 and 191 [ECF No. 933] in their favor and

against UBS AG London Branch and UBS Securities, LLC (together, "UBS") with respect to Proof of Claim Nos. 190 and 191 submitted by UBS (such claims, the "UBS Claim").

It is hereby FOUND AND DETERMINED 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 (B).

C. Notice of the Motion was sufficient under the circumstances.

D. Based on this Court's review of the pleadings, the documents submitted in connection with the Motion, discovery materials on file, and other documents submitted during the Debtor's bankruptcy case, there is no genuine issue as to any material fact in respect of the relief sought in the Motion.

E. The Redeemer Committee and the Crusader Funds are entitled to summary judgment concerning (i) the application of res judicata to the UBS Claim, and (ii) the release of UBS's claims for losses or other relief arising from the March 2009 asset transfers to the Crusader Funds and the Credit Strategies Fund, such that judgment must be, and hereby is, entered in the Redeemer Committee and the Crusader Funds' favor concerning the Crusader Objection as requested in the Motion.

Accordingly, the Court having determined that the Redeemer Committee and the Crusader Funds are entitled to summary judgment on the relief requested in the Motion based on the legal and factual bases set forth in the Motion, the Memorandum of Law submitted in support of the Motion, and the arguments of counsel at the hearing on the Motion:

It is hereby ORDERED that:

1. The Motion is **GRANTED**.

2. Capitalized terms not defined herein shall have the meanings ascribed to them in the Motion or Memorandum of Law.

3. Summary judgment is hereby entered in the Redeemer Committee and Crusader Funds' favor on the Crusader Objection, as requested in the Motion.

4. The UBS Claim is hereby disallowed to the extent that it seeks to hold the Debtor liable for (i) damages based on breaches or other conduct that occurred before February 24, 2009; and (ii) damages arising from the March 2009 Transfers to the Credit Strategies Fund and the Crusader Funds, including in each case as relief for the Debtor's alleged breach of the covenant of good faith and fair dealing.

5. This Order shall be effective immediately upon entry by the Court.

###END OF ORDER###

Submitted by:

/s/ Mark A. Platt

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Counsel for the Redeemer Committee of the Highland Crusader Fund and the Crusader Funds[1]

[1] Frost Brown Todd LLC is counsel only for the Redeemer Committee and Jenner & Block, LLP is counsel to the Redeemer Committee, and for the limited purpose of this Motion, the Crusader Funds.

Appendix Exhibit 59

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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]	:	Case No. 19-34054-sgj11
	:	
Debtor.	:	

OBJECTION TO THE DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENTS WITH (A) THE REDEEMER COMMITTEE OF THE HIGHLAND CRUSADER FUND (CLAIM NO. 72), AND (B) THE HIGHLAND CRUSADER FUNDS (CLAIM NO. 81)

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

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UBS Securities LLC and UBS AG, London Branch (together, "UBS"), by and through their undersigned counsel, hereby submit this objection (the "Objection") to the *Debtor's Motion for Entry of an Order Approving Settlements with (A) The Redeemer Committee of the Highland Crusader Fund (Claim No. 72), and (B) The Highland Crusader Funds (Claim No. 81), and Authorizing Actions Consistent Therewith* [Dkt. No. 1089] (the "Motion") regarding the proofs of claim filed by the Redeemer Committee of the Highland Crusader Fund ("Redeemer" and the "Redeemer Claim") and the Highland Crusader Funds ("Crusader"[2] and the "Crusader Claim"). In support of this Objection, UBS respectfully states as follows:

PRELIMINARY STATEMENT

Under Federal Rule of Bankruptcy Procedure 9019, a bankruptcy court must make an independent judgment of the merits of any settlement proposed by a debtor to ensure that it is fair, equitable, and in the best interest of the debtor's estate. While settlements are certainly desirable in the context of a bankruptcy case—especially in this case, which is particularly complex and fraught with allegations of fraud and bad faith—a settlement should not be approved just because the debtor says it should be. Here, Highland Capital Management, L.P. (the "Debtor") acknowledges that it made "substantial compromises" to strike a deal with Crusader and Redeemer, but contends that those compromises benefit the Debtor's estate. A closer review of the Proposed Settlement (as defined below), however, belies such assertion and evidences that the Debtor has not met its burden of showing this is a fair and equitable compromise within the range of reasonable alternatives.

[2] Crusader refers to a collection of four funds: Highland Crusader Offshore Partners, L.P., Highland Crusader Fund, L.P., Highland Crusader Fund, Ltd., and Highland Crusader Fund II, Ltd.

The Debtor's "modest reductions" to the Redeemer Claim do not account for the significant risk that a substantial portion of the Redeemer Claim (based on an Arbitration Award) is subject to vacatur. More importantly, under the Proposed Settlement, the Debtor would forfeit rights to over $30 million in cash and valuable assets potentially worth more than $80 million, permitting a significant windfall to Redeemer to the detriment of the Debtor's estate and other creditors.

The Redeemer Claim is based on an Arbitration Award that required the Debtor, *inter alia*, to pay $118,929,666 (including prejudgment interest and attorneys' fees) in damages and to pay Redeemer $71,894,891 (including prejudgment interest) ***in exchange*** for all of Crusader's shares in Cornerstone. Pursuant to that same Arbitration Award, the Debtor also retained the right to receive $32,313,000 in Deferred Fees upon Crusader's liquidation. As shown below, after accounting for those reciprocal obligations to the Debtor and depending on the true value of the Cornerstone shares to be tendered (which is disputed), the actual value of the Arbitration Award to Redeemer is between $74,911,557 and $128,011,557.[3]

Under the Proposed Settlement, however, Redeemer stands to gain far more because the Debtor has inexplicably agreed to release its rights to Crusader's Cornerstone shares and the Deferred Fees (with a combined value that could be as much as $115,913,000)—providing a substantial windfall to Redeemer. The Debtor has failed to provide sufficient information to permit this Court to meaningfully evaluate the true value of the Proposed Settlement, including the fair value of the Cornerstone shares, which it must do in order for this Court to have the information it needs to approve the Proposed Settlement. Depending on the valuation of the Cornerstone shares,

[3] The potential range of value attributable to the Cornerstone shares is significant because, according to the Debtor's liquidation analysis, the Debtor expects to have only $195 million total in value to distribute, and only $161 million to distribute to general unsecured creditors under its proposed plan. *See Liquidation Analysis* [Dkt. No. 1173-1]; *First Amended Plan of Reorganization of Highland Capital Management, L.P.* [Dkt. No. 1079].

the value of the Proposed Settlement to Redeemer may be as much as $253,609,610—which substantially exceeds the face amount of the Redeemer Claim.

In the meantime, other general unsecured creditors of the Debtor will receive a much lower percentage recovery than they would if those assets were instead transferred to the Debtor's estate, as required by the Arbitration Award, and evenly distributed among the Debtor's creditors. The Proposed Settlement is only in the best interests of Redeemer and, as such, it should be rejected.

BACKGROUND[4]

A. Procedural Background

1. The Debtor is an investment management firm that manages a variety of hedge funds, structured investment vehicles, and mutual funds.

2. On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for chapter 11 relief in the Bankruptcy Court for the District of Delaware. Pursuant to an order dated December 4, 2019, the Debtor's bankruptcy proceedings were transferred to this Court under the above-captioned case number (the "Chapter 11 Case").

3. On March 2, 2020, this Court entered the *Order (I) Establishing Bar Dates for Filing Claims and (II) Approving the Form and Manner of Notice Thereof* [Dkt. No. 488]. Pursuant to that order, the general bar date for proofs of claim was set for April 8, 2020.

4. On April 3, 2020, Redeemer filed Proof of Claim No. 72 against the Debtor's estate, claiming (1) $190,824,557 (its so-called "Damages Award"); (2) "post-petition interest, attorneys' fees, costs and other expenses;" (3) the right to distribute funds held in the "Deferred Fee Account" to Crusader investors; and (4) the transfer or cancellation of certain limited partner interests in Crusader held by the Debtor, the Charitable DAF Fund, L.P. ("DAF"), and Eames, Ltd. ("Eames").

[4] **Additional background information is described in the UBS Objection (defined below) [Dkt. No. 996] and incorporated herein by reference.**

Redeemer Claim Rider at 1-2. The Redeemer Claim is predicated upon an "Arbitration Award," which it characterizes as an "executory contract." Redeemer Claim Rider at 1.

5. As discussed in further detail below, the Arbitration Award is actually made up of three awards: (i) a March 6, 2019 "Partial Final Award," (ii) a March 14, 2019 "Modification Award," and (iii) an April 29, 2019 "Final Award"—all issued by the same panel of arbitrators in the same arbitration proceeding, but none of which has ever been confirmed or otherwise entered as a final judgment by any court of competent jurisdiction. *See* Mot. ¶ 15.

6. On April 6, 2020, Crusader filed Proof of Claim No. 81 against the Debtor's estate alleging the Debtor had been a faithless fiduciary and claiming (1) $55,796,446, including the disgorgement of $8,233,337 in "Management Fees" and $15,250,109 in "Distribution Fees" previously paid to the Debtor for its service as investment manager, as well as forfeiture of the Debtor's right to $32,313,000 in "Deferred Fees" and any "Other Fees" that "may now or in the future otherwise be owing to [the Debtor]"; (2) any other Deferred Fees the Debtor "might otherwise become entitled in the future"; (3) "pre- and post-petition interest, attorneys' fees, costs and other expenses"; and (4) a right of setoff against any claim that the Debtor may assert against it for "Withheld Amounts." Crusader Claim Rider at 1-2;[5] Crusader Claim at 2; *see* Mot. ¶ 22.

7. On August 26, 2020, UBS filed its *Objection to the Proof of Claim Filed by Redeemer Committee of the Highland Crusader Fund* [Dkt. No. 996] (the "UBS Objection"). UBS objected to the Redeemer Claim's: (1) characterization of the Arbitration Award as an executory contract, (2) inclusion of relief in the so-called Damages Award that was impermissibly awarded for the first time in the Final Award and thus is subject to vacatur, and (3) failure to take into

[5] The Crusader Claim also asserts an alternative claim based on the Arbitration Award in the event any part of the Redeemer Claim is not allowed. Mot. ¶ 21 n.5; Crusader Claim Rider at 2.

account the value of assets that Redeemer is obligated to transfer to the Debtor's estate under the same Arbitration Award. UBS Obj. at 3, 19.

8. On September 23, 2020, the Debtor filed the Motion and the *Declaration of John A. Morris in Support of the Debtor's Motion for Entry of an Order Approving Settlement with (A) the Redeemer Committee of the Highland Crusader Fund (Claim No. 72), and (B) the Highland Crusader Funds (Claim No. 81), and Authorizing Actions Consistent Therewith* [Dkt. No. 1090] (the "Morris Declaration"). The Motion seeks approval of a stipulation, attached as Exhibit 1 to the Morris Declaration [Dkt. No. 1090-1] (the "Proposed Settlement").

B. The Arbitration Award

9. From Crusader's inception through August 2016, the Debtor served as Crusader's investment manager. Mot. ¶¶ 10, 13; Crusader Claim Rider at 1. In late 2008, Crusader was put into wind-down. Mot. ¶ 11. That process was governed by a *Joint Plan of Distribution of the Crusader Funds* and the *Scheme of Arrangement Between the Crusader Funds and their Scheme Creditors* (the "Plan and Scheme"),[6] both adopted in 2011 in an attempt to permit redeeming investors to be able to realize additional monetary benefits that would not ordinarily be realized through general liquidation. Plan & Scheme at 14-16; *see also* Mot. ¶ 12. This arrangement was not intended to be a risk-free choice. Plan & Scheme at 16 ("There is a risk that the Company Redeemers' Distributions may be less than their Redemption Amounts . . .").

10. Pursuant to the Plan and Scheme, payment of certain fees owed to the Debtor as compensation for its role as investment manager was deferred (the "Deferred Fees") until

[6] The Plan and Scheme, filed under seal at Docket No. 953, is Exhibit 22 to *Redeemer Committee of the Highland Crusader Funds and the Highland Crusader Funds' Objection to the Proofs of Claim of UBS AG, London Branch and UBS Securities LLC and Joinder in the Debtor's Objection* [Dkt. No. 933]. UBS notes, however, that Redeemer and Crusader filed only a pre-execution draft. *E.g.* Plan & Scheme at 38 (reflecting track change revisions).

liquidation of Crusader's assets was complete. Mot. ¶¶ 10, 13, 25; Plan & Scheme at 37, 73-74. Unlike certain "Distribution Fees" that the Debtor would not be entitled to receive if removed for cause, Plan & Scheme at 48, 73, the "Deferred Fees are payable under ***all*** circumstances to HCMLP," except for the "Deferred Fee Account." Plan & Scheme at 20 (emphasis added). For those amounts in the Deferred Fee Account, the Debtor had the right to "potentially receive" those amounts if it met specified distribution targets on time. Plan & Scheme at 15, 57-58, 82-83.

11. Redeemer was entrusted with oversight of this process from the start and at all times had the power to terminate the Debtor as Crusader's investment manager upon thirty days' notice, with or without cause. Plan and Scheme at 15-16, 18, 51, 76. Redeemer chose not to exert this power until July 5, 2016, when Redeemer provided the Debtor with notice it was being terminated as investment manager and an arbitration proceeding was being initiated against it. Mot. ¶¶ 13-14. Pursuant to this notice, the Debtor's investment management services ended effective August 4, 2016. Mot. ¶ 13. The Debtor was replaced by Alvarez & Marsal CRT Management, LLC ("Alvarez"). PFA at 4. Concurrently with its arbitration demand, Redeemer initiated an action in the Delaware Chancery Court (the "Delaware Court") for a status quo order, *id.*, where the Debtor added Alvarez as a third party defendant. *See* Mot. ¶ 14 n.3; Ex. A, Debtor Brief to Vacate (REDEEMER_001635).

12. In the arbitration proceeding, Redeemer asserted breach of contract and breach of fiduciary duty claims against the Debtor seeking disgorgement and other relief based on the Debtor's service as Crusader's investment manager. Mot. ¶ 14; PFA at 3-4. Redeemer chose not to allege the Debtor had been a faithless servant. PFA at 8, 49. After "the record was declared closed" on December 12, 2018, *id.* at 7, the panel of arbitrators (the "Panel") rendered a "Partial Final Award" (or "PFA") [Dkt. No. 1128] on March 6, 2019. The Partial Final Award was a 56-

page single-spaced reasoned decision unanimously signed by all three members of the Panel. *See generally id*. Four aspects of the Partial Final Award are of particular relevance here:

- **Deferred Fees.** The Panel found that the Debtor was entitled to receive the Deferred Fees but had paid them to itself prematurely. PFA at 3; Mot. ¶ 25. Because Redeemer was deprived of the use of these funds during the improper period, the Panel awarded damages of $41,320,655, consisting of $32,313,000 in damages and $9,007,655[7] in prejudgment interest. Importantly, the Panel made no finding that the Debtor's misconduct required it to give up its right to receive the Deferred Fees at the time set forth in the Plan and Scheme. PFA at 14.[8] Under the Plan & Scheme, the Deferred Fees are required to be paid to the Debtor's estate upon Crusader's complete liquidation, which as UBS understands, is largely tied to the disposition of the Cornerstone shares. *See* PFA at 51.

- **Cornerstone Award.** The Panel also found that the Debtor had breached its fiduciary duty by failing to liquidate Crusader's shares in Cornerstone Healthcare Group ("Cornerstone"). Mot. ¶ 30. The Arbitration Award ordered the Debtor to pay Redeemer $48,070,407 (at the fair market value of $3,241.41 per share, calculated as of the date of the Debtor's interference, PFA at 42, 48), plus $21,169,417 in prejudgment interest, ***and ordered Redeemer to transfer Crusader's Cornerstone shares to the Debtor***. PFA at 55; *id*. at 48 ("[We] order that the [Redeemer] Committee simultaneously cause the Crusader Fund to surrender its interest in Cornerstone to Highland."). Neither Redeemer nor Crusader was provided any future interest in Cornerstone or right to seek retention of the Cornerstone shares in lieu of damages. *See* PFA at 48, 55; Mot. ¶ 31.

- **Barclays LP Interests.** The Panel ruled on one of Redeemer's core allegations—namely, that the Debtor improperly transferred certain limited partner interests in Crusader that belonged to Barclays (the "Barclays LP Interests") from Barclays to Eames, *see*, *e.g.*, PFA at 8, 15, 20-22, 54—and determined that such transfers were a breach of the parties' agreement. PFA at 21-22, 54. But the Panel did not treat the Debtor's transfers of the Barclays LP Interests as an independent wrongdoing. Instead, the Partial Final Award only discussed the transfer of the Barclays LP Interests in the context of one of Redeemer's broader sets of claims, known as its "Distribution Fee Claim." *See* PFA at 15; *id.* at 20 (analyzing "Payments to Barclays and Eames ***as Distributions***"). After determining that the Debtor's transfers of the Barclays LP Interests were "improper," PFA at 20-22, 54, the Panel awarded Redeemer a "total" of $14,452,275 in aggregate damages (plus prejudgment interest) to cover all of the conduct relating to its Distribution Fee Claim—a claim that specifically included the Debtor's transfers of the Barclays LP Interests. *E.g.*, PFA at 22.

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[7] The Partial Final Award included interest "through the date of this Partial Final Award." *Id*. at 14. The Final Award's extension of the prejudgment accumulation period added an additional $1,784,740 in interest bringing the total Deferred Fees award to $43,105,395.

[8] In fact, the Debtor asserted a counterclaim against Redeemer to recover the Deferred Fees prior to complete liquidation of Crusader, because it alleged Alvarez should have completed the Crusader liquidation by December 2017, triggering the payment to the Debtor. PFA at 8, 49. The Panel, however, found that Alvarez was not responsible for any delay. *Id.* at 51. Notably, Redeemer did not raise a faithless servant defense. PFA at 8, 49.

- **Prejudgment Interest.** As noted, the Panel awarded Redeemer prejudgment interest on its damages awards, *see e.g.*, PFA at 48, 54-55, accruing from the time of the alleged breaches through March 6, 2019, the date of the Partial Final Award. *E.g.*, PFA at 54 (awarding "statutory interest of 9%, calculated on a simple basis, from the dates of taking in January and April 2016 through the date of this Partial Final Award").

13. On March 7, 2019, one day after the Panel issued the Partial Final Award, Redeemer requested a modification to the Partial Final Award. FA at 1. On March 11, 2019, ***before*** the Debtor was required to respond to the request, the Panel responded by email that it "[would] be modifying" the Partial Final Award. Ex. A, Debtor Brief to Vacate at 5 (REDEEMER_001644). Next, on March 14, 2019, and also ***before*** the Debtor was required to respond to the request, the Panel unilaterally issued a "Disposition of Application for Modification of Award" [Dkt. No. 1129] (the "Modification Award" or "MA"). This email and the Modification Award added a completely new category of damages as a result of the Debtor's "improper" transfer of the Barclays LP Interests—damages above and beyond the $14.5 million already ordered for such conduct in the Partial Final Award. FA at 11.

14. The Modification Award purported to be issued pursuant to Rule 50 of the AAA Commercial Rules, which allows a panel to "correct any clerical, typographical, or computational errors in the award." MA at 1; FA at 1 n.1. If Rule 50 had been properly applied, the Debtor would have had "10 calendar days to respond to [Redeemer's] request" in writing. AAA R-50. Instead, the Modification Award was issued on March 14, 2019—just 7 days after Redeemer's request and 3 days short of the timeframe for objections provided for in Rule 50. FA at 1; Mot. ¶ 15. The Debtor timely opposed Redeemer's modification request on March 17, 2019, and requested that the Panel withdraw its Modification Award and refrain from any further modification of the Partial Final Award. FA at 2(a). That did not happen.

15. Almost three weeks later, on April 5, 2019 (ten days ***after*** Rule 50's allotted period for modification requests closed), Redeemer submitted yet another formal written request for

modification of the Partial Final Award, this time asking the Panel to "award further damages in connection with the Barclays claim" and to "award prejudgment interest through" an extended date. FA at 2. Again, the Debtor opposed Redeemer's request for such "further damages" on the basis that such post-award modifications are improper under the AAA Rules and governing law. FA at 2-3.

16. On April 29, 2019,[9] the Panel issued a new "Final Award." In that Final Award, the Panel "re-adopt[ed] all prior findings and conclusions" but "specifically modified" portions of the earlier Partial Final Award. FA at 1. The "modifications" included several substantive changes to the Partial Final Award by: (1) awarding Redeemer an additional $21,768,743 in damages due to the transfers of the Barclays LP Interests, as well as $9,042,623 in prejudgment interest on these new damages; (2) granting injunctive relief that required the Debtor to return improperly taken limited partner interests held by Eames to Redeemer; and (3) extending the time for prejudgment interest to accrue until "the date paid or the entry of a final judgment." FA at 2, 14-15. Put differently, the relief awarded through the Arbitration Award included:

Award	Modification	Amount Added	Total Liquidated Damages Award
Partial Final Award	n/a	n/a	$154,314,614[10]
Modification Award	New damages related to Barclays LP Interests	$30,811,366	$183,923,629
Final Award	Incorporated MA; added injunctive relief (Eames); extended accrual period for prejudgment interest	$6,900,921 & injunctive relief	$190,824,557

[9] Two of three arbitrators signed on April 29, the third arbitrator signed on May 9, 2019. FA at 19-22; *see* Mot. ¶ 15 (referencing a May 9, 2019 Final Award).

[10] The Partial Final Award explicitly found liability and awarded damages for the "Sale of CLO interests" and "Credit Suisse claims," as well as for attorneys' fees, but directed the parties to confer regarding the appropriate amount of damages or, if no agreement could be reached, the Panel would determine the amount. PFA at 55-56. These amounts was properly clarified in the Final Award and such amounts are included in this calculation.

17. After the Final Award was issued, and prior to the Petition Date, Redeemer moved in the Delaware Court to have that award confirmed as a judgment. Mot. ¶ 17. Also prior to the Petition Date, the Debtor moved the Delaware Court to vacate at least $36.5 million of the Arbitration Award on the grounds that the Panel was without authority to modify its Partial Final Award ("Motion to Vacate"). Mot. ¶ 17. Both motions were scheduled to be heard by the Delaware Court on the day that the Debtor filed its Chapter 11 Case.[11] The Delaware proceedings are currently stayed by section 362 of the Bankruptcy Code.

C. The Proposed Settlement

18. On July 8, 2020, the Debtor informed this Court that it and Redeemer had reached a settlement in principle as to Redeemer's claim and would file their agreement when certain language was finalized. Dkt. 817, July 8, 2020 Hr'g Tr.

19. Subsequently, and in parallel with the Debtor and Redeemer finalizing their agreement, the Debtor, Redeemer and other parties in interest, including UBS, proceeded with mediation. A brief summary of the terms of the Redeemer settlement was announced to the mediation parties on the first day of mediation, August 27, 2020.

20. Then, on September 23, 2010, the Debtor filed its Motion and Proposed Settlement. As the Debtor has acknowledged to this Court in the past, a settlement of the Redeemer Claim based on the Arbitration Award is not as simple or straightforward as with a typical arbitration award. Dkt. No. 817, July 8, 2020 Hr'g Tr. This is, in part, because of the obligations imposed by the Arbitration Award and Plan and Scheme that require Redeemer to transfer meaningful assets

[11] The Motion emphasizes that Redeemer "timely moved" to confirm the Arbitration Award, but implies that the timeliness of the Debtor's Motion to Vacate is in question. *See* Mot. ¶¶ 17-18 n.4 (citing the three-month statutory time limit under the Federal Arbitration Act, 9 U.S.C. § 12). The Debtor's Motion to Vacate was filed on June 6, 2019, less than six weeks after the Final Award was issued, and the Debtor's brief was filed on July 10, 2019, pursuant to an ordered briefing schedule. *See, e.g.*, Ex. A, Debtor Brief to Vacate at 9 (REDEEMER_001648).

to the Debtor's estate—*i.e.*, the Deferred Fees and Cornerstone shares. Under the Proposed Settlement, Redeemer is relieved of those obligations, and the Debtor forfeits the estate's rights to those assets. Among other terms (in addition to an exchange of releases and discontinuation of litigation), under the Proposed Settlement:

- The Redeemer Claim would be allowed in the amount of $137,696,610. Mot. ¶ 23; Proposed Settlement ¶ 1.
- The Crusader Claim would be allowed in the amount of $50,000. Mot. ¶ 23; Proposed Settlement ¶ 2.
- Limited partner interests in Crusader held by (i) the Debtor, (ii) the DAF, and (iii) Eames, would be cancelled, and the "Reserved Distributions" associated with those interests would be forfeited. Mot. ¶ 23; Proposed Settlement ¶ 3.
- The Debtor would forfeit its right to collect approximately $32,313,000 of Deferred Fees owed to it upon Crusader's completed liquidation. Mot. ¶ 23; Proposed Settlement ¶ 5.
- The Debtor would forfeit its right to the Cornerstone shares held by Crusader, in exchange for an approximately $30,500,000 reduction of the Redeemer Claim "to account for the perceived fair market value of those shares," and Redeemer and the Debtor would work together to monetize Cornerstone. Mot. ¶ 23; Proposed Settlement ¶ 8.

21. These terms purport to reflect two self-styled "substantial compromise[s]" and "other modest reductions" that were applied to reduce the Redeemer Claim from an asserted claim of $190,824,557 to an allowed claim of $137,808,302. *See* Mot. ¶ 28, 32; *id.* ¶¶ 27, 31. *First*, Redeemer "agreed to reduce the Damages Award by $21,592,000" (which the Debtor claims is "approximately two-thirds of the Deferred Fees" component of the so-called Damages Award), and in exchange, the Debtor agreed to forfeit its right to collect approximately $32,313,000 in Deferred Fees upon liquidation of Crusader. Mot. ¶ 27. *Second*, Redeemer agreed to reduce the $71,894,891 component of the so-called Damages Award "by approximately $30,500,000 to account for the perceived fair market value of" the Cornerstone shares, and in exchange, the Debtor agreed to forfeit its right to receive the Cornerstone shares. Mot. ¶ 31. Under the Proposed Settlement, Crusader would retain its minority interest in Cornerstone, and Redeemer would

cooperate with the Debtor to liquidate the Cornerstone investment as a whole. *Id.* *Finally*, the parties agreed to further reduce the so-called Damages Award by approximately $924,255, for unspecified reasons.[12] Mot. ¶ 32.

D. The Cornerstone Shares

22. The Cornerstone shares undoubtedly provide value to whatever entity holds them. Crusader currently owns 14,830 shares (or approximately 40%) of Cornerstone. The Motion states that the "perceived fair market value" of those shares is $30.5 million ($2,059/share), Mot. ¶ 31, but does not provide any details whatsoever regarding whose "perception" this is, what it is based on, when it was calculated, or what information was taken into account to arrive at this valuation. And the Motion does not provide any evidence at all to support such a valuation.

23. On October 12, 2020, REDACTED

Alvarez, Crusader's investment manager and a released "Crusader Additional Party" under the Proposed Settlement. *See* Proposed Settlement at 1, ¶ 11; Ex. B, 6/4/20 Presentation to Redeemer at 16 (REDEEMER_004899).

24. The true value of Crusader's Cornerstone shares (and thus, the true value of the rights forfeited by the Debtor) is much higher than the $30.5 million assigned to them for

[12] Under the Proposed Settlement, the Debtor and Eames would also forfeit all rights to "certain other monies as to which the Debtor and Eames may have had an interest in the absence of this Stipulation." Proposed Settlement ¶ 5. But it is unclear what those "other monies" are. Other aspects of the Proposed Settlement are equally unclear, for example, the Debtor's forfeiture of its interest in any "Reserved Distributions," future "Distribution Fees," and "Management Fees" that may relate either to "the Cancelled LP Interests or any other role or position of the Debtor with respect to the Crusader Funds (including but not limited to its role as the investment manager for the Crusader Funds until August 4, 2016)." *Id.* These unquantified fees that may be "currently accrued or that might have accrued in the future," *id.*, appear to provide value for the Crusader Claim that could be well beyond the $50,000 allowed claim. *See* Crusader Claim Rider at 2 (asserting a claim "[i]n the amount of any other compensation, fees or distributions which may now or in the future otherwise be owing to [the Debtor]"). These items were not sought in the Redeemer Claim. *See generally* Redeemer Claim Rider.

settlement purposes. REDACTED

25. REDACTED

26. UBS's own financial advisor in this matter, Grant Thornton LLP, has evaluated both the Crusader Houlihan June Valuation and the Debtor Houlihan Valuation. *See* Declaration of W. Kevin Moentmann (the "GT Declaration"). REDACTED

[13] It is unclear whether the same individuals at Houlihan prepared both analyses.

REDACTED

27. Moreover, based on the data made available to it and using the methodology described in the Declaration submitted herewith, Grant Thornton has calculated that the actual value of Cornerstone as of June 30, 2020 might be as high as between $116 million and $208.7 million, in the aggregate. GT Decl. ¶ 5. That means that Crusader's 14,830 shares might have an actual value of between $46.5 million and $83.6 million, *id.* ¶ 6 (the "Grant Thornton Estimation")—*i.e.*, nearly triple the $30.5 million fair market value calculated REDACTED , which apparently forms the basis for the Debtor's decision to forfeit its rights to Crusader's 14,830 shares in exchange for a $30.5 million reduction of the Redeemer Claim in the Proposed Settlement.

ARGUMENT

28. The Debtor's own evaluation of the deal it struck cannot and should not "be automatically accepted as reasonable" by this Court. *In re Alfonso*, 2019 Bankr. LEXIS 2816, at *9 (Bankr. W.D. Tex. Sept. 6, 2019). Instead, when evaluating a claim compromise under Bankruptcy Rule 9019, the Court must be apprised "of the relevant facts and law so that it can make an informed and intelligent decision on whether the settlement proposed is fair and equitable to parties in interest.'" *Id.* at *8; *In re Rogumore*, 393 B.R. 474, 480 (Bankr. S.D. Tex. 2008) (applying the court's independent judgment and finding the proposed compromise must be denied).

29. Such information is necessary because, while settlements are desirable, the Court cannot "simply accept the [settling parties'] word that the settlement is reasonable," nor can it "merely 'rubber-stamp'" a settlement. *In re Shankman*, 2010 Bankr. LEXIS 619, at *9 (Bankr. S.D. Tex. Mar. 2, 2010) (Isgur, M.). Rather, a Court must determine whether the compromise

struck is "fair, equitable, and in the best interest of the estate." *Id.* at *7.[14] To make that determination, the Court must balance the "terms of the compromise with the likely rewards of litigation" by considering several factors: "(1) The probability of success in the litigation, with due consideration for the uncertainty in fact and law; (2) The complexity and likely duration of the litigation and any attendant expense, inconvenience and delay; and (3) All other factors bearing on the wisdom of the compromise," including the "best interests of the creditors, with proper deference to their reasonable views" and the "extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." *E.g.*, *id.*; *In re Alfonso*, 2019 Bankr. LEXIS 2816, at *8.

30. Importantly, the Court should not just consider whether the compromise as a whole is fair, rather, the Court must look at each component to determine whether the Proposed Settlement is in the best interest of the Debtor's estate. *See In re Allied Props., LLC*, 2007 Bankr. LEXIS 2174, at *13 (Bankr. S.D. Tex. June 25, 2007) (Isgur, M.) (rejecting a settlement despite "[m]ost provisions" of the compromise being fair, equitable, and in the best interest of the debtor's estate, because "two provisions do not meet this standard"). It is the Debtor's burden to establish that the Proposed Settlement is within the range of reasonable alternatives and would lead to a fair and equitable claim settlement. *Id.* at *12.

31. Here, the Proposed Settlement includes several components that are not fair, equitable, or in the best interest of the Debtor's estate. The Debtor acknowledges that it made "substantial compromises." Mot. ¶¶ 28, 47. All settlements necessarily include compromises. But those compromises must be reasonable concessions, not capitulations. The Debtor misleadingly portrays those compromises as providing its estate with "immediate[]" benefits. Mot.

[14] Unless noted, all internal quotations have been omitted.

¶ 64. UBS disagrees. In fact, those compromises—which provide no reductions for substantial litigation risk, and forfeit the estate's rights to meaningful assets—provide Redeemer with a windfall to the detriment of the Debtor's estate and other creditors.

32. For these reasons and others, there is sufficient basis to reject the Proposed Settlement based on the Bankruptcy Rule 9019 factors set forth by the Fifth Circuit.

A. The Debtor Is More Likely Than Not To Succeed On Its Motion To Vacate

33. Under the first factor, the Debtor argues that it is unlikely to succeed in contesting the Redeemer Claim because the claim is based on the Arbitration Award, which addressed every claim and argument asserted by the parties, after the Panel examined extensive evidence, heard lengthy argument, and made detailed legal and factual findings. Mot. ¶ 43. But the Proposed Settlement does not account for the fact that the Arbitration Award is contingent, disputed, and has never been confirmed by any court of competent jurisdiction.[15]

34. The Debtor argues that Redeemer "could simply move to lift the automatic stay for the sole purpose of having the Arbitration Award confirmed, thereby eliminating the alleged 'contingent' nature of the claim." Mot. ¶ 46. But the Debtor ignores that, even if this Court granted Redeemer's motion to lift the automatic stay, the Debtor's Motion to Vacate is also fully briefed and pending before the Delaware Court. While litigation outcomes are never guaranteed, at minimum, the Debtor's chance of success on its Motion to Vacate and Redeemer's Motion to Confirm is much closer to 50% than the 0% chance of success the Proposed Settlement appears to assign to it, by applying no reduction to account for this litigation risk.

[15] For this reason and others, UBS objected to Redeemer's characterization of the Arbitration Award as an "executory contract" under 11 U.S.C. § 365, rather than as the prepetition litigation damages claim that it is. UBS Obj. ¶¶ 21-22 (*citing, e.g., In re Denman*, 513 B.R. 720, 723 (Bankr. W.D. Tenn. 2014) ("[A]n executory contract must be a 'contract' and not some other legal instrument.")). The Debtor argues that this issue is "moot" because the Proposed Settlement does not treat the Arbitration Award as an executory contract.

35. As the Debtor itself argued in the Motion to Vacate, and as addressed more fully in the UBS Objection, *see* UBS Obj. ¶¶ 23-32, the Panel overstepped its fundamental authority as arbitrators by modifying certain aspects of the Partial Final Award, in violation of well-established state law, the Federal Arbitration Act, and Rule 50 of the AAA Commercial Arbitration Rules. *See Weinberg v. Silber*, 140 F. Supp. 2d 712, 724 (N.D. Tex. 2001) ("[T]he arbitrator shall not revisit his decision on the merits, as his authority to do so has expired."), *aff'd*, 57 F. App'x 211 (5th Cir. 2003); 9 U.S.C. §10; AAA R-50 ("[Parties] may request the arbitrator, . . . , to correct any clerical typographical, or computational errors in the award," but "[t]he arbitrator is not empowered to redetermine the merits of any claim already decided."). The new Final Award improperly modified the Partial Final Award in two distinct ways.

36. *First*, the Final Award dramatically expanded the Debtor's purported liability for Redeemer's claim that the Debtor had improperly transferred the Barclays LP Interests to Eames. The Partial Final Award acknowledged Redeemer's claims included the "payment of Distribution Fees" and "transfer of Barclays' Fund interests without Redeemer Committee approval." *See* PFA at 8; *but see* Mot. ¶ 54 (arguing the UBS Objection "conflates two separate and distinct issues" related to Barclays). Whereas the Partial Final Award discussed both claims and awarded Redeemer total damages in the amount of $14,452,275 (and prejudgment interest through March 6, 2019) for the Distribution Fee Claim, including for the Debtor's "improper" transfer of Barclays LP Interests, the Panel elected in the Final Award to grant Redeemer an additional $21,768,743 in damages arising out of the Debtor's "improper" transfer of the Barclays LP Interests. FA at 18. That is not all. The Final Award also awarded Redeemer prejudgment interest on these new compensatory damages—a sum that, on its own, adds yet another $9,042,623 to the award. *Id.* All told, the Panel's modification of these aspects of the Partial Final Award resulted in a combined

total of ***$30,811,366 in new damages*** for the Debtor's transfers of the Barclays LP Interests—an amount Redeemer itself now refers to as the "Barclays Claim." Redeemer Claim Rider at 2.[16]

37. *Second*, in the Final Award, the Panel reconsidered its prior ruling on prejudgment interest. The Panel had previously ordered that the Debtor pay Redeemer a finite amount of prejudgment interest (9% per simple interest annum) "through the date of this Partial Final Award" (March 6, 2019), PFA at 14, yet the Panel threw that limitation out entirely in the Final Award. After openly acknowledging its prior ruling, *see* FA at 14, the Panel announced in the Final Award that it was doing away with that March 6, 2019 end date and, instead, all such interest would run through "the earlier of the date paid or the entry of a final judgment," *id.* at 2, 14. In addition to the $30.8 million in additional damages for the Barclays LP Interests, the additional interest contemplated by the Final Award accounted for at least ***another $5.7 million*** through the Petition Date, for a total of ***approximately $36.5 million*** in new damages.

38. Any suggestion that the two major modifications discussed above were attempts to correct "clerical, typographical, or computational errors," AAA R-50, is belied by their sweeping impact. Prior to the Final Award, the aggregate amount of compensatory damages expressly awarded to Redeemer under the Partial Final Award was roughly $142 million (excluding fees and costs). The Panel's two modifications described above, standing alone, immediately add no less than $36,500,000 to that compensatory damages sum—more than a ***25% increase*** (in addition to mandatory injunctive relief purporting to require the Debtor to take the Barclays LP Interests from Eames and transfer them to Redeemer).[17] FA at 18. The portions of the Final Award reflecting

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[16] On top of these additional liquidated damages, the Panel ordered the Debtor to "take all necessary steps to cause the improperly taken [] LP interests currently owned and controlled by Respondent through Eames, Ltd to be transferred to Claimant . . . within sixty (60) days from the date of transmittal of this Final Award"—mandatory injunctive relief that is also not mentioned anywhere in the Partial Final Award. FA at 18.

[17] Eames's limited partner interests in Crusader are valued at several million dollars, and possibly more based on the other amounts related to these interests released in the Proposed Settlement. In addition to being subject to

these improper, material modifications are examples of the Panel exceeding its authority and are subject to vacatur. *Smith v. Transp. Workers Union of Am.*, 374 F.3d 372, 375 (5th Cir. 2004) ("If an arbitral panel exceeds its authority, it provides grounds for a court to vacate that aspect of its decision.").

39. The Proposed Settlement does not appear to account for the very real risk that a court would vacate those aspects of the Arbitration Award, as the Debtor strongly believed itself when it advocated for vacatur on the same grounds described above to the Delaware Court. The Debtor argues now that "[t]hese procedural attacks on the Arbitration Award were considered and rejected by the Panel" and are unlikely to succeed "here" or in the Delaware Court, if the automatic stay were lifted. Mot. ¶ 49. But the Panel's self-serving evaluation of its conduct is unreasonable and irrelevant to a court's independent analysis of whether that same Panel exceeded its authority under the applicable law and rules.

40. In fact, the Panel's own excuses for its conduct removes any doubt that it exceeded its authority. In the Final Award, the Panel claims the new damages awarded for the Barclays LP Interests were "clear" in the Partial Final Award but it left that "paragraph missing from the damages portion" inadvertently. FA at 9. But courts have considered, and rejected, this exact "explanation" before. *See Wein v. Morris*, 909 A.2d 1186, 1198 (N.J. Super. Ct. App. Div. 2006) (deciding that AAA Rule 46, the predecessor to Rule 50, does not allow modifications to address "inadvertent omissions" and "neither expressly states nor suggests that claims denied through inadvertence could also be revisited").

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vacatur for the reasons discussed above, the Debtor's Motion to Vacate also challenged this injunctive relief on the basis that Eames was not a party to the arbitration and it was therefore outside of the Panel's powers to award this relief. Ex. A, Debtor Brief to Vacate at 8, 15, 17-18.

41. To justify the settlement, the Debtor now credits Redeemer's arguments that the Partial Final Award was labeled "Partial," directed the parties to confer regarding the amount of certain damages, and left the hearing open for those issues to be agreed upon or decided by the Panel. Mot. ¶ 51. But this loses sight of an important distinction: the Panel did not leave the hearing open until *all issues* were resolved; the panel left the "hearing open until all *issues set forth above* have been agreed upon by the Parties or decided by the Tribunal." PFA at 56. The issues "set forth above" did not include damages for the Barclays LP Interests or prejudgment interest because those issues had already been directly addressed and decided in the Partial Final Award. *E.g.*, PFA at 14, 24. The Panel conceded as much, *see* FA at 14 ("In the March 6 Partial Final Award, we awarded damages and interest through the date of that award"), but decided to reach a different conclusion in the Final Award because, in its own view, the prior ruling in the Partial Final Award was "***not determinative of this issue***." FA at 15. That is exactly what the Panel cannot do. A partial final award rendered on any issue is, by definition, determinative of the issue. *See Fluor Daniel Intercontinental, Inc. v. GE*, 2007 WL 766290, at *2-3 (S.D.N.Y. Mar. 13, 2007); *see also Trade & Transp., Inc. v. Nat. Petroleum Charterers Inc.*, 931 F.2d 191, 195 (2d Cir. 1991).

42. No court has ever ruled on the propriety of the Panel's attempts to redetermine the merits of claims already decided. The Debtor argues that under the Federal Arbitration Act, this Court would be required to defer to the Panel's exercise of its discretion under AAA Rule 8 to "interpret and apply" the AAA Rules, "***so long as it is 'within reasonable limits***.'" Mot. ¶ 58 (quoting *Commc'ns Workers of Am., AFL-CIO, v. Sw. Bell Tel. Co.*, 953 F.3d 822, 827 (5th Cir. 2020)) (emphasis added). But the Debtor cannot seriously expect that this Court (with its equitable powers) or the Delaware Court would view changes that fundamentally alter—and in this instance, significantly increase—the relief granted to Redeemer as a mere correction of a "clerical error"

and a "reasonable" interpretation of AAA Rule 50. Nor does the Debtor's Motion grapple with the fact that the modifications requested by Redeemer, which prompted changes in the Final Award, were requested too late under Rule 50.[18]

43. UBS recognizes that litigation is uncertain. But even if the likelihood of the Debtor prevailing on its Motion to Vacatur is assigned a 50% chance of success, that would suggest a $18,250,000 ($36,500,000 x 50%) reduction of the Redeemer Claim to account for that uncertainty, millions above the "modest" unspecified reduction of $924,255 included the Proposed Settlement. Mot. ¶ 32. UBS submits that the Debtor's failure to take into account the litigation risk associated with its arguments for vacatur is an exercise of business judgment that falls below any range of reasonableness. *In re Allied Props., LLC*, 2007 Bankr. LEXIS 2174, at *20 (Bankr. S.D. Tex. June 25, 2007) (Isgur, M.) (requiring the trustee to "show that his decision falls within the range of reasonable litigation alternatives").

B. This Court Or the Delaware Court Could Decide The Motions To Confirm And Vacate With Minimal Expenditure Of Time And Resources

44. Under the second factor, the Debtor seems to place the Redeemer Claim at both ends of this spectrum. To show that the complexity of litigation favors settlement, the Debtor asserts that issues in the Redeemer Claim "are fairly complex; litigation would require meaningful resources, would take time, and would delay the Debtor's efforts to get to a confirmable plan." Mot. ¶ 59. But as discussed above, the Debtor also acknowledges that its Motion to Vacate and Redeemer's Motion to Confirm were both fully briefed prior to the Petition Date, and that

[18] In contrast to Redeemer's April 5, 2019 submission, Redeemer's March 7, 2019 submission was timely—but the Panel responded to that request before the Debtor's 10-day response period had lapsed. *See generally* MA; FA at 1.

Redeemer "could simply move to lift the automatic stay for the sole purpose of having the Arbitration Award confirmed." *Id.* ¶ 46.

45. UBS does not dispute that the Panel already made extensive findings of fact, legal rulings, and credibility determinations. The only issue left to be litigated is the propriety of the Panel's modifications to the Arbitration Award at issue. No further discovery, evidence, or witness testimony is needed to decide that issue, so the remaining litigation would be a much "simpler" proceeding than the previous evidentiary hearing before the Panel, which featured four expert witnesses as well as eleven fact witnesses and spanned nine days. Mot. ¶ 43. Nor would this consume meaningful resources or cause significant delay—all that is left to do is for a court (this Court or the Delaware Court) to rule on the Debtor and Redeemer's pending motions.[19] In fact, the Debtor would likely spend only a very small sum of money in legal fees (if anything), to possibly reduce the Redeemer Claim by as much as $36,500,000.

C. The Proposed Settlement Is Not In The Best Interests Of All Creditors

46. Under the third factor, this Court must consider all other factors bearing on the wisdom of the Proposed Settlement, including most importantly, whether the Proposed Settlement is in the best interests of *all* the creditors. Applying this factor, courts generally look at "the consideration offered by the settling creditor and the degree to which creditors object." *In re Rogumore*, 393 B.R. 474, 480 (Bankr. S.D. Tex. 2008); *In re Shankman*, 2010 Bankr. LEXIS 619,

[19] The Motion also references how "notoriously complex" setoff issues would arise with respect to the Deferred Fees and Cornerstone shares in litigation. Mot. ¶ 59. To "make an informed and independent judgment, however, the court needs facts, not allegations." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 437 (1967); *see In re Allied Props., LLC*, 2007 Bankr. LEXIS 2174, at *15. The Debtor states, without citation, that "under principles of setoff, the Redeemer Committee may have only been required to tender shares equal in value to the recovery of its claim." Mot. n.15. It is unclear how traditional principles of setoff—under which a Debtor's monetary debt owed to a creditor is offset by a separate monetary debt owed by the creditor to the Debtor—applies to a situation like this one, where the Deferred Fees and Cornerstone shares are real assets owed to the Debtor. Without further elaboration, the Debtor does not show that this Court would need to address this "notoriously complex" issue.

at *9 (Bankr. S.D. Tex. Mar. 2, 2010) (Isgur, M.). Where a significant unsecured creditor affected by the Proposed Settlement—here, UBS—objects, "the Court must look to the reasonable views of" that creditor. *Id.* at *20 (rejecting a settlement when only two creditors "strenuously opposed" but it became "clear that they will not receive any benefit under the proposed compromise).[20]

47. The Debtor describes the Proposed Settlement as purportedly benefitting the estate, doing so "on reasonable terms," and in the exercise of "sound business judgment." Mot. ¶ 63. But the Proposed Settlement's terms should not be viewed as anything approaching "reasonable" to any creditor, except Redeemer. When studied carefully, the supposed benefits to the estate are illusory. *In re Shankman*, 2010 Bankr. LEXIS 619, at *10 (rejecting the proposed settlement because it offered only "illusory benefits" and was not just, equitable, and in the best interests of the estate).

48. In addition to the lack of any reduction to account for the litigation uncertainty associated with the risk of vacatur discussed above, in the Proposed Settlement, the Debtor forfeits the right to meaningful assets that otherwise would be transferred to the estate and distributed pro rata among all of the estate's unsecured creditors. This provides a windfall to Redeemer to the detriment of other creditors, by not only permitting Redeemer to receive more than its pro rata share of the Debtor's estate, but also requiring the Debtor to forfeit the estate's rights to valuable assets. When these components are factored in, Redeemer could receive a greater than 100% recovery on the Redeemer Claim, and all other creditors would lose out. Accordingly, this

[20] The Motion asserts that the UBS Objection was the only objection made to the Redeemer Claim or Crusader Claim. Mot. ¶ 33 n.10. The number of creditors who object to a claim or settlement is not dispositive of this factor or the resolution. Regardless of whether *any* creditors object, "[t]he Court is obliged to independently consider whether the creditor's best interests are being served." *In re Allied Props., LLC*, 2007 Bankr. LEXIS 2174, at *27 (Bankr. S.D. Tex. June 25, 2007) (Isgur, M.). Even when no creditors object, a Court must reject a claim settlement if the compromise is not fair, equitable, and in the best interest of the debtor's estate. *In re Rogumore*, 393 B.R. at 479 (finding a compromise was not fair, equitable, or in the best interests of the debtor's estate "[a]lthough no objections to the motions were filed").

compromise violates the third factor that courts in the Fifth Circuit have focused on in evaluating settlements. *In re Allied Props., LLC*, 2007 Bankr. LEXIS 2174, at *18-19 ("Th[e third] factor focuses on the degree to which the compromise serves *all* creditors' interests. The compromise provides *no* material benefits to the estate. Consequently, to the extent that the compromise gives Black Mountain assets that otherwise would be distributed pro rata among all the estate's unsecured creditors, the compromise violates the third factor.").

1. The Debtor Would Forfeit Its Right To Collect Deferred Fees

49. The Debtor acknowledges that while the Panel found that $32,313,000 in Deferred Fees were prematurely taken by the Debtor, the Debtor ultimately would be entitled to those fees pursuant to the Plan and Scheme, upon the completion of the liquidation of Crusader. Mot. ¶¶ 25-27. In the Proposed Settlement, the Debtor and Redeemer claimed to have reached a "substantial compromise," whereby Redeemer "agreed to reduce the Damage Award by $21,592,000," which the Debtor characterizes as "approximately two-thirds" of the Deferred Fees component, in exchange for the Debtor forfeiting its right to collect the Deferred Fees. Mot. ¶ 27. According to the Debtor, this compromise results in the estate "immediately" receiving a benefit (through the reduction of the Damages Award), rather than waiting for the completion of Crusader's liquidation and "litigating at some future date the merits of" the "faithless servant" defense. Mot. ¶ 64. This characterization of the compromise, and who it really "benefits," is misleading at best.

50. As an initial matter, the Debtor's claim that the Proposed Settlement discounted the Deferred Fee component of the Arbitration Award by "approximately two-thirds" is inaccurate. Mot. ¶ 27. The Deferred Fee component of the Arbitration Award listed in the Redeemer Claim

is $43,105,395 (not $32,313,000), which includes $10,792,395 in pre-judgment interest.[21] Redeemer Claim Rider at 1. Thus, an "apples-to-apples" or "claim-to-claim" comparison of the asserted claim and allowed claim would acknowledge that a reduction of the so-called Damages Award by approximately $21,592,000 is only one-half, rather than two-thirds, of the Deferred Fee component. Redeemer retains $21,513,395 of its claim based on the Deferred Fees ($43,105,395 - $21,592,000), and does not have to pay the Debtor $32,313,000 upon complete liquidation of Crusader. The Debtor, meanwhile, forfeits its right to receive ***any*** of the Deferred Fees indisputably owed to it upon Crusader's completed liquidation.

51. None of Redeemer's counterarguments (or the Debtor's justifications) provides a reasonable basis for the Debtor to forfeit its right to $32,313,000 in Deferred Fees in the future altogether. *First*, Redeemer apparently expressed its view that it was entitled to recover all of the Deferred Fees found by the Panel to be prematurely taken. Mot. ¶ 26. But Redeemer previously argued, and the Panel agreed, that the Debtor's conduct was improper because it transferred the Deferred Fees to itself *too soon*. Mot. ¶ 25. The Debtor's entitlement to the Deferred Fees in the future was not in question, however. For this reason, the Panel made clear that "measuring the damages suffered by [Redeemer] by referencing the full amount of the Deferred Fees taken is ***not*** the same as literally ordering a return of the moneys." PFA at 14; *id.* at 3. The Motion does not explain why Redeemer, not the Debtor, would be legally entitled to those fees under any scenario. Under the Plan and Scheme, contracts to which Redeemer is a party, the Debtor alone is entitled

[21] Of this prejudgment interest, $9,007,655 accrued by March 6, 2019, the date of the Partial Final Award. PFA at 54. An additional $1,784,740 in prejudgment interest was later added in the Final Award. FA at 16. This portion may be vacated. *Infra* Section A, at 16.

to those fees, and the Arbitration Award did not alter those rights in any way or order that the Debtor "return" or forfeit the fees.

52. *Second*, the Debtor implies that it will not receive the Deferred Fees until some point far in the future, when Crusader's liquidation is complete, but the Debtor provides no facts to ascertain what assets besides the Cornerstone shares, if any, remain at Crusader to be liquidated or when Crusader's liquidation may be completed. Crusader went into wind down in 2008—twelve years ago. *See* Mot. ¶ 11. The Arbitration Award suggests the Cornerstone shares are among the last assets at Crusader to be liquidated. PFA at 51 (discussing whether liquidation of the Cornerstone shares had delayed liquidation being completed). Therefore, it is entirely possible that Crusader may be liquidated before the close of this Chapter 11 Case. The uncertainty of *when* the Debtor's estate will receive the Deferred Fees is not reason to forfeit them altogether.

53. *Third*, Redeemer's argument that the Debtor would be barred from recovering any of the Deferred Fees from Crusader upon its complete liquidation because of the "faithless servant" doctrine is meritless and ignores the Debtor's valid defenses. *See* Mot. ¶ 26. Redeemer contends that waiver and estoppel are inapplicable because "that is a defense that would only be required to be asserted when HCMLP made a claim for the Deferred Fees—as it did during the negotiations." Mot. ¶ 28 n.9. However, recent negotiations were not the first time the Debtor sought to collect the Deferred Fees, meaning this defense was "required to be asserted" previously. When the Debtor asserted a counterclaim for the Deferred Fees during arbitration, Redeemer defended itself against that claim without ever raising the faithless servant defense. PFA at 49. Moreover, under the Proposed Settlement, the parties agreed to an allowed claim of $50,000 for the Crusader Claim—a claim based in its entirety on the same "faithless servant" doctrine—because, as the

Debtor points out, it "is very likely to defeat this claim based on, among other things, affirmative defenses, including the statute of limitations, waiver, laches, and estoppel." Mot. ¶ 58 n.14.

54. The Debtor's forfeiture of its clear right to the Deferred Fees is not a sound exercise of business judgment. The $32,313,000 in Deferred Fees is a cash receivable, a valuable asset that Redeemer would otherwise be required to transfer to the estate upon liquidation of Crusader, at which point it would be available to increase *all* creditors' pro rata recoveries on their allowed claims. ***That*** would be a real benefit to the estate, even if not an "immediate" one. In that scenario, Redeemer would end up giving more in real, cash assets to the Debtor through this pay-back obligation than it would receive on a pro rata basis recovery on its Deferred Fee Claim. Instead, Redeemer avoids this obligation altogether. There is nothing fair or equitable about this compromise from the perspective of all other creditors.

2. <u>The Debtor Would Forfeit Its Right To Crusader's Cornerstone Shares, Which May Be Worth Double The Value Assigned To Them For Settlement Purposes</u>

55. Next, there is no dispute that the Arbitration Award requires Redeemer, simultaneously with a damages payment from the Debtor (including prejudgment interest), to have Crusader "tender its Cornerstone shares to [the Debtor]." FA at 17; PFA at 48; *see* Mot. ¶ 31. In the UBS Objection, UBS expressed concern regarding how the value of Crusader's 14,380 Cornerstone shares would be taken into account when calculating the true value of the Redeemer Claim. UBS Objection ¶ 20. The Debtor dismisses these concerns as "moot" with little explanation: "these obligations were fully considered by the Debtor and form the basis for substantial compromises embedded in the Stipulation." Mot. ¶¶ 35, 47. UBS's concerns, however, are only heightened by the treatment of Crusader's Cornerstone shares in the Proposed Settlement.

56. Under the Proposed Settlement, the Debtor "agreed to treat the Cornerstone Shares differently from the process required under the Arbitration Award." Mot. ¶ 31. Rather than

tendering the Cornerstone shares, Redeemer's "Damage Award will be reduced by approximately $30.5 million to account for the perceived fair market value of those shares," and Crusader will retain the shares. *Id.* This "substantial compromise" is actually a complete surrender.

57. As an initial matter, this reduction translates to Redeemer receiving ***over half*** of the Cornerstone component in its allowed claim. The Cornerstone component of the Arbitration Award listed in the Redeemer Claim is $71,894,891 (not $48,070,407, as the Debtor suggests), which includes $23,824,284 in pre-judgment interest.[22] Redeemer Claim Rider at 1. Thus, an "apples-to-apples" or "claim-to-claim" comparison of the asserted claim and allowed claim would acknowledge that a reduction of the total payments by approximately $30.5 million is a less than 50% reduction of the Cornerstone component ($71,894,891). Put differently, Redeemer retains both $17,570,407 of its asserted claim based on the Cornerstone shares ($48,070,407 - $30,500,000), ***plus*** another $23.8 million (the full amount of pre-judgment interest awarded by the Final Award), for a total of $41,394,691 in an allowed claim to be paid pro rata from the estate. And on top of that, Redeemer retains the value of Crusader's Cornerstone shares upon their liquidation, while the Debtor "does not have to purchase" Crusader's Cornerstone shares for $48,070,407 in cash (which the Debtor points out it does not have).

58. But that is not the way that the Arbitration Award was supposed to operate and it is certainly not an equitable way to proceed in this Chapter 11 Case. The Debtor was supposed to pay to Redeemer a fixed amount, which included the Panel's calculation of the fair market value of Crusader's 14,380 shares in Cornerstone plus prejudgment interest. PFA at 48. In return, Crusader was required to tender its Cornerstone shares to the Debtor. That the Debtor does not

[22] Of this prejudgment interest, $21,169,417 accrued by March 6, 2019, the date of the Partial Final Award. PFA at 54. An additional $2,655,067 in prejudgment interest was later added in the Final Award. FA at 16. This portion may be vacated. *Infra* Section A, at 16.

have $48,070,407 in cash (right now) to pay the full amount assigned by the Panel to the Cornerstone component of the Damages Award is beside the point. Based on the Debtor's current asset valuation, no general unsecured creditors, other than perhaps certain retained employees, will receive a full recovery on account of their prepetition claims. But permitting Redeemer to avoid that downside by keeping both half of the amount that was supposed to be paid for the Cornerstone shares ***and*** the Cornerstone shares provides Redeemer with a windfall that the Panel did not contemplate.

59. Moreover, the Debtor's reduction of the Redeemer claim by $30.5 million falls below any reasonable range of valuation, including the Debtor Houlihan Valuation or even the Crusader Houlihan June Valuation. REDACTED

higher than the $30.5 million fair market value calculated in the Crusader Houlihan March Valuation and used by the Debtor for settlement purposes. It is unreasonable for the Debtor to accept a lower valuation calculated by the exact same financial firm, while failing to provide the Court with any explanation of what analysis the Debtor or Houlihan performed to determine that this lower value is reasonable (and should be fixed in March as opposed to June, when the value of Cornerstone increased in those three months). *See In re Rogumore*, 393 B.R. 474, 481 (Bankr. S.D. Tex. 2008) (rejecting a settlement under Rule 9019 and questioning why the estate should "be forced to accept the low valuation at whatever date," when "[n]o party to the Compromise adequately explained why the cash surrender value should be fixed at the March 24 value").

60. In fact, UBS believes that the valuation of Crusader's shares in Cornerstone is potentially nearly triple the $30.5 million calculated in the Crusader Houlihan March Valuation

and used by the Debtor for settlement purposes. According to the Grant Thornton Estimation, the true value of Cornerstone as of June 30, 2020 might be between $116 million and $208.7 million. GT Decl. ¶ 5. This means that Crusader's 14,830 shares might have a value of between $46.5 million and $83.6 million, *id.* ¶ 6, which Redeemer will receive upon a sale of Cornerstone.

61. Indeed, such a sale is contemplated by the Proposed Settlement. Specifically, the Proposed Settlement requires the Debtor to "in good faith, use commercially reasonable efforts to monetize all shares of capital stock of Cornerstone held by the Debtor, any funds managed by the Debtor, and the Crusader Funds," and requires Redeemer to cooperate in the sale process. Mot. ¶ 23. According to the Debtor, Redeemer's cooperation means that Cornerstone "may be sold as a whole, to the likely benefit of all creditors." Mot. ¶ 64. Redeemer's cooperation is an illusory benefit. If instead, Redeemer was required to comply with its obligations under the Arbitration Award, Crusader's minority interest in Cornerstone would be transferred to the Debtor, and the Debtor would have the same ability to sell Cornerstone "as a whole."[23] Plus, as UBS understands, Cornerstone is among the last of Crusader's assets to be liquidated, so under the Plan and Scheme, the Debtor could (upon receipt of Crusader's shares) trigger payment of the $32,313,000 of Deferred Fees due to the Debtor upon completion of the Crusader liquidation.

3. The Proposed Settlement May Result In Redeemer Recovering More Than 100% On Its Claim

62. All told, the Debtor's forfeiture, and Redeemer's retention, of the Deferred Fees and Cornerstone shares may in fact result in Redeemer recovering more than 100% on its claim. The Debtor's Plan has not been approved and the general unsecured creditor class pro rata recovery

[23] The "Amended & Restated Stockholders' Agreement" filed with the Proposed Settlement, Dkt. No. 1090-1 at Schedule A, raises further questions about the Proposed Settlement—and the Debtor's acceptance of it—by including a Schedule of "Highland Capital Stockholders" that is inconsistent with other documentation provided regarding which Highland entities currently hold Cornerstone shares.

remains uncertain, for a variety of reasons. *See, e.g.*, *First Amended Plan of Reorganization of Highland Capital Management, L.P.* [Dkt. No. 1079]. Under the Proposed Settlement, however, when the value of the forfeited assets are taken into account, Redeemer may fare far better than it would have under the underlying Arbitration Award and far better than other general unsecured creditors in this Chapter 11 Case.

63. To illustrate the potential windfall to Redeemer under the Proposed Settlement, a comparison of Redeemer's recovery under the Arbitration Award versus its potential recovery under the Proposed Settlement is helpful. Under the Arbitration Award, the Debtor was required to pay Redeemer 118,929,666 (including prejudgment interest and attorneys' fees) in damages and to pay Redeemer $71,894,891 (including prejudgment interest) ***in exchange*** for all of Crusader's shares in Cornerstone. In exchange, Redeemer remained obligated to (i) tender Crusader's Cornerstone shares; and (ii) pay the Debtor $32,313,000 in Deferred Fees upon liquidation of Crusader. As shown below, after accounting for its reciprocal obligations to the Debtor, and depending on the value of the Cornerstone shares to be tendered (which is disputed), the value of the Arbitration Award to Redeemer is between $74,911,557 (using the Grant Thornton Estimation) and $128,011,557 (using the Crusader Houlihan March Valuation):

Redeemer Recovery (Arbitration Award)

Highland Payments	$190,824,557			
Pay Deferred Fees	($32,313,000)			
REDACTED				
Total Recovery	**$74,911,557**	**$104,811,557**	**$103,111,557**	**$128,011,557**

[24] For purposes of this chart, the highest ends of the ranges calculated by Grant Thorton and Houlihan ("HL") are used, except for the Crusader Houlihan March Valuation, which uses the low end of the range, as the Debtor does.

64. Under the Proposed Settlement, however, Redeemer stands to gain far more. Depending on the valuation of the Cornerstone shares, Redeemer could receive or retain value in an amount up to $253,609,610 (based on the Grant Thornton Estimation) or $200,509,610 (based on the Crusader Houlihan March Valuation), each of which exceeds the face amount of the Redeemer Claim ($190,824,557) and the highest recovery it would have received under the Arbitration Award ($128,011,557), as reflected in the chart above.

Redeemer Recovery (Proposed Settlement)

Allowed Claim	$137,696,610			
Release of Deferred Fees	$32,313,000			
REDACTED				
Total Recovery	**$253,609,610**	**$223,709,610**	**$225,409,610**	**$200,509,610**

65. Not only does the Proposed Settlement create a likelihood that Redeemer will recover more than 100% of its filed claim amount, it does so while depriving the Debtor's estate of valuable assets that could be used to pay other creditors and increase their pro rata recovery. This contradicts any assertion that the "proposed settlement is in the best interests of the Debtor's creditors." *See* Mot. ¶ 62. Where, as here, the Proposed Settlement "adversely affect[s] recovery by the estate's other creditors," it is not "fair and equitable" and should be rejected. *In re Alfonso*, 2019 Bankr. LEXIS 2816, at *13 (Bankr. W.D. Tex. Sept. 6, 2019).

CONCLUSION

[25] For purposes of this chart, the highest ends of the ranges calculated by Grant Thornton and Houlihan ("HL") are used, except for the Crusader Houlihan March Valuation, which uses the low end of the range, as the Debtor does.

66. For the foregoing reasons, UBS respectfully requests that the Court independently assess the merits of the Proposed Settlement. Upon doing so, UBS submits that the Court should deny the Motion and provide any such other and further relief to which UBS and all creditors might be entitled. UBS respectfully submits that such relief should include an Order requiring the Debtor to provide sufficient information for UBS and the Court to assess the true value of the Cornerstone shares held by Crusader, and/or an Order requiring the Debtor to obtain a valuation of Cornerstone from an independent, third-party financial advisor.

67. In the alternative, even if the Court approves the Proposed Settlement, UBS respectfully requests that when the Debtor and Redeemer have sold the Cornerstone shares, if the sale price of Crusader's 14,380 shares exceeds the $30,500,000 "perceived" fair market value assigned to them in the Proposed Settlement, the Court take the additional proceeds of that sale into consideration when calculating Redeemer's pro rata recovery from the Debtor's estate, under Section 105 of the Bankruptcy Code.

DATED this 16 day of October, 2020.

LATHAM & WATKINS LLP

By /s/ Sarah Tomkowiak

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CERTIFICATE OF SERVICE

I, Martin Sosland, certify that the *Objection to the Debtor's Motion for Entry of an Order Approving Settlements with (A) The Redeemer Committee of the Highland Crusader Fund (Claim No. 72), and (B) The Highland Crusader Funds (Claim No. 81)* was filed electronically through the Court's ECF system, which provides notice to all parties of interest.

Dated: October 16, 2020.

/s/ Martin Sosland

Exhibit A

Debtor Brief to Vacate

(To Be Filed Under Seal)

Exhibit B

6/4/20 Presentation to Redeemer

(To Be Filed Under Seal)

Exhibit C

8/6/20 Presentation to Redeemer

(To Be Filed Under Seal)

Appendix Exhibit 60

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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
Debtor.	:	

HARBOURVEST LIMITED OBJECTION AND RESERVATION OF RIGHTS TO DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH (A) ACIS CAPITAL MANAGEMENT, L.P. AND ACIS CAPITAL MANAGEMENT GP LLC (CLAIM NO. 23), (B) JOSHUA N. TERRY AND JENNIFER G. TERRY (CLAIM NO. 156), AND (C) ACIS CAPITAL MANAGEMENT, L.P. (CLAIM NO. 159), AND AUTHORIZING ACTIONS CONSISTENT THEREWITH

HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and

HarbourVest Partners L.P., on behalf of funds and accounts under management (collectively, "**HarbourVest**") hereby files this limited objection (the "**Objection**") to the *Debtor's Motion for Entry of an Order Approving Settlement with (A) Acis Capital Management, L.P. and Acis Capital Management GP LLC (Claim No. 23), (B) Joshua N. Terry and Jennifer G. Terry (Claim No. 156), and (C) Acis Capital Management, L.P. (Claim No. 159), and Authorizing Actions Consistent Therewith* (Docket No. 1087) (the "**Acis Settlement**") by Highland Capital Management, L.P. (the "**Debtor**" or "**Highland**"). In support of the Objection, the HarbourVest respectfully represents the following:

I. PRELIMINARY STATEMENT

1. HarbourVest objects to the Acis Settlement, on which it otherwise takes no position, to the extent that it attempts to infringe upon HarbourVest's claims or other rights. Specifically, HarbourVest objects to those portions of the Acis Settlement that purport to (i) to release HarbourVest's claims without the consent or involvement of HarbourVest or (ii) mandate the transfer of Highland HCF Advisor, Ltd. ("**Advisor**") to Acis Capital Management, L.P. ("**Acis**") without the consent of HCLOF or its investors, including HarbourVest, in violation of the Investment Advisers Act of 1940 and its applicable agreements.

II. RELEVANT BACKGROUND

2. HarbourVest owns an approximately 49% interest in Highland CLO Funding, f/k/a Acis Loan Funding, Ltd. ("**HCLOF**"). Advisor, a subsidiary of the Debtor, is the current portfolio manager of HCLOF. As described in its proofs of claim, listed in the Debtor's claim register as claims number 143, 147, 149, 150, 153, and 154 (the "**Proofs of Claim**") and further detailed in the *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-*

Documentation Claims [Docket No. 1057] HarbourVest also has significant claims against the Debtor (the "**HarbourVest Claims**").

3. The Acis Settlement was negotiated without any input from, or involvement of, HarbourVest, and HarbourVest has not consented to any of its terms or to the transactions contemplated thereby.

III. LIMITED OBJECTION

A. The Acis Settlement Purports to Release HarbourVest's Claims

4. The General Release, attached Exhibit 2 to the *Declaration of Gregory V. Demo in Support of the Debtor's Motion for Entry of an Order Approving Settlement with (A) Acis Capital Management, L.P. and Acis Capital Management GP LLC (Claim No. 23), (B) Joshua N. Terry and Jennifer G. Terry (Claim No. 156), and (C) Acis Capital Management, L.P. (Claim No. 159), and Authorizing Actions Consistent Therewith* [Docket No.1088] (the "**General Release**") included in the Acis Settlement purports to release the claims of, and provide releases to, a wide variety of parties – none of whom were party to the settlement – including HarbourVest.

5. The General Release provides for each "HCMLP Released Party" to mutually release all claims against each "Acis Party." General Release at §1(b). "HCMLP Released Parties" include, but are not limited to, entities "managed by either [the Debtor] or a direct or indirect subsidiary of [the Debtor]" and members of such managed entities. General Release at §1(a). As HarbourVest is a member of HCLOF, which in turn is an entity for which Advisor—a subsidiary of the Debtor—acts as portfolio manager, it is arguably included in the definition of HCMLP Released Parties. While HCLOF is expressly excluded as an HCMLP Released Party, HarbourVest is not.

6. It is not clear whether the Debtor intended to attempt to release HarbourVest's claims through this settlement, and nor can the Debtor purport to do so in the context of a settlement between

itself and Acis. Nonetheless, out of an abundance of caution, HarbourVest files this limited objection to ensure all of its rights and claims are preserved and unaffected by the Acis Settlement.

7. For the avoidance of doubt, HarbourVest did not and does not consent to this release. An involuntary release of this nature is beyond the proper scope of the Acis Settlement. To the extent the Release, or any other provision of the Acis Settlement or the proposed order approving the same, purports to release any HarbourVest Claims, or any other claims or rights of HarbourVest, HarbourVest objects. HarbourVest respectfully requests that the Court make clear that the rights, and claims, of HarbourVest and its employees and affiliates remain unaffected.

B. The Acis Settlement Purports to Unlawfully Transfer Highland HCF Advisor to Acis

8. The Acis Settlement purports to require the Debtor to "transfer all of its right, title and interest in Highland HCF Advisor, Ltd., whether its ownership is direct or indirect to Acis or its nominee." Exhibit 1 to the *Declaration of Gregory V. Demo*, § 1(c) (the "**Settlement Agreement**"). Any such transfer, absent the consent of, among others, HarbourVest as an investor in HCLOF, would violate Advisor's portfolio management agreement as well as the Investment Advisers Act of 1940. To the extent that the Acis Settlement purports to authorize any such transfer absent HarbourVest's express consent, HarbourVest objects. HarbourVest respectfully requests that the Court make clear that all of its rights under applicable non-bankruptcy law (including those which arise under contract or under the Investment Advisors Act of 1940) are expressly preserved.

Dated: Dallas, Texas

October 16, 2020

Respectfully submitted,

/s/ Vickie Driver

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Appendix Exhibit 61

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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 RESPONSE TO DEBTOR'S FIRST OMNIBUS OBJECTION TO CERTAIN (A) DUPLICATE CLAIMS; (B) OVERSTATED CLAIMS; (C) LATE FILED CLAIMS; (D) SATISFIED CLAIMS; (E) NO-LIABILITY CLAIMS; AND (F) INSUFFICIENT-DOCUMENTATION CLAIMS

NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC ("HCREP") files this Response to the Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims (the "Objection") and respectfully states as follows:

I. PROCEDURAL BACKGROUND

1. On or about April 8, 2020, HCREP filed its Proof of Claim with Highland Capital Management, LP's (the "Debtor") claims agent, a copy of which is attached hereto as Exhibit 1. [Claim No. 146] (the "Proof of Claim"). In the Proof of Claim, HCREP asserts a claim against the Debtor based on the parties' interests and agreements in connection with an entity called SE

Multifamily Holdings, LLC ("SE Multifamily"). In the Proof of Claim, HCREP notes that it has requested information from the Debtor to ascertain the exact amount of its claim, such process is on-going, and has been delayed due to the outbreak of the Coronavirus. *See* Proof of Claim, Ex. A.

2. On July 30, 2020, Debtor filed its Objection, objecting to various categories of claims that it seeks to disallow, expunge, or reduce. HCREP's Proof of Claim was included in Schedule 5 to the Objection, which the Debtor characterized as alleged "No-Liability Claims." Specifically, the Debtor claims that the Proof of Claim has no basis in the Debtor's Books and Records and is not an obligation of the Debtor. *See* Objection, ¶ 22. The Debtor seeks to disallow and expunge the Proof of Claim.

3. After initial discussions between HCREP and the Debtor, the Debtor agreed to multiple extensions of HCREP's deadline to respond to the Objection, such that the agreed deadline for HCREP to respond to the Objection is now October 16, 2020. The parties have attempted to resolve the Objection; however, have not yet been able to do so.

4. For the reasons set forth in detail below, HCREP respectfully requests the Court enter a scheduling order to allow for discovery in connection with HCREP's Proof of Claim, set an evidentiary hearing on HCREP's Proof of Claim, and overrule the Debtor's Objection and allow the claim in the amount determined at such evidentiary hearing.

II. RESPONSE

5. After reviewing what documentation is available to HCREP with the Debtor, HCREP believes the organizational documents relating to SE Multifamily Holdings, LLC (the "SE Multifamily Agreement") improperly allocates the ownership percentages of the members thereto due to mutual mistake, lack of consideration, and/or failure of consideration. As such, HCREP has a claim to reform, rescind and/or modify the agreement.

6. However, HCREP requires additional discovery, including, but not limited to, email communications and testimony, to determine what happened in connection with the memorialization of the parties' agreement and improper distribution provisions, evaluate the amount of its claim against the Debtor, and protect its interests under the agreement. Accordingly, HCREP requests the Court enter a scheduling order allowing for formal discovery and set an evidentiary hearing after such discovery has occurred.

III. CONCLUSION

For these reasons, the HCREP respectfully requests that the Court (i) hold a status conference at which it sets a scheduling order in connection with this contested matter; (ii) set a date for an evidentiary hearing on the Proof of Claim; (iii) overrule the Objection and allow HCREP's Proof of Claim in the amount established at such evidentiary hearing; and (iii) grant HCREP 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 NEXPOINT REAL ESTATE PARTNERS, LLC F/K/A HCRE PARTNERS, LLC

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2020, a true and correct copy of the foregoing Joinder was served via the Court's electronic case filing (ECF) system upon all parties receiving such service in this bankruptcy case; and via e-mail upon the following parties:

Jeffrey N. Pomerantz
Ira D. Kharasch
John A. Morris
Gregory V. Demo
10100 Santa Monica Boulevard, 13th Floor
Los Angeles, CA 90067
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Melissa S. Hayward
Zachery Z. Annable
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Email: MHayward@HaywardFirm.com
ZAnnable@HaywardFirm.com

/s/ Lauren K. Drawhorn
Lauren K. Drawhorn

EXHIBIT 1

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas (State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**
   HCRE Partner, LLC
   Name of the current creditor (the person or entity to be paid for this claim)
   Other names the creditor used with the debtor

2. **Has this claim been acquired from someone else?**
   ☑ No
   ☐ Yes. From whom?

3. **Where should notices and payments to the creditor be sent?**
   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

   Where should notices to the creditor be sent?
   HCRE Partner, LLC
   300 Crescent Court, Ste. 700
   Dallas, TX 75201

   Contact phone
   Contact email bryan.assink@bondsellis.com

   Where should payments to the creditor be sent? (if different)
   Contact phone
   Contact email

   Uniform claim identifier for electronic payments in chapter 13 (if you use one):

4. **Does this claim amend one already filed?**
   ☑ No
   ☐ Yes. Claim number on court claims registry (if known) Filed on MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**
   ☑ No
   ☐ Yes. Who made the earlier filing?

1934054200408000000000058

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**
- ☑ No
- ☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ___ ___ ___ ___

7. **How much is the claim?** $ See attached Exhibit "A" . **Does this amount include interest or other charges?**
- ☑ No
- ☐ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

Limit disclosing information that is entitled to privacy, such as health care information.

See attached Exhibit "A"

9. **Is all or part of the claim secured?**
- ☑ No
- ☐ Yes. The claim is secured by a lien on property.

Nature or property:

- ☐ Real estate: If the claim is secured by the debtor's principle residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.
- ☐ Motor vehicle
- ☐ Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: $_____

Amount of the claim that is secured: $_____

Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amount should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: $_____

Annual Interest Rate (when case was filed)_____%
- ☐ Fixed
- ☐ Variable

10. **Is this claim based on a lease?**
- ☑ No
- ☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**
- ☑ No
- ☐ Yes. Identify the property: _____

1934054200408000000000058

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

	Amount entitled to priority
☑ No	
☐ Yes. *Check all that apply:*	
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$
☐ Up to $3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$
☐ Wages, salaries, or commissions (up to $13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$
☐ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. **Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?**

☑ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

$_____

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☑ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 04/08/2020
MM / DD / YYYY

/s/James D. Dondero
Signature

Print the name of the person who is completing and signing this claim:

Name: James D. Dondero
First name Middle name Last name

Title: _____

Company: HCRE Partner, LLC
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address: _____

Contact phone _____ Email _____

 KCC ePOC Electronic Claim Filing Summary

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor:
19-34054 - Highland Capital Management, L.P.
District:
Northern District of Texas, Dallas Division

Creditor:
HCRE Partner, LLC
300 Crescent Court, Ste. 700
Dallas, TX, 75201
Phone:
Phone 2:
Fax:
Email:
bryan.assink@bondsellis.com

Has Supporting Documentation:
Yes, supporting documentation successfully uploaded
Related Document Statement:

Has Related Claim:
No
Related Claim Filed By:

Filing Party:
Authorized agent

Other Names Used with Debtor:

Amends Claim:
No
Acquired Claim:
No

Basis of Claim:
See attached Exhibit "A"

Last 4 Digits:
No

Uniform Claim Identifier:

Total Amount of Claim:
See attached Exhibit "A"

Includes Interest or Charges:
No

Has Priority Claim:
No

Priority Under:

Has Secured Claim:
No
Amount of 503(b)(9):
No
Based on Lease:
No
Subject to Right of Setoff:
No

Nature of Secured Amount:
Value of Property:
Annual Interest Rate:
Arrearage Amount:
Basis for Perfection:
Amount Unsecured:

Submitted By:
James D. Dondero on 08-Apr-2020 4:47:11 p.m. Eastern Time
Title:
Company:
HCRE Partner, LLC

Exhibit A

HCRE Partner, LLC ("Claimant") is a limited partner with the Debtor in an entity called SE Multifamily Holdings, LLC ("SE Multifamily"). Claimant may be entitled to distributions out of SE Multifamily, but such distributions have not been made because of the actions or inactions of the Debtor. Additionally, Claimant contends that all or a portion of Debtor's equity, ownership, economic rights, equitable or beneficial interests in SE Multifamily does belong to the Debtor or may be the property of Claimant. Accordingly, Claimant may have a claim against the Debtor. Claimant has requested information from the Debtor to ascertain the exact amount of its claim. This process is on-going. Additionally, this process has been delayed due to the outbreak of the Coronavirus. Claimant is continuing to work to ascertain the exact amount of its claim and will update its claim in the next ninety days.

Appendix Exhibit 62

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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]	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
	§	

DEBTOR'S OBJECTION TO PATRICK HAGAMAN DAUGHERTY'S MOTION FOR TEMPORARY ALLOWANCE OF CLAIM FOR VOTING PURPOSES PURSUANT TO BANKRUPTCY RULE 3018

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

Debtor and debtor-in-possession Highland Capital Management, L.P. ("Debtor") hereby objects (the "Objection") to the *Motion for Temporary Allowance of Claim for Voting Purposes Pursuant to Bankruptcy Rule 3018* ("Estimation Motion") [Docket No. 1281] filed by creditor Patrick Hagaman Daugherty ("Daugherty"),[2] and represents as follows:

I. INTRODUCTION

1. Daugherty's operative claim is Proof of Claim No. 77 in the amount of "at least $37,483,876.62" (the "Daugherty Claim"), to which the Debtor has objected.[3] He has pending a motion for leave to amend his claim to increase it to $40,710,819.42, and by the Estimation Motion seeks temporary allowance in that amount for voting purposes.

2. In support of his Estimation Motion, Daugherty needlessly presents the Court with dozens of pages of blow-by-blow allegations and argument relating to claims to which the Debtor does not object. Specifically, the Debtor's Board determined not to contest Daugherty's claim to enforce against the Debtor his $2.6 million judgment against Highland Employee Retention Assets LLC ("HERA"), which totaled approximately $3.7 million with interest to the petition date. Claim Objection ¶¶ 3(i), 40. Hence, Daugherty's description of the transfer of HERA's assets to the Debtor, and the Debtor's failure to escrow and restore to HERA assets to pay his judgment, serves little purpose other than as a transparent attempt to poison the well.

3. The Debtor also does not object to the temporary allowance of the Daugherty Claim for voting purposes in an amount equal to the maximum damages alleged by Daugherty's expert in pre-petition litigation – approximately $9.1 million. While the Debtor reserves the

[2] Daugherty also filed a Memorandum of Law and Brief in Support of the Estimation Motion (the "Estimation Brief") [Docket No. 1282].
[3] *See Debtor's (I) Objection to Claim No. 77 of Patrick Hagaman Daugherty and (II) Complaint to Subordinate Claim of Patrick Hagaman Daugherty* (filed as an adversary complaint due to its request for subordination of any allowed claim for a partner distribution) (the "Claim Objection") [Docket No. 1008].

right to dispute such damages on the merits, they represent (when combined with the pre-petition judgment, plus interest) the maximum plausible value of the Daugherty claim.

4. Of the balance of the $40 million claim that Daugherty seeks to vote: (a) approximately $21 million is based on claims that were dismissed by the Delaware Chancery Court; (b) an additional approximately $7.74 million is for a claimed right to a distribution to pay a possible personal tax liability resulting from an audit, which is not a creditor claim and would be subordinated even if it were; and (c) the balance consists of several million dollars in attorneys' fees incurred in personal and mostly unsuccessful litigation with the Debtor, which Daugherty wrongly contends are subject to indemnification.

5. The Debtor objects to the foregoing parts of the Daugherty Claim, on the grounds set forth in the Claim Objection and summarized herein. However, to avoid unnecessary litigation and remove the need for the Court to delve prematurely into factually or legally complex issues, the Debtor proposes for voting purposes that the Daugherty Claim be allowed in an amount equal to (1) $3,722,019, on account of the HERA Judgment (as defined below), plus (2) $5,412,000, the maximum amount set forth in the Wazzan Report (as defined below), for a total of $9,134,019, an amount far in excess of the $3,722,019 million that the Debtor has already conceded and believes should ultimately be allowed for distribution purposes.

II. FACTUAL BACKGROUND

6. Daugherty is a former limited partner of the Debtor and a former officer of the Debtor's general partner, Strand Advisors, Inc. ("Strand"). His employment by Strand ended on May 28, 2009, and he resigned from the Debtor on September 28, 2011. Litigation ensued in Texas state court (the "Texas Action"). The Debtor prevailed on claims against Daugherty for breach of contract and breach of fiduciary duty for non-monetary damages and obtained an award of $2.8 million in attorneys' fees.

7. Daugherty lost on all claims against the Debtor. He did, however, prevail on a third-party claim against HERA, which was an employee deferred compensation vehicle. He was awarded the value of his ownership interest in HERA—$2.6 million—on a claim against HERA for breach of the implied covenant of good faith and fair dealing in connection with actions that allegedly deprived him of the value of those interests (the "HERA Judgment").

8. Daugherty was unable to collect on the HERA Judgment against HERA. The Debtor had purchased the interests of all HERA members except Daugherty, and HERA's assets, consisting of cash and stock (the "HERA Assets"), were transferred to the Debtor, which represented that it would escrow the assets and restore to HERA amounts needed to satisfy a Daugherty judgment. That did not occur. Not wishing to return to the Texas state court, Daugherty commenced an action against the Debtor, HERA, and others in the Delaware Chancery Court (the "Delaware Action").

9. The Daugherty Claim attaches and incorporates his operative complaint in the Delaware Action, which was in the midst of trial when this bankruptcy commenced, and adds two additional claims to reach an asserted total of "at least $37,483,876.62." The Daugherty Claim has the following components:

- Enforcement of the HERA Judgment against the Debtor, pursuant to unjust enrichment, promissory estoppel and fraudulent transfer claims, in the amount of $2.6 million plus prepetition interest of $1.13 million. (Daugherty contends that interest has continued to accrue post-petition).

- The value of what Daugherty contends is his continuing interest in the HERA Assets transferred to the Debtor, notwithstanding that he was already awarded the value of that interest in the Texas Action. In the Delaware Action, Daugherty contends that his 19.1% ownership interest in HERA translated to an interest in the HERA Assets valued by his damages expert, Paul Wazzan, in a range from approximately $4,023,000 to $5,412,000.

    - The Debtor contends that this would constitute a double-recovery, at the expense of the Debtor's other creditors, for the reasons set forth below. To avoid unnecessary and premature litigation, however, the Debtor does not object to the temporary allowance of this aspect of Daugherty's Claim solely for voting purposes.

- The value of the other 81.9% ownership interests in HERA, on the theory that Daugherty actually owns 100% of HERA, because the Debtor was not permitted to acquire the interests that it purchased from the former members. This allegedly leaves Daugherty by default as the 100% owner of the HERA Assets, which Daugherty asserts are worth $26 million as a whole.

    - Daugherty reveals in a footnote that this $21 million component of the Daugherty Claim, which is frivolous in any event, was dismissed as time-barred by the Delaware Chancery Court. Estimation Motion at 39, n. 120.

- "Indemnification" as a former partner of the Debtor for any personal tax liability arising from a pending 2008/09 IRS audit of the Debtor that may result in additional pass-through income to the Debtor's partners. He values this claim at $7,744,692 ($6,751,902.41, plus interest of $992,790.40). As set forth below, the claim is frivolous, overstated, and even if allowable would be subordinated pursuant to 11 U.S.C § 510. It is a claim for a tax distribution, and partners do not have the rights of creditors for partnership distributions.

- Indemnification of attorneys' fees incurred in the Texas Action and the Delaware Action under the Debtor's partnership agreement.

- Defamation damages stemming from a November 30, 2017 press release. Daugherty appears to have dropped this time-barred claim.[4]

10. On the day this bankruptcy case was filed, Daugherty was about to present expert testimony on his asserted damages in the Delaware Action, which is the basis for the Daugherty Claim. Daugherty's damages expert, Paul Wazzan, had prepared a report (the "Wazzan Report"), which asserted a range of damages from approximately $4,023,000 to $5,413,000.[5]

11. As explained below, the Debtor does not dispute approximately $3.7 million of the Daugherty Claim. Although it disputes the balance of the damages addressed in the Wazzan Report, in order to resolve this matter, the Debtor will not object to the temporary allowance of the Daugherty Claim for voting purposes at the high end of damages asserted therein.

[4] Daugherty asserted that the Debtor "defam[ed] him on its website pursuant to its November 30, 2017 press release." *See* Daugherty Claim. The claim is barred by the one-year statute of limitations. TEX. CIV. PRAC. & REM. CODE § 16.002(a), which runs from the date of first publication of the allegedly defamatory statement on the defendant's website. *Glassdoor, Inc v. Andra Group, LP*, 575 S.W.3d 523, 528–29 (Tex. 2019).

[5] The Wazzan Report is attached as Exhibit 1 to the Declaration of *John A. Morris In Support of Debtor's Objection to Patrick Hagaman Daugherty's Motion for Temporary Allowance of Claim for Voting Purposes Pursuant to Bankruptcy Rule 3018*, filed contemporaneously herewith ("Morris Dec.").

12. Now, however, Daugherty apparently believes the Wazzan Report was faulty and seeks the temporary allowance of the Daugherty Claim in the amount of $40,710,819.42.

13. As described herein, the Daugherty Claim has other components that the Debtor believes are meritless for the reasons set forth in the Claim Objection, including indemnification for his fees incurred litigating against the Debtor and for an equity holder distribution to cover his personal taxes ($7.7 million). The Estimation Motion fails to explain why he should be entitled to vote a $40 million claim instead.

14. Instead, in a single paragraph (Estimation Brief ¶83) that purports to incorporate an entirely different brief (his Pretrial Brief in the Delaware Action), Daugherty argues that his asserted interest in HERA, which was never more than 19.1% (and which the Debtors contend has no value beyond the damages awarded in the HERA Judgment), has become 100% (or, more than five times the maximum amount of damages that Daugherty's expert claimed Daugherty was entitled to). But as Daugherty is forced to acknowledge, this claim has already been dismissed by the Delaware court. Estimation Brief at 39, n. 120.[6]

A. <u>The Debtor Does Not Object to Daugherty's Claim to Collect the HERA Judgment</u>

15. The Debtor does not object to Daugherty's claims related to the HERA Judgment ($2.6 Million), prejudgment interest ($279,500), and post-judgment interest to the Petition Date ($842,519), totaling $3,722,019. Claim Objection ¶¶ 3(i), 40.

16. Daugherty claims he is also entitled to postpetition interest because the HERA Judgment is against a nondebtor, HERA. "As such, postjudgment interest continues to accrue against HERA, and thus the damages arising from the unjust enrichment, promissory estoppel, and fraudulent transfer continues to increase as a result of postjudgment interest." Estimation Motion at 30. But the Bankruptcy Code is not so easily circumvented. Claims are measured as

[6] Daugherty suggests that he intends to appeal this adverse ruling (*id.*), but a year after the Debtor filed for bankruptcy, he has yet to move to lift the stay for that purpose.

of the petition date, and Daugherty offers no support for the novel proposition that it matters whether the claim is based on a judgment, a common count, or a statute.

17. HERA was a deferred compensation plan that held interests in certain Highland-related entities. At the time Daugherty resigned on September 28, 2011, he owned (and in his view still owns) 19.1% of the HERA units. The other 80.91% is owned by the Debtor.

18. On February 16, 2012, HERA enacted a Second Amended and Restated LLC Agreement (the "HERA Agreement"). Section 12.1 provided that legal fees incurred in a lawsuit relating to the HERA Agreement may be offset against the capital balance of the LLC member bringing the lawsuit. After Daugherty filed claims against HERA and the Debtor in the Texas Action, the Debtor bought out all other members of HERA and, based on Section 12.1, issued a capital balance statement of "zero" to Daugherty for his HERA membership units.

19. On April 30, 2013, HERA assigned to the Debtor all of HERA's remaining assets, consisting of (i) $9,527,375 in limited partnership interests in Highland Restoration Capital Partners, L.P. ("RCP"); (ii) 5,424 shares in stock in NexPoint Credit Strategies Fund ("NHF"); and (iii) $6,338,702 in cash (the "Distribution Assets").

20. In December 2013, the Debtor agreed to escrow Daugherty's alleged ratable 19.1% share of the Distribution Assets, namely (i) $1,820,050 in RCP units, (ii) the cash equivalent of 1,088 shares of NHF, and (iii) $1,201,502 in cash (the "Escrow Assets"). The escrow agreement stated that if Daugherty prevailed against HERA, the Debtor would return the Escrow Assets to HERA.

21. Daugherty prevailed against HERA in the Texas Action. The jury found that HERA used Section 12.1 to deny Daugherty the value of his HERA units, that this breached HERA's duty of good faith and fair dealing, and that the market value of the HERA units was

$2.6 million. On July 14, 2014, the Texas court rendered the HERA Judgment, comprising a judgment against HERA of $2.6 million, plus prejudgment and post-judgment interest at 5%.

22. Daugherty was unable to collect the HERA Judgment from HERA. On December 1, 2016, the escrow agent resigned and returned the Escrow Assets to the Debtor rather than HERA, leaving HERA without assets. In the Delaware Action, Daugherty asserts, *inter alia*, claims against the Debtor, HERA, Highland ERA Management, LLC, and James Dondero for fraudulent transfer, promissory estoppel, and unjust enrichment. Daugherty alleges the Escrow Assets were pledged as security against his claims and should have been transferred to HERA and then to him after confirmation of the HERA Judgment on appeal.

23. The Debtor has defenses to the constructive fraudulent transfer claims. Nonetheless, the Debtor determined not to object to the allowance of the Daugherty Claim in the amount of the HERA Judgment ($2.6 million), plus prejudgment interest ($279,500) and post-judgment interest to the Petition Date ($842,519), totaling $3,722,019. Daugherty is not entitled to postpetition interest on the claim, whatever its substantive basis.

B. The Debtor Does Not Object to the Temporary Allowance Solely for Voting Purposes of Daugherty's Purported Claim for the Value of His Former 19.1% Interest in HERA Assets

24. The HERA Judgment was based on Daugherty's assertion that the transactions below deprived him of the value of that interest, and it was measured by the value of that interest. Notwithstanding, the Daugherty Claim *also* asserts that Daugherty is entitled to the present value of all of the Distribution Assets, which Daugherty alleges is $26,009,573. But even if Daugherty had a continuing ownership interest in HERA (which the Debtor disputes), it would be 19.1%. That is exactly how his expert in the Delaware Action, Paul Wazzan, calculated Daugherty's damages. *See, e.g.*, Morris Dec. Ex. 1 ¶¶ 63, 64. The Debtor does not

object to including the maximum amount advocated in the Wazzan Report in Daugherty's temporarily allowed claim for voting purposes.

25. To be clear, the Debtor believes the claim is baseless. Patently, it constitutes a double recovery. The very nature of Daugherty's claim was that the actions that the jury found had breached the implied covenant of good faith and fair dealing had deprived him of the value of his membership units in HERA. Even if those membership units were not extinguished, Daugherty's capital account would have been reduced to zero by the award, entitling him to no further distributions. It would be a double recovery to Daugherty if he also retained that ownership interest and recovered the value of the Distribution Assets *again*.

26. Still further, even if Daugherty did have a continuing ownership interest, any award for the value of that interest must be reduced by the amount he was already awarded in the HERA Judgment for the diminution in value of that interest. Daugherty does not articulate any way in which he is not being compensated twice for the same harm. He asserts that "[t]he damages awarded in the HERA Judgment are attributable to the decline in the value of Daugherty's HERA units as a result of HERA's breach of its duty of good faith and fair dealing. Put differently, Daugherty was damaged because the value of his HERA units went down by $2.6 Million as a result of the February 2012 HERA Amendment and the Lose-Lose clause contained therein." Estimation Motion ¶80. But the damages are not different: the asserted bad faith was the zeroing of his capital account through the amendment to HERA's operating agreement. His HERA interest was valued and awarded in the HERA Judgment. Restoring his interest in those assets is another way of compensating the <u>exact</u> <u>same</u> <u>loss</u>. If the present value of those assets is greater, and if he is entitled to the present value rather than the amount that was calculated at the time of the HERA Judgment (which he is not), that present value would at minimum have to be reduced by the amount he was already awarded for the same loss.

27. The basis for Daugherty's assertion of a continuing ownership interest is a negative inference, drawn from the fact that the Texas court struck-through language in the judgment that would have made express that Daugherty had no further interest in HERA:

> Furthermore, the Court, after considering the jury's findings regarding HERA's breach of the implied covenant of good faith and fair dealing, finds and concludes that Daugherty is entitled to relief hereinafter given.
>
> It is therefore further ORDERED that Daugherty have and recover $2,600,000 from HERA, ~~representing the full value of Daugherty's interest in HERA as determined by the jury.~~
>
> It is further ORDERED that Daugherty shall no longer have any ownership or other interest in HERA or any proceeds or accounts arising from Daugherty's prior interest in HERA that were not distributed to Daugherty prior to the entry of this judgment, Daugherty having been awarded the full value of that interest in HERA as determined by the jury.
>
> It is further ORDERED that total amount of the actual damages rendered against HERA herein will bear prejudgment interest at the rate of 5% simple interest from May 22, 2012, until the day before this judgment is signed.
>
> It is further ORDERED that the total amount of the judgment here rendered against HERA will bear interest at the rate of 5% per annum, compounded annually, from the date this judgment is signed until paid.

28. Daugherty divines that the Texas court intended to confirm that he still owns 19.1% of HERA. But it is far more likely that the court struck the language because it was outside the scope of the jury's findings, concerning instead the *prospective* effect of the judgment, which was not before the court. Daugherty's statement that the Debtor's argument has been made and rejected on multiple occasions is incorrect. Daugherty has no greater insight than the Debtor as to why the Texas court struck the language. If the inference is that it was intended

to give Daugherty an award to compensate for the zeroing of his capital account ***and*** a continuing ownership interest in HERA assets, and if at minimum the former is not subtracted from the latter, the result is a double recovery at the expense of the Debtor's creditors.

C. <u>The Debtor Objects to Allowance For Any Purpose of Daugherty's Claim for the Value of All HERA Assets</u>

29. Even if Daugherty had a continuing ownership interest in HERA's assets, it would be limited to his former 19.1% share, not 100% (*i.e.*, the "Escrowed Assets" and not the "Distribution Assets"). Daugherty's overreaching claim for 100% of HERA's assets is not new: Daugherty asserted in the Delaware Action that he was entitled to 100% of HERA's assets, increasing his claim by $21 million, based on a theory that the Debtor's purchases of the other members' interests were ineffective:

> [W]hen Dondero and the Debtor attempted to take control of HERA by buying all of the preferred units other than Daugherty's, the Debtor was not an authorized holder or assignee of HERA preferred units. Thus, when the prior holder of HERA preferred units relinquished all of their rights and interests in their HERA preferred units, Daugherty remained the only holder of preferred units in HERA and the entire value of HERA should be returned to HERA, with Daugherty as the sole rightful owner.[120]

Estimation Motion ¶81.

30. Daugherty discloses in the footnote, however, that the claim that is the basis of over half of his asserted $40 million claim was dismissed in the Delaware Action:

> [120] Daugherty notes that this claim was dismissed in the Delaware I Case based upon a laches argument. Daugherty intends to appeal the ruling, and includes herein in order to fully preserve the claim and the value related thereto.

31. Daugherty provides no legally tenable basis for assigning any value whatsoever, even for voting purposes, to a dismissed claim, particularly when the decision appears to have been discretionary. And even if the claim was not previously dismissed, this attempted windfall would fail. To start, Daugherty does not specify the legal basis on which the Debtor could not purchase membership interests, on what basis those purchases if ineffective would redound to

Daugherty's benefit, or how the Debtor was obligated to transfer back to HERA any more than Daugherty's 19.1% share, either under the escrow agreement or fraudulent transfer law.

32. On this basis alone, therefore, the Daugherty Claim must be reduced by $21 million even for voting purposes.

D. The Debtor Objects to Allowance For Any Purpose of Daugherty's Claim for Tax "Indemnification" or a Tax Distribution[7]

33. The Daugherty Claim has a damages breakdown that contains what is referred to as an indemnification claim of $992,790.40, including interest and penalties, on account of a pending IRS audit of the Debtor. Daugherty states:

> Daugherty is a former senior partner of Highland Capital Management, LP and this claim arises out of a 2008/2009 pending undecided audit/dispute (06252018 0028) between the Debtor and the Internal Revenue Service that remains unresolved.

34. The IRS audit of the Debtor's return for 2007-08 (not 2008-09 as erroneously stated in the Daugherty Claim) resulted in a determination that additional taxes were owed by the Debtor's partners as the owners of a pass-through entity. The audit determination is subject to appeal. Daugherty's 4% share of the additional distributions comes to $1,475,860. Assuming a 35% marginal rate ($440,227), and adding penalties ($88,045) and interest ($212,035), his total exposure approximates **$740,307** at this time.

35. Regardless of amount, Daugherty has no right to mandatory indemnification of his personal tax liability as a former partner of the Debtor. Section 4.1(h) of the Partnership Agreement provides for indemnification of limited partners in the "sole and unfettered discretion" of the general partner. It does provide for mandatory indemnification of the general

[7] It is not entirely clear from the Estimation Motion whether Daugherty seeks to have his "tax distribution" claim allowed for voting purposes. To the extent that he does, the Debtor objects for the reasons set forth herein and in the Claim Objection.

partner, Strand, of which Daugherty was an officer, but that provision is inapplicable to his personal tax liabilities. In relevant part, Section 4.1(h) reads as follows:

> 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.

36. Daugherty's personal income taxes on distributions received in his capacity as a limited partner of the Debtor do not fall within the Debtor's indemnification of its general partner for "liabilities, losses, and damages incurred . . . 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 . . . ." Daugherty incurred personal taxes on his income. The closest nexus to the Debtor would be that an indeterminate portion of that income came from the Debtor. He did not incur any loss or liability in his asserted capacity as a "GP Party," *i.e.*, an officer of Strand, the indemnified general partner. Therefore the indemnity clause does not apply by its express terms and as a matter of common sense.

37. Nor does Daugherty have a claim for a tax distribution from the Debtor. The last Partnership Agreement to which Daugherty was a signatory was the *Second Amended and Restated Agreement of Limited Partnership*. Morris Ex. 2. Distributions are addressed in section 3.9, which provides in part:

> (a) General. The General Partner shall review the Partnership's accounts at the end of each calendar quarter to determine whether distributions are appropriate. 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. 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. . . .
>
> (b) Tax Distributions. The General Partner shall promptly 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"). To satisfy this requirement, the Partnership shall pay to each Partner on or before April 14 of each Fiscal Year….

Id.

38. Partners have no right to distributions as if they were creditors. That is why section 3.9(a) clearly states that distributions will be limited if funds are insufficient to pay current debt. A partnership agreement is simply an agreement between partners as to when and how distributions may be made if the partnership has the funds to do so. Even if there were such an obligation, the Debtor had not made any distributions that would be subject to tax, and so would have had no obligation *at that time* to make tax distributions. And even if the Partnership Agreement were interpreted to call for a tax distribution to be made on account of income that is imputed to its partners ten years later as a result of the IRS audit (which is still contingent), the Debtor may not have funds in excess of current debt. Thus, Daugherty has no claim for tax indemnification or a tax distribution.

39. Even if Daugherty had a claim under the Partnership Agreement, it would be subordinated under Bankruptcy Code section 510(b), which provides:

> (b) For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

40. Section 510(b) applies to the ownership interests in a limited partnership. *See In re SeaQuest Diving, LP*, 579 F.3d 411 (5th Cir. 2009); *Templeton v. O'Cheskey (In re Am. Hous.*

Found.), 785 F.3d 143, 154 (5th Cir. (2015); *In re Garrison Mun. Partners, LP*, 2017 Bankr. LEXIS 3765, *8 (Bankr. S.D. Tex. Oct. 31, 2017).

41. Thus, there are three distinct categories of claims subject to mandatory subordination under section 510(b): (1) a claim arising from rescission of a purchase or sale of a security of the debtor (the rescission category); (2) a claim for damages arising from the purchase or sale of a security of the debtor (the damages category); and (3) a claim for reimbursement or contribution allowed under 11 U.S.C. § 502 on account of either (1) or (2). *SeaQuest*, 579 F.3d at 418.

42. Even if Daugherty had a claim under the Partnership Agreement to cover his taxes, such a claim would be a claim for damages "arising from" the purchase of a security (category 2). The category covers claims arising from not just the purchase itself but all claims arising thereafter as incidents of ownership, except where the claim is genuinely a "debt"—*e.g.*, where it arises from a documented loan or other distinct transaction between the partner and the partnership:

> For purposes of the damages category, the circuit courts agree that a claim arising from the purchase or sale of a security can include a claim predicated on post-issuance conduct, such as breach of contract. They also agree that the term "arising from" is ambiguous, so resort to the legislative history is necessary. For a claim to "arise from" the purchase or sale of a security, there must be some nexus or causal relationship between the claim and the sale. Further, the fact that the claims in the case seek to recover a portion of claimants' equity investment is the most important policy rationale.

SeaQuest, 579 F.3d at 421 (internal citations omitted). In *SeaQuest*, the Fifth Circuit ruled that a settlement that essentially effected a rescission and, when breached, resulted in a judgment, was nonetheless subordinated under section 510(b). *Id*. at 423-26 ("For purposes of § 510(b), we may look behind the state court judgment to determine whether the . . . claim 'arises from' the rescission of a purchase or sale of a security of the debtor.").

43. In *Garrison Municipal Partners*, a redemption claim arising from withdrawal from the partnership was subordinated under section 510(b). The situations identified by the court in which section 510(b) *would not* apply illustrate why it *would* likely apply here:

> Debtor's failure to pay the Greens' claim upon withdrawal is a claim for breach of contract arising from the withdrawal. The Greens are seeking to recover their equity investment. Thus, under Section 510(b), their claim is subordinated and has the same priority as the other prepetition investors.
>
> The Greens' argument that their notice of withdrawal is a redemption claim similar to those in *In re Montgomery Ward Holding Co*. 272 B.R. 836 (Bankr. D. Del. 2001), *abrogated on other grounds by In re Telegroup, Inc*., 281 F.3d 133 (3d Cir. 2002) lacks merit. A redemption claim requires a separate note, *see SeaQuest*, 579 F.3d, at 423, and must be independent of the partnership agreement. *See In re American Housing Foundation*, 785 F.3d 143 (5th Cir. 2015). In this case, the notice of withdrawal was not self-executing so as to give the Greens an interest in the assets of the partnership. The partnership agreement required action on the part of the general partner to repay the Greens equity interests.

Garrison Mun. Partners, 2017 Bankr. LEXIS 3765 at *9; *see also Official Comm. of Unsecured Creditors v. FLI Deep Marine LLC (In re Deep Marine Holdings, Inc.)*, 2011 Bankr. LEXIS 579 (Bankr. S.D. Tex. Jan. 19, 2011) (claims for right of appraisal, fraud, and accounting were causally linked to status as shareholders and so were subordinated); *Queen v. Official Comm. of Unsecured Creditors (In re Response U.S.A., Inc.)*, 288 B.R. 88 (D.N.J. 2003) (shareholder cannot avoid subordination under 11 USC § 510(b) by placing risk-limiting provision in stock purchase agreement in order to claim creditor status in bankruptcy proceedings).

44. By comparison, *Stucki v. Orwig*, No. 3:12-CV-1064-L, 2013 U.S. Dist. LEXIS 53139, at *15-19 (N.D. Tex. Apr. 12, 2013) found section 510(b) inapplicable where the claim arose from breach of a settlement agreement by which the shareholders withdrew a lawsuit seeking to compel a shareholders' meeting and election of directors. *Id.* at *17. The court reasoned as follows: "[I]n both *In re SeaQuest* and *In re Deep Marine Holdings*, the claims essentially sought to recover the claimants' equity interests in the debtor. There is no suggestion

in the record that the shareholders sought to do the same here. The court therefore concludes that the connection or causal relationship between the Breach Claim and the actual or virtual purchase or sale of any security interests in FirstPlus is too attenuated to bring it within § 510(b)'s reach." *Id*. at *19. That decision seems debatable, but in any event, it is a far cry from this case, where what Daugherty is effectively demanding is a distribution on account of his partnership interest. Such a claim should fall squarely under section 510(b).

45. Daugherty is asserting a right under the Partnership Agreement for a subsequent distribution on ownership interests in the Debtor to cover the taxes he owes on the distributions he previously received on account of his ownership interest in the Debtor. To the extent he has such a right, it is an incident of ownership arising from the Partnership Agreement and not from any ancillary transaction such as a loan. It is in the nature of a "partner claim," not a creditor claim, and must be subordinated.

E. Daugherty Is Not Entitled to Indemnification of Fees in His Personal Litigation with the Debtor, But the Debtor Does Not Object to Temporary Allowance for Voting Purposes

46. Daugherty also asserts two indemnification claims against the Debtor for fees incurred defending claims against him by the Debtor in the Texas Action based on his employment performance, which he states were nonsuited, and for "fees on fees" for prosecuting his asserted right to indemnification in the Delaware Action. It appears from the proof of claim that these claims are represented by two line items of $3,139,452 and $3,479,318. These portions of the Daugherty Claim should be disallowed even for voting purposes, for the reasons discussed in the Claim Objection. Claim Objection ¶¶45-56.

47. The claims in the Texas Action which Daugherty alleges are subject to indemnification, as reflected on the jury verdict (referenced as Exhibit O to the Daugherty Claim), are as follows:

Claim	Description of Claim	Outcome
Highland 1	Declaratory judgment that Highland did not owe Daugherty any compensation or payments under Highland's long-term incentive plan ("LTIP") because his conduct forfeited his rights. Ex. O at 8.	Voluntarily dismissed pre-trial
Highland 2	Breach of employment agreement and a buy-sell agreement relating to purported complaints from other Highland employees about Daugherty and purported disclosures of confidential information that "violated his common law duties to Highland, as well as several agreements between him and Highland." Ex. O at 9.	***Jury found Daugherty liable.***
Highland 3	Breach of fiduciary duty and a claim of entitlement to "all compensation paid to Daugherty during the time he was breaching his duties, as well as to an award of exemplary and punitive damages." Ex. O at 9.	***Jury found Daugherty liable.***
Highland 4	A claim for violation of the Texas Theft LiabilityAct related to purported theft of Highland's trade secrets.	Voluntarily dismissed pre-trial
Highland 5	Tortious interference with Highland's business relations seeking exemplary and punitive damages	Jury found Daugherty not liable.
Highland 6	Defamation related to Daugherty's purported statements about Highland to potential investors	Jury found Daugherty not liable.
Highland 7	Misappropriation of trade secrets and other confidential information, including on behalf of Cornerstone	Voluntarily dismissed pre-trial
Highland 8	Conversion related to purported conversion of confidential information, including on behalf of Cornerstone	Voluntarily dismissed pre-trial
Highland 9	Business disparagement, including on behalf of Cornerstone. *Id*. at 13-15	Voluntarily dismissed pre-trial

48. The Debtor prevailed on claims for breach of the Employment Agreement and for breach of fiduciary duty, which Daugherty minimizes as "only" having to do with confidential

information with no compensatory damages, but on which the Debtor was awarded $2.8 million in attorneys' fees. The Debtor was found to have complied with the Employment Agreement and honored all obligations concerning the LTIP Plan, the HERA Agreement, and severance pay.

49. As discussed above in connection with Daugherty's attempt to be indemnified for his personal tax liability, indemnification of limited partners is discretionary under the Debtor's Partnership Agreement; hence, Daugherty relies upon its mandatory indemnification of the general partner, Strand, under Section 4.1(h). He claims to be a "GP Party," which is "any director, officer, employee, agent, or representative of the General Partner." GP Parties are indemnified for:

> all liabilities, losses, and damages incurred … [including attorneys' fees] by reason of any act *performed or omitted to be performed in the name of or on behalf of [the Debtor] or in connection with the Partnership's business* … to the fullest extent permitted by the Delaware Act … [except] for any action or inaction that constitutes gross negligence or willful or wanton misconduct. (emphasis added).

50. Daugherty claims he is entitled to indemnification as a GP Party because all of his litigation expense was purportedly "in connection with [the Debtor's] business." He contends there is no limitation to defensive litigation expenses, nor any even any requirement that he be successful.

51. Daugherty was a GP Party as an officer of Strand only until May 29, 2009, and he resigned from the Debtor on September 28, 2011. Other than the first non-suited claim, which relates to his personal compensation, all of the claims for which he was not found liable involve actions taken well after he left Strand and even after he left the Debtor, as to which he was not a GP Party. None of the Debtor's claims against Daugherty related to his time as an officer of Strand, when he was a GP Party.

52. Second, Daugherty was not an "agent" for any relevant purpose that would make him an indemnified GP Party for these purposes. None of the actions for which the Debtor sued

him were taken at the instruction or on behalf of the General Partner as its "agent or representative." *See Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 163 (Del. Ch. 2003) (in reference to 8 Del. C. §145, governing indemnification of corporate officers, "I read §145 as embracing the more restrictive common law definition of agent, which generally applies only when a person (the agent) acts on behalf of another (the principal) in relations with third parties."). Furthermore, Delaware "[c]ourt[s] limit[] agency in the indemnification context to only those situations when an outside contractor can be said to be acting as an arm of the corporation vis-à-vis the outside world." *Pasternack v. N.E. Aviation Corp.*, No. 12082-VCMR, 2018 WL 5895827, at *8 (Del. Ch. Nov. 9, 2018).

53. Third, even if Daugherty were to prove he was a GP Party at a relevant time, and even if he were to prove that he was acting in the capacity of an agent—*i.e.*, interacting on behalf of Strand with third parties—decisions under the Delaware General Corporation Law ("DGCL") hold that a director is not entitled to indemnification in respect of employment litigation between the director and the corporation. *See Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 594 (Del. Ch. 1994) (holding that former officer was not entitled to indemnification for claims relating to breach of her employment contract because those claims did not involve the officer's duties to the corporation and its shareholders); *Stifel Fin. Corp. v. Cochran*, 809 A.2d 555, 562 (Del. 2002) ("Although Cochran's termination is the event that triggered the relevant provisions of the employment contract, Cochran's decision to breach the contract was entirely a personal one, pursued for his sole benefit.")

> When a corporate officer signs an employment contract committing to fill an office, he is acting in a personal capacity in an adversarial, arms-length transaction. To the extent that he binds himself to certain obligations under that contract, he owes a personal obligation to the corporation. When the corporation brings a claim and proves its entitlement to relief because the officer has breached his individual obligations, it is problematic to conclude that the suit has been rendered an "official capacity" suit subject to indemnification under § 145 and implementing bylaws.

Paolino v. Mace Sec. Int'l, Inc., 985 A.2d 392, 404 (Del. Ch. 2009) (citing the *Cochran* Chancery Court decision, 2000 Del. Ch. LEXIS 179, 2000 WL 1847676, at *6 (reversed in part on other grounds).

54. The Daugherty Claim anticipates the defense under *Cochran* that the subject claims were "personal employment-related" claims, and attempts to distinguish it on the basis that the Delaware Revised Uniform Limited Partnership Act ("DRULPA") is more permissive than the DGCL and does not preclude indemnification even when the indemnitee has been adjudged liable to the partnership (if a court deems it fair in view of all the circumstances). If it provides for coverage to the full extent permitted under the law, then it is to be provided unless the partnership agreement or law provide otherwise.

55. Citing *Paolino*, *supra*, Daugherty specifically argues that *Cochran* is inapplicable because his employment conduct was not "personal" in distinction from the compensation issues in *Cochran*. Regardless, he did not incur losses "by reason of any act performed or omitted to be performed . . . in connection with the Partnership's business" under section 4.1 of the Partnership Agreement. The "by reason of the fact" standard is not met where the claims at issue do not involve the exercise of judgment, discretion, or decision-making authority on behalf of the corporation. *Batty v. UCAR Int'l Inc.*, No. 2018-0376-KSJM, 2019 Del. Ch. LEXIS 114, at *19 (Del. Ch. Apr. 3, 2019) (quoting *Paolino*). Here, the Debtor's Claims 4-9 related solely to conduct *after* Daugherty left the Debtor's employ. Daugherty was found liable on Claims 2 and 3, and the Partnership Agreement provides that "the Partnership shall have no obligation to indemnity and hold harmless a GP Party for any action or inaction that constitutes gross negligence or willful or wonton misconduct.").

56. Even if Daugherty were to surmount all other hurdles, even under his construction, any rights to fees would be discretionary. The Debtor respectfully submits that the

facts do not support penalizing the Debtor's other creditors by awarding Daugherty fees in his personal litigation with the Debtor on account of his status as an officer of Strand, relating to conduct that had nothing to do with actions taken or not taken in his capacity as an officer of Strand, and largely post-dating that tenure.

57. Finally, Daugherty should have to segregate his attorneys' fees between those incurred on any indemnifiable claims and other claims, in particular those on his counter- and third-party claims. Indemnification under Partnership Agreement §4.1(h) relates to acts performed or not performed by Daugherty (as an agent of Strand) in connection with the Debtor's business. Daugherty's counter- and third-party claims in the Texas Action related to (i) his departure from the Debtor (defamation and breach of employment agreement by the Debtor relating to severance, all of which Daugherty lost), (ii) a separate incentive vehicle called Sierra Verde which was wound down separate from Daugherty's resignation, (iii) claims related to Daugherty's value in HERA, and (iv) claims in relation to his LTIP.[8] Of these, categories (ii) and (iii) related to third-party claims against compensation vehicles, and Daugherty lost claims in categories (i) and (iv). In fact, Daugherty succeeded on only one of his twenty total affirmative claims.

III. CONCLUSION

WHEREFORE, the Debtor requests that the Daugherty Claim be temporarily allowed for voting purposes in an amount equal to $9,134,019.

[8] Daugherty's *Third Amended and Restated Answer, Counterclaim, and Third-Party Petition* in the Texas Action at ¶¶ 122 – 183.

Dated: November 9, 2020.

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Appendix Exhibit 63

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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]	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	

DEBTOR'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON PROOF OF CLAIM NOS. 190 AND 191 OF UBS SECURITIES LLC AND UBS AG, LONDON BRANCH

[1] The last four digits of the Debtor's taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

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TABLE OF AUTHORITIES

Cases

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Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case (the "Bankruptcy Case"), submits this reply in support of the *Debtor's Motion for Partial Summary Judgment on Proof of Claim Nos. 190 and 191 of UBS Securities LLC and UBS AG, London Branch* [D.E. 1180] (the "Motion"), and in response to *UBS's Brief in Opposition to Motions for Partial Summary Judgment on Proof of Claim Nos. 190 and 191 and in Support of Rule 56(d) Request* [D.E. 1341] (the "Opposition") filed by UBS Securities LLC and UBS AG, London Branch (collectively, "UBS"). For the reasons set forth herein, in the Motion, and in the Debtor's opening brief in support of the Motion [D.E. 1181] (the "Opening Brief"), the Debtor respectfully requests that the Court enter an order, in substantially the form attached as Exhibit A to the Motion, granting partial summary judgment in favor of the Debtor on the UBS Claim.[2]

INTRODUCTION

1. UBS has been telling everyone – most importantly, this Court – that UBS has a more than $1 billion claim against the Debtor based on the breach of contract judgment it obtained against SOHC and CDO Fund (collectively, the "Funds"). Nothing could be further from the truth. The Motion requires UBS to substantiate its position with specific facts and evidence, and yet UBS has responded with just a series of ineffectual ducks and dives that only serve to highlight the fallacy of UBS's purported $1 billion claim.

2. UBS admits that it is not presently seeking to enforce the $1 billion judgment against the Debtor and is not presently asserting that the Debtor is the alter ego of the Funds. In a desperate attempt to keep up its charade, however, UBS argues that it can try to hold the Debtor liable as an alter ego at some point in the future because alter ego is a "theory of liability"

[2] Capitalized terms not otherwise defined herein have the meanings ascribed to such terms in the Opening Brief. All citations herein to "A__" refer to the *Appendix of Exhibits in Support of Debtor's Motion for Partial Summary Judgment on Proof of Claim Nos. 190 and 191 of UBS Securities LLC and UBS AG, London Branch* [D.E. 1184], and all citations herein to "B__" refer to the *Appendix of Exhibits to Debtor's Reply in Support of Motion for Partial Summary Judgment on Proof of Claim Nos. 190 and 191 of UBS Securities LLC and UBS AG, London Branch*, filed concurrently herewith.

and not a "claim" that needed to be asserted by the UBS Bar Date. A "claim" is, of course, broadly defined in the Bankruptcy Code to include any "right to payment" and any "equitable remedy for breach of performance" whether or not reduced to judgment, contingent, unliquidated, unmatured, or disputed. 11 U.S.C. § 101(5). UBS does not even try to explain how a "theory of liability" is not a "right to payment" from the Debtor, and thus a "claim" under the Bankruptcy Code. UBS's failure to assert any alter ego claim against the Debtor by the UBS Bar Date operates as a complete bar to any such claim.

3. UBS also has failed to rebut the fact that *res judicata* prevents UBS from asserting any alter ego claim against the Debtor based on any conduct occurring prior to February 24, 2009. That is the date UBS filed its first complaint against the Debtor, which resulted in a judgment on the merits in favor of the Debtor. And, accordingly, February 24, 2009 is the date which the New York Appellate Division ruled is the line of demarcation prior to which no alleged conduct can stand as the basis of a claim against the Debtor.

4. To try to slide under the *res judicata* bar, UBS argues that "alter ego is generally not a theory of liability that is subject to *res judicata* under New York law." Opposition p. 47. But UBS's position cannot be reconciled with the fact that the Appellate Division already has applied *res judicata* to UBS's assertion of alter ego liability against one of the Debtor's co-defendants (HFP), holding that *res judicata* bars UBS from seeking alter ego relief to recover against HFP for pre-February 24, 2009 claims, because HFP was in privity with the Debtor and thus is entitled to the same *res judicata* protection. *See UBS v. Highland Capital Mgmt., L.P.*, 93 A.D.3d 489, 490 (N.Y. App. Div. 2012). If *res judicata* prohibits UBS from seeking alter ego relief against the Debtor's privy for pre-February 24, 2009 conduct – which would include the December 2008 breach of contract underlying UBS's $1 billion judgment – it indisputably prohibits UBS from seeking the same relief against the Debtor.

5. With no ability to enforce the $1 billion judgment against the Debtor, the UBS Claim is at most a theoretical claim for a maximum principal amount of approximately $233 million, which represents the value of certain assets transferred by HFP or its subsidiaries in March 2009. UBS seeks to recover this amount by alleging that the March 2009 transfers were fraudulent conveyances by entities with which UBS was not in privity and that those transfers breached a supposed implied covenant of good faith and fair dealing under the warehouse agreements which UBS had previously terminated. UBS attempts to avoid the $233 million cap on the UBS Claim by arguing that the "record evidence" reflects that "the bases for its implied covenant claim extend beyond the March 2009 transfers." Opposition p. 25. Given this statement, one would expect UBS to provide examples of that "record evidence" in support of its Opposition, and indeed UBS was required to do so in response to the Motion. Nonetheless, after spending pages of its Opposition claiming that it has evidence of additional post-February 24, 2009 conduct, UBS then fails to identify a single piece of evidence showing any actionable conduct beyond the March 2009 transfers. Instead, UBS cites only evidence of pre-February 24, 2009 conduct – which is not actionable – and its own allegations – which are not competent summary judgment evidence. Furthermore, UBS's unsupported allegations themselves amount to nothing more than an argument that the Debtor supposedly had an implied duty to guarantee payment by the Funds, a position that cannot be reconciled with the Appellate Division's determination that the warehouse agreements imposed no duty on the Debtor "to ensure or guarantee" performance by the Funds, or the fact that the warehouse agreements explicitly place all responsibility for 100% of any warehouse facility losses on the Funds, **not** the Debtor.

6. In recognition of the fact that it has not adequately responded to the Motion, UBS requests that the Court deny or defer the Motion to allow UBS time to conduct additional discovery on the claims that have been pending for more than a decade. This is a transparent attempt to avoid summary judgment. UBS conducted extensive discovery in the State Court

litigation and certified to the State Court seven years ago that discovery was complete and UBS's case was trial-ready. UBS also insisted to this Court, at the October 6, 2020 status conference on the UBS Claim, that UBS was fully prepared to proceed to trial this month, in advance of the Debtor's confirmation hearing. And, finally, UBS acknowledges that the Debtor's production in response to UBS's document requests has been completed. Therefore, UBS cannot meet its burden of showing, pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, that any further discovery will produce evidence creating a genuine issue of material fact in this case.

7. Finally, the Debtor is entitled to summary judgment enforcing UBS's release of its claims for approximately $172 million of the transfers made in March 2009. The transfers at issue were made to third parties Crusader and Credit Strategies (the "Settling Defendants"). In 2015, UBS entered into Settlement Agreements with the Settling Defendants in which UBS released all claims against the Debtor "**for losses or other relief specifically arising from the fraudulent transfers** to [the Settling Defendants] alleged in the UBS Litigation ...." Crusader Settlement Agreement § 5.3 [A265-266] (emphasis added); *see also* Credit Strategies Settlement Agreement § 5.3 [A299-300]. While UBS may now try to claim that its implied covenant claim is based on something other than the allegedly fraudulent transfers, there is absolutely no dispute that the implied covenant claim **is** a claim for "**losses or other relief specifically arising**" from the allegedly fraudulent transfers covered by the Settlement Agreements. *See, e.g.,* Opposition p. 4 ("Under its implied covenant claim – as UBS repeatedly has explained – UBS is seeking damages from the Debtor resulting not just from the fraudulent transfers in March 2009 ..."). Thus, based on the clear and unambiguous language of the Settlement Agreements, UBS released all of its claims against the Debtor to recover any "losses" arising from the approximately $172 million transferred to the Settling Defendants. Having recovered from the Settling Defendants on account of the alleged losses specifically arising from the transfers to those parties, and having released all claims as to those alleged losses, UBS is not entitled to

recover the same alleged losses from the Debtor on either its fraudulent transfer claim or its implied covenant claim.

8. With only approximately $233 million at issue, UBS's release of $172 million of that amount leaves UBS with a theoretical claim against the Debtor in the maximum principal amount of approximately $61 million. Using the exact amounts of the transfers, summary judgment should be granted in favor of the Debtor disallowing any principal recovery on the UBS Claim in excess of $61,043,362 ($233,455,147-$172,411,785=$61,043,362).

ARGUMENT

I. Any Post-Trial Relief Against the Debtor, Including Any Attempt to Enforce the Approximately $1 Billion Phase I Breach of Contract Judgment Against the Debtor, Must Be Disallowed

A. Any Post-Trial Relief Against the Debtor is Barred by the UBS Bar Date

(1) Any Post-Trial Relief Against the Debtor Was a Pre-Petition Claim Under the Bankruptcy Code

9. UBS contends that it was not required to assert any supposed alter ego liability against the Debtor by the UBS Bar Date because alter ego is not an independent claim, but rather is a "form of liability" under New York law. Opposition p. 45. UBS does not even attempt to reconcile its argument with the definition of a "claim" under the Bankruptcy Code. Under 11 U.S.C. § 101(5), a "claim" includes any "right to payment" a claimant may have against a debtor – in other words, any "form of liability" a debtor may have to a claimant – whether or not reduced to judgment, contingent, unliquidated, unmatured, disputed or otherwise. 11 U.S.C. § 101(5). UBS's own characterization of alter ego liability places such relief squarely within the definition of "claim" under the Bankruptcy Code.

10. Moreover, UBS has failed to meaningfully address the cases cited at paragraphs 60-61 of the Opening Brief, all of which establish beyond question that the assertion of alter ego liability against a debtor is indeed the assertion of a "right to payment" under the Bankruptcy Code. The court in *Yan v. Lombard Flats, LLC (In re Lombard Flats, LLC)*, 2016 U.S. Dist.

LEXIS 38112, *17-20, *26-29 (N.D. Cal. March 23, 2016) specifically considered and rejected the notion that an alter ego theory of liability based on pre-petition conduct is not a pre-petition "claim" under the Bankruptcy Code. Opening Brief ¶ 60. The courts in *In re Hurricane R.V. Park, Inc.*, 185 B.R. 610, 613-14 (Bankr. D. Utah 1995) and *In re Slater*, 573 B.R. 247, 253-55 (Bankr. D. Utah 2017) reached the same conclusion. Opening Brief ¶ 61. While UBS tries to distinguish these cases on the grounds that the debtors in *Lombard Flats*, *Hurricane R.V. Park*, and *Slater* were post-confirmation or post-discharge debtors, whereas here the Debtor's plan has not yet been confirmed, that distinction is irrelevant. In all three cases, the issue was whether the alter ego "form of liability" sought to be imposed on the debtor, based on pre-petition conduct, was a pre-petition claim under the Bankruptcy Code. All three courts correctly answered that question in the affirmative, and UBS has cited nothing to the contrary.

11. Finally, UBS suggests, again without citation to any relevant authority, that any assertion of alter ego liability against the Debtor was somehow exempt from the UBS Bar Date because, under certain circumstances, alter ego liability can be asserted in New York trial courts in a post-judgment proceeding, with actions to enforce a judgment subject to a 20-year statute of limitations running from entry of judgment. Opposition p. 45. UBS's argument misses the mark. As discussed at length at paragraphs 57-59 of the Opening Brief, federal law, not state law, determines when a claim arises for bankruptcy purposes, and applicable case law is clear that a creditor "need not have a cause of action that is ripe for suit outside of bankruptcy in order for it to have a pre-petition claim for purposes of the Code." *United States v. Williams*, 2005 U.S. Dist. LEXIS 15857, *9-10 (N.D. Tex. Aug. 3, 2005) (citation omitted); *see also Veritas DGC, Inc. v. Digicon, Inc. (In re Digicon, Inc.)*, 2003 U.S. App. LEXIS 29535, *22 (5th Cir. June 11, 2003) (creditor's contingent claim was a pre-petition claim, "even though it may not have accrued under [state] law" as of the petition date, because it nonetheless was "a claim that could have and should have been anticipated" by the creditor).

12. Thus, any post-trial relief against the Debtor, including any attempt to impose alter ego liability on the Debtor for the Phase I breach of contract judgment (or otherwise), was a pre-petition claim that UBS was required to assert, if at all, by the UBS Bar Date. UBS's deliberate decision not to do so operates as a complete bar to any such claim.

(2) Neither UBS's Attempted Reservation of Rights to Assert New Untimely Claims Against the Debtor Nor Any Untimely Amendment to the UBS Claim Can Be Used to Vitiate the UBS Bar Date

13. UBS contends that its unasserted alter ego claim was preserved by its attempted "reservation of rights" in the UBS Claim to assert additional claims against the Debtor, and also argues that it should be allowed to amend the UBS Claim at some point in the future to assert an untimely alter ego claim against the Debtor. Opposition p. 47. It is undisputed that an alter ego theory of liability would be a new claim against the Debtor – UBS itself has insisted that the UBS Claim neither seeks to enforce the Phase I judgment against the Debtor nor asserts alter ego liability against the Debtor. Under these circumstances, UBS cannot use either its attempted reservation of rights or an untimely amendment to the UBS Claim to vitiate the bar date and assert an alter ego theory of liability against the Debtor at some point in the future.

14. The "principal concern" of claim amendments after the bar date is "that no new claim be tardily asserted." *United States (IRS) v. Kolstad (In re Kolstad)*, 928 F.2d 171, 175 (5th Cir. Tex. 1991). Bar dates "are not to be vitiated by amendments, and the courts must ensure that the amendments do not introduce wholly new grounds of liability." *Highlands Ins. Co. v. Alliance Operating Corp. (In re Alliance Operating Corp.)*, 60 F.3d 1174, 1175 (5th Cir. 1995); *see also Metzler v. Energy & Expl. Partners, Inc.*, 2020 U.S. Dist. LEXIS 117491, *9 (N.D. Tex. July 6, 2020) (amendments that change the nature of a claim set forth a new claim). Amendments after the bar date "are not permitted if the purpose of the amendment is to create an entirely new claim." *In re Northstar Offshore Grp., LLC*, 2018 Bankr. LEXIS 2801, *7 (Bankr. S.D. Tex. September 14, 2018) (citation omitted).

15. The same principle applies to reservations of rights to assert additional claims – a reservation of rights does not permit a claimant to assert new claims after the bar date. *See, e.g.*, *In re Entergy New Orleans, Inc.*, 2008 Bankr. LEXIS 4269, *9-10 (Bankr. E.D. La. July 17, 2008) (allowing creditor to use reservation of rights to assert new, untimely claim against the debtor would vitiate the role of bar dates); *see also Metzler*, 2020 U.S. Dist. LEXIS 117491 at *13 (reservation of rights in confirmation order relating to assertion of claims did not "create a perpetual opportunity" for claimant to file new claims or revise existing claim).[3] As stated by the court in *Entergy New Orleans*, allowing creditors to assert new claims after the bar date merely by reserving rights in their original proofs of claim would permit "any creditor filing a proof of claim in a bankruptcy proceeding [to] include a short paragraph of reservation of rights language and [then] have a claim against the debtor for anything that happened between that creditor and the debtor from well before the beginning of the case until the case closed, which in certain bankruptcy cases could mean a period of several years if not decades," thereby negating the role of bar dates in bankruptcy proceedings. 2008 Bankr. LEXIS 4269 at *9-10.

16. Here, there is no doubt that the assertion of alter ego liability against the Debtor, whether to enforce the Phase I judgment against the Debtor or otherwise, would be a new claim. Six months ago, in its motion for relief from the automatic stay, UBS asserted that it could hold the Debtor "responsible" for the Phase I breach of contract judgment. D.E. 644 at ¶ 18. Nonetheless, after the Court denied UBS's motion, and set June 26, 2020 as the UBS Bar Date, UBS filed the UBS Claim with a conspicuous absence of any claim against the Debtor for alter ego liability, whether for the Phase I judgment or otherwise. Since then, UBS has steadfastly

[3] *In re Halekua Dev. Corp.*, 2009 Bankr. LEXIS 3095 (Bankr. D. Haw. September 25, 2009), which UBS cites in support of its "reservation of rights" argument, did not hold that the creditor in that case could assert an entirely new claim based on its reservation of rights. Instead, in evaluating litigation risk for purposes of approving a settlement with the creditor, the court merely noted that the trustee and others had argued that one of the creditor's claims was untimely, the creditor had responded that its original claim reserved the right to seek additional amounts, and thus the new amounts sought in the late claim were "at least arguably" covered by the original claim. *Id*. at *11.

maintained that the UBS Claim does **not** seek to enforce the Phase I judgment against the Debtor, and that UBS is **not** asserting any alter ego liability against the Debtor. *See, e.g.*, D.E. 1105 at pp. 19-20 ("As UBS informed the Court previously and reiterates here [in response to the objections to the UBS Claim], UBS has not asserted and is not asserting that the Debtor was an alter ego of the Fund Counterparties."); Opposition p. 44 (stating that the UBS Claim "is ***not*** an attempt to enforce the Phase I breach of contract judgment ... against the Debtor, as UBS repeatedly has made clear") (emphasis in original). As a result, any attempt by UBS to assert alter ego liability against the Debtor at some point in the future, whether by an untimely amendment to the UBS Claim or based on UBS's general reservation of rights, would vitiate the UBS Bar Date and is therefore prohibited.

B. Any Post-Trial Relief Against the Debtor Based on Pre-February 24, 2009 Claims is Barred by Res Judicata

17. As discussed at length in the Opening Brief, any alter ego claim seeking to hold the Debtor responsible for the Funds' breach of the warehouse agreements in December 2008 or the Phase I breach of contract judgment against the Funds also is barred by *res judicata*. Opening Brief ¶¶ 64-67. The Appellate Division already determined that *res judicata* prevents UBS from asserting any direct claim against the Debtor based on conduct that occurred prior to February 24, 2009. *See, e.g., UBS v. Highland Capital Mgmt., L.P.*, 86 A.D.3d 469, 474 (N.Y. App. Div. 2011) (holding that *res judicata* bars UBS from asserting claims against the Debtor that "implicate events alleged to have taken place before the filing of the original complaint" on February 24, 2009, which resulted in a judgment on the merits in favor of the Debtor) [A191]. Here, the State Court found that the breach of contract underlying the Phase I judgment occurred on December 5, 2008, and thus there is no dispute that *res judicata* bars any attempt to hold the Debtor responsible for the breach.

18. The same holds true for any attempt to hold the Debtor responsible as a purported alter ego of the Funds. While UBS argues that "alter ego is generally not a theory of liability that

is subject to *res judicata* under New York law" [Opposition p. 47], UBS completely ignores the decision by the Appellate Division **in this very litigation** that applied *res judicata* to UBS's assertion of alter ego liability against one of the Debtor's co-defendants (HFP). Specifically, the Appellate Division held in 2012 that *res judicata* bars UBS from seeking alter ego relief to recover against HFP for pre-February 24, 2009 claims, because HFP was in privity with the Debtor and thus is entitled to the same *res judicata* protection. *See UBS v. Highland Capital Mgmt., L.P.*, 93 A.D.3d 489, 490 (N.Y. App. Div. 2012) (holding that UBS's claims against other defendants in privity with the Debtor – including the claim that HFP is the alter ego of one of the Funds – are likewise limited to conduct that occurred after February 24, 2009) [A195].

19. Moreover, the Appellate Division's decision is consistent with other authority applying New York's *res judicata* doctrine to bar alter ego claims where (as here) a judgment on the merits has been entered in favor of one defendant, and the plaintiff later seeks to hold that defendant liable as an alter ego for a judgment entered against a different defendant arising out of the same dispute. *See, e.g., Bd. of Managers of the 195 Hudson St. Condo. v. Jeffrey M. Brown Assocs.*, 652 F. Supp. 2d 463, 479-81 (S.D.N.Y. 2009) (holding that *res judicata* applied to bar plaintiff from enforcing judgment against defendant as alleged alter ego of judgment debtor, because defendant previously had obtained a judgment in its favor and was dismissed from the prior litigation, and any alter ego relief against defendant could have, and should have, been sought in the prior litigation).[4]

20. Finally, UBS cites three cases in support of its argument that *res judicata* would not bar an alter ego claim seeking to hold the Debtor liable for the Funds' breach of the warehouse

[4] UBS attempts to distinguish *Bd. of Managers* on the grounds that, in that case, the defendant was entirely dismissed from the prior litigation, whereas "UBS has live substantive claims" against the Debtor. Opposition p. 47 fn. 27. UBS overlooks the fact that, in this case, the Debtor **was** entirely dismissed from the prior litigation. UBS's "live" claims against the Debtor were asserted in a new action after the Debtor's dismissal, and have been limited by the Appellate Division to only those claims for conduct that post-dates the filing of UBS's first unsuccessful complaint against the Debtor.

agreements in December 2008 – *Careccia v. MacRae*, 2005 U.S. Dist. LEXIS 48970 (E.D.N.Y. July 15, 2005), *First Capital Asset Mgmt., Inc. v. N.A. Partners, L.P.*, 260 A.D.2d 179 (N.Y. App. Div. 1999), and *Rebh v. Rotterdam Ventures, Inc.*, 252 A.D.2d 609 (N.Y. App. Div. 1998). All three cases cited by UBS were issued well before both the Appellate Division's 2012 decision applying *res judicata* to limit UBS's alter ego claim against HFP in the State Court litigation and the Southern District of New York's 2009 decision in *Bd. of Managers* applying *res judicata* to bar the assertion of a post-judgment alter ego claim against a previously-dismissed defendant. Furthermore, the cases identified by UBS cannot overcome the import of the Appellate Division's 2012 decision in this case: if one of the Debtor's privies is protected by *res judicata* from any alter ego claim based on pre-February 24, 2009 conduct (*e.g.*, the breach of the warehouse agreements) as a result of the prior judgment on the merits entered in favor of the Debtor, then the Debtor itself, as the party that obtained the prior judgment, most certainly is entitled to the same protection. Therefore, summary judgment should be granted in favor of the Debtor barring UBS from asserting any claim against the Debtor based on UBS's approximately $1 billion breach of contract claim against the Funds or any other claim that arose prior to February 24, 2009.

II. The UBS Claim Is Based Solely on the Transfers of Approximately $233 Million in March 2009 by HFP or Its Subsidiaries

A. UBS Has Failed to Establish Any Dispute of Fact as to the Scope of Its Implied Covenant Claim

21. UBS bears the ultimate burden of proof for all aspects of the UBS Claim. *In re Armstrong*, 347 B.R. 581, 583 (Bankr. N.D. Tex. 2006) (citation omitted). On a motion for summary judgment where (as here) the ultimate burden rests on the non-movant, the motion must be granted if the non-movant fails to "produce evidence to support an essential element of its claim." *Palm Energy Group, LLC v. Greenwich Ins. Co. (In re Tri-Union Dev. Corp.)*, 2012 Bankr. LEXIS 4089, *23 (Bankr. S.D. Tex. September 3, 2012); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (movant is entitled to judgment if non-movant fails to make a

sufficient showing on an essential element of its case on which it has the burden of proof). To make a sufficient showing, the non-movant "must identify specific evidence in the summary judgment record demonstrating that there is a material fact issue concerning the essential elements of its case for which it will bear the burden of proof at trial." *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994). "Needless to say, unsubstantiated assertions are not competent summary judgment evidence." *Id*. The non-movant "may not rest upon the mere allegations or denials of its pleadings, and unsubstantiated or conclusory assertions that a fact issue exists will not suffice." *Morris v. Covan World Wide Moving,* 144 F.3d 377, 380 (5th Cir. 1998).

22. Here, the undisputed facts set forth in the Opening Brief include the fact that UBS's implied covenant claim is based on nothing more than the allegedly fraudulent transfers of approximately $233 million that occurred in March 2009. Opening Brief ¶¶ 52-53. In response, UBS repeatedly insists that it has evidence of additional post-February 24, 2009 conduct, asserting that the "record evidence" reflects that "the bases for its implied covenant claim extend beyond the March 2009 transfers." Opposition p. 25; *see generally* Opposition pp. 24-26.[5] And yet, UBS has not provided a shred of evidence to support that statement. UBS instead relies almost exclusively on its own allegations in the UBS Claim and underlying complaint, and the unsubstantiated assertions it made in response to the objections to the UBS Claim, none of which describe any specific post-February 24, 2009 conduct aside from the

[5] UBS also asserts that the Appellate Division already has decided that UBS's implied covenant claim is based on something other than the transfers in March 2009. Opposition pp. 13-14, 24-25. This is just another disingenuous statement made by UBS to this Court, trying to take advantage of the somewhat gnarly procedural history of the State Court litigation. A review of the materials cited by UBS shows that (i) the cited briefs were submitted at a time when the entirety of UBS's fraudulent transfer claim against the Debtor had been dismissed, and the Debtor was arguing that the implied covenant claim should be dismissed as well [UBS333-34], (ii) UBS – much like it is doing here – argued that its implied covenant claim extended beyond the approximately 127 transfers made by HFP or its subsidiaries in March 2009, but cited nothing other than its own rhetoric [UBS361-65], and (iii) the Appellate Division recalled its decision as to the fraudulent transfer claim, and affirmed the reinstatement of the implied covenant claim, but never made any determination as to the scope of the implied covenant claim [UBS196].

March 2009 transfers. Opposition pp. 25-26. Moreover, as set forth above, UBS's own allegations and assertions are not competent summary judgment evidence.

23. The scant "evidence/argument" cited in the Opposition does nothing to meet UBS's burden of showing any even remotely actionable claims against the Debtor based on post-February 24, 2009 conduct beyond the claims UBS already has asserted relating to the March 2009 transfers. The evidence referenced in the Opposition consists of (i) a deposition excerpt discussing a December 2008 email exchange [UBS206], (ii) investment management agreements from 2006 [UBS232] and 2007 [UBS208], which are not evidence of any conduct, (iii) a December 2008 email exchange discussing transfers to be made in December 2008 [UBS243], (iv) a January 2009 email discussing the dispute with UBS [UBS203], and (v) the report of one of UBS's expert witnesses discussing the March 2009 transfers by HFP or its subsidiaries.[6] Opposition pp. 8-9, 25-28. Again, none of this is evidence of any post-February 24, 2009 conduct aside from the March 2009 transfers of approximately $233 million.

24. It also bears noting that UBS's unsupported allegations regarding the bases for its implied covenant claim boil down to nothing more than an argument that the Debtor somehow breached a supposed implied promise to guarantee payment by the Funds. *See, e.g.*, Opposition p. 26. The warehouse agreements expressly place all responsibility for any losses in the warehouse facility on the Funds, **not** the Debtor. *See* Opposition p. 7; Engagement Letter ¶ 3(c) [RC App. 0878]; Cash Warehouse Agreement ¶ 5(A) [RC App. 0846]; Synthetic Warehouse Agreement ¶ 6(C) [RC App. 0900].[7] Moreover, the Appellate Division has determined that the warehouse agreements contained no promise by the Debtor "to undertake liability" with respect to UBS's losses or "to ensure or guarantee" performance by the Funds. *UBS v. Highland Capital*

[6] All citations herein to "UBS__" refer to the appendix of exhibits [D.E. 1345] filed by UBS in support of the Opposition.
[7] All citations herein to "RC App.__" refer to the appendix of exhibits [D.E. 1189] filed by the Redeemer Committee in support of its motion for partial summary judgment on the UBS Claim.

Mgmt., L.P., 2010 NY Slip Op 1436, ¶ 1 (N.Y. App. Div.) [A184]. And, the Southern District of New York has rejected a similar attempt by Citibank to imply a promise by the Debtor to ensure that cash would be available for distribution on the HFP notes that were extinguished in the March 2009 transaction. *See Highland CDO Opportunity Master Fund, L.P. v. Citibank, N.A.*, 270 F. Supp. 3d 716 (S.D.N.Y. 2017). In that case, Citibank argued, in seeking to impose alter ego liability on the Debtor, that the Debtor had an implied obligation under a pledge agreement to ensure that cash was available for distribution to Citibank on the HFP Notes. *Citibank*, 270 F. Supp. 3d at 731. The district court granted summary judgment in favor of the Debtor. It was "unpersuaded that HCM [the Debtor] even owed Citi a good faith obligation to ensure that cash was available for distribution on the HFP Notes." *Id.* at 732. "[I]t makes little sense to read into the [agreement] an implied promise that [the Debtor] would ensure that cash was available for distribution on the HFP Notes. To the contrary, such an implied promise would impose a duty on [the Debtor] beyond that which Citi bargained for." *Id*.

25. In sum, UBS has failed to meet its burden to identify specific evidence demonstrating that there is a material fact issue concerning the scope of UBS's implied covenant claim. The implied covenant claim is therefore limited to the $233,455,147 of assets transferred in March 2009. And, as discussed above and below, UBS released its claims to $172,411,785 of that amount. As a result, summary judgment should be granted in favor of the Debtor disallowing any principal recovery on the UBS Claim in excess of $61,043,362.

B. UBS Has Failed to Establish that Further Discovery on Its Claims is Necessary or Appropriate

26. UBS cannot defeat the Motion by relying on Rule 56(d) of the Federal Rules of Civil Procedure. The assertion that UBS needs additional time for discovery as to its implied covenant claim, which has been pending since 2010, is disingenuous at best. Discovery was conducted in the State Court litigation, with asset information provided to UBS that obviously was sufficient to allow UBS and its experts to evaluate the solvency of HFP and the Funds, and

transfers made by HFP, the Funds and other entities. *See, e.g.,* Opposition p. 9. Notably, on September 3, 2013, UBS's counsel certified to the State Court that (i) discovery proceedings known to be necessary had been completed, (ii) there were no outstanding discovery requests, (iii) there had been a reasonable opportunity to complete discovery and other pre-trial proceedings, and (iv) UBS's case was ready for trial. 09/03/13 Note of Issue [B003]. UBS also has repeatedly insisted to this Court that its case is trial-ready. *See, e.g.*, 10/06/20 Hearing Tr. 16:14-18 ("We're all ready to try the case as expeditiously as possible, but certainly before the plan confirmation. We would say let's just adjudicate our claim in, you know, November, whether it's mid-November or late November, sometime so that our claim is just resolved.") [B006].

27. Moreover, "[a] plaintiff's entitlement to discovery before a ruling on a motion for summary judgment is not unlimited and may be cut off when the record shows that the requested discovery will not be likely to produce facts he needs to withstand a summary judgment motion." *Krim v. BancTexas Grp.*, 989 F.2d 1435, 1443 (5th Cir. 1993) (internal quotation marks and citation omitted). A party "cannot evade summary judgment simply by arguing that additional discovery is needed, and may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." *Adams v. Travelers Indem. Co.*, 465 F.3d 156, 162 (5th Cir. 2006) (internal quotation marks and citations omitted). "If it appears that further discovery will not produce evidence creating a genuine issue of material fact, the [court] may, in the exercise of its discretion, grant summary judgment." *Krim*, 989 F.2d at 1442.

28. Here, the affidavit and supporting documents submitted by UBS show that further discovery will not produce evidence creating a genuine issue of material fact. In the Bankruptcy Case, the Debtor produced responsive documents to UBS on a rolling basis, and completed its production by October 30, 2020, with the bulk of the Debtor's production completed well in advance of that date. 11/06/20 Tomkowiak Decl. ¶¶ 10, 13, 15-19 [UBS507-510]; 10/02/20

Email from R. Feinstein to A. Clubok (email from Debtor's counsel advising UBS's counsel that, notwithstanding objections to UBS's document requests and in the interest of expediency and transparency, the Debtor would produce the requested documents) [UBS552]; 10/30/20 Email from G. Demo to S. Tomkowiak (email from Debtor's counsel advising UBS's counsel that the Debtor's production was substantially complete, *i.e.*, the Debtor had conducted a diligent review and had fulfilled its production obligations, with no known additional documents to produce) [UBS570].

29. Denial of the Motion to permit additional time for discovery will not change the fact that the Debtor has completed its production in response to UBS's document requests. While UBS complains that the Debtor's production is insufficient to allow UBS to assess the assets held by HFP and the Funds as of February 24, 2009 and any subsequent asset-related activity [Opposition pp. 20-21], UBS has known for almost a decade that only limited financial information is available for those entities following the 2008-2009 time period. *See, e.g.*, 08/30/12 C. Stoops Dep. Tr. 569:8-571:14 (testimony by the Debtor's former chief accounting officer that "HFP consolidated" did not go forward with an FYE 2008 audit because operations were limited in scope and therefore there was no need "to spend all the money" for an audit) [B009]. In short, the problem is **not** that the Debtor's production is incomplete, or that additional time is needed for discovery. The problem is that UBS was futilely hoping to find a "smoking gun" that would allow it to claim that its implied covenant cause of action is based on something other than the March 2009 transfers, but even after conducting discovery in both the State Court litigation and the Bankruptcy Case, UBS is unable to do so. As a result, UBS's request for a Rule 56(d) denial or deferral of the Motion should be denied.

III. Any Recovery By UBS On Account of the Approximately $172 Million Transferred to the Settling Defendants Must Be Disallowed

A. Summary Judgment Should Be Granted to the Debtor Based on the Plain Language of the Settlement Agreements

30. As discussed at length in the Opening Brief, UBS has released all of its claims against the Debtor for the approximately $172 million of assets transferred to the Settling Defendants in March 2009. *See, e.g.*, Opening Brief ¶¶ 68-79, 85-89. The parties agree that the relevant language of the Settlement Agreements is unambiguous: UBS released all "Claims" against the Debtor "for losses or other relief specifically arising from the fraudulent transfers to [the Settling Defendants] alleged in the UBS Litigation ...." Crusader Settlement Agreement § 5.3 [A265-266]; *see also* Credit Strategies Settlement Agreement § 5.3 [A299-300].

31. UBS argues that this language does not apply to its implied covenant claim because that claim "arises" from the warehouse agreements, not the allegedly fraudulent transfers in March 2009. Opposition p. 32. The question, however, is not whether the implied covenant *claim* arises from the warehouse agreements or the allegedly fraudulent transfers. The question is whether the implied covenant claim is a claim for *losses or other relief* arising from the allegedly fraudulent transfers – and it most certainly is. While UBS disputes whether its implied covenant claim seeks any recovery in addition to the amounts transferred in March 2009, there is absolutely no question that the implied covenant claim **does** seek to recover the amounts transferred in March 2009. *See, e.g.*, Opposition p. 4 ("Under its implied covenant claim – as UBS repeatedly has explained – UBS is seeking damages from the Debtor resulting not just from the fraudulent transfers in March 2009 ..."). As such, the implied covenant claim is clearly and unambiguously a claim "for losses or other relief specifically arising from" the allegedly fraudulent transfers to the Settling Defendants, and thus is covered by the releases granted to the Debtor in the Settlement Agreements.

32. UBS also fails to meaningfully address the use of the defined term "Claims" in the releases granted to the Debtor. Opposition p. 35. The term "Claims" broadly includes all

causes of action, liabilities, or obligations of any kind, whether contractual, tort, or statutory, arising out of or directly or indirectly relating to the warehouse agreements and/or the UBS litigation. Crusader Settlement Agreement §§ 5.2, 5.3 [A265-266]; Credit Strategies Settlement Agreement §§ 5.2, 5.3 [A299-300]. The implied covenant claim – a contractual cause of action – falls clearly within the definition of the "Claims" released by UBS. UBS's sole contention in response to this point – that the term "Claims" is qualified by reference to "losses or other relief specifically arising from" the allegedly fraudulent transfers – does nothing to establish that UBS's release covered only its fraudulent transfer claim, and not its implied covenant claim.

33. UBS's remaining arguments are similarly unavailing. With respect to the "avoidance of doubt" sentence in Section 5.3 of the Settlement Agreements, that sentence merely repeats that UBS has released the Debtor from its "Claims" for "losses or other relief" specifically arising from the allegedly fraudulent transfers to the Settling Defendants. Opposition p. 36. It does not change the broad scope of the releases granted to the Debtor. Finally, as to the provision permitting UBS to introduce evidence relating to the transfers made to the Settling Defendants to the extent relevant to UBS's remaining claims [Opposition p. 34], that provision cannot be read to mean that UBS's releases did not cover the implied covenant claim. UBS had (and has) numerous other claims that were not released, including its alter ego claim against HFP, and its fraudulent transfer claim against the Debtor and other parties based on other transfers made in March 2009. Particularly in light of the fact that the transfers to the Settling Defendants were made as part of the same transaction as the other transfers, and were reflected in the same documentation extinguishing the HFP notes, it is neither surprising nor significant that UBS reserved the right to introduce evidence relating to the transfers to the Settling Defendants.

34. Based on the clear and unambiguous language of the releases, summary judgment should be granted in favor of the Debtor (i) barring UBS from obtaining any recovery against the

Debtor on account of the $172,411,785 transferred to the Settling Defendants in March 2009, and (ii) disallowing any principal recovery on the UBS Claim in excess of $61,043,362 ($233,455,147-$172,411,785=$61,043,362).

B. Even if Parol Evidence is Considered, Summary Judgment Should Be Granted to the Debtor

35. In the event the Court determines that the release language is ambiguous, and considers relevant extrinsic evidence, summary judgment should be granted in favor of the Debtor. As an initial matter, UBS's assertion that its email negotiations with the Settling Defendants prove that UBS "expressly refused" to release its implied covenant claim is demonstrably false. Opposition p. 38. To the contrary, in response to the suggestion from counsel for Crusader that the release language be edited "[s]o that the parties are clear that the claim for breach of good faith and fair dealing in connection with the transfer of assets to Crusader is encompassed within the scope of the release UBS is granting" to the Debtor, UBS **never** stated that the implied covenant claim was not covered. 06/07/15 Email Chain at pp. 1-2 [A331-332]. Instead, UBS's counsel stated only that UBS would not change the release language because "we spent a lot of time with credit strat on this language and ubs is not going to change it for this agreement because it could create problems and we still don't understand what your concern is beyond a highly improbable hypothetical." *Id*. at p. 1 [A331].

36. Furthermore, neither the email correspondence with counsel for Crusader nor the excerpt from the redline of the Crusader Settlement Agreement [Opposition p. 39] show that Crusader sought to "broaden" the release language, or that UBS ever refused to "broaden" that language. Instead, the extrinsic evidence shows only that counsel for Crusader proposed that the releases be phrased in terms of the "Claims" arising from the alleged fraudulent transfers and related alleged breaches of the implied covenant, and that the "losses or other relief" language be deleted. *See* 06/07/15 Email Chain pp. 1-3 [A331-A333]; Opposition p. 39. The proposed changes suggested a different framework for describing the releases, but did not change the

broad scope of the releases – as discussed above, there never has been any doubt that the implied covenant claim is a claim for losses arising out of the transfers made in March 2009.

37. For the reasons discussed above and in the Opening Brief, to the extent the Court considers the extrinsic evidence, the only reasonable interpretation of the Settlement Agreements in light of the extrinsic evidence is that UBS released its rights to any recovery against the Debtor specifically arising from the allegedly fraudulent transfers of $172,411,785 to the Settling Defendants, regardless of whether UBS attempts to recover that amount on account of its fraudulent transfer claim or its implied covenant claim. Thus, even if the Court determines that the releases are ambiguous, summary judgment should be granted in favor of the Debtor.

C. The Debtor Is Not Judicially Estopped from Enforcing the Releases

38. UBS's remaining argument regarding the releases – that the Debtor is judicially estopped from enforcing the releases – is addressed at length in the Opening Brief. Opening Brief ¶¶ 90-93. As set forth therein, UBS has failed to establish judicial estoppel because UBS cannot show (among other things) that the Debtor has asserted a legal position that is inconsistent with any prior position regarding the releases. Indeed, the record establishes that, in the State Court litigation, the Debtor expressly indicated its intent to seek enforcement of the releases at the appropriate time, and never took a contrary position. Opening Brief ¶¶ 91-92. For instance, in an opposition to a motion in limine relating to Phase I of the trial, the Debtor and the Funds argued:

> Accordingly, if any liability against Defendants [*i.e.*, the Funds] is ultimately found, Defendants will be entitled to a substantial offset. Thus, UBS's argument that the Court cannot hear evidence or argument regarding UBS's prior settlements fails. **The settlements likewise release Defendant Highland Capital Management, L.P. from any liability relating to the alleged fraudulent transfers with the Settling Defendants, and the Court will need to likewise enforce these provisions.**

06/13/17 HCMLP et al. Mot. Lim. Opp. at p. 19 of 30 (emphasis added) [A324]. The Debtor's position in June 2017 – that UBS released the Debtor from **any** liability relating to the allegedly

fraudulent transfers to the Settling Defendants – is completely consistent with the position set forth herein and in the Opening Brief. As a result, UBS cannot establish that the Debtor is judicially estopped from enforcing the releases.

IV. The Debtor's Motion for Partial Summary Judgment Is Procedurally Proper

39. UBS contends that the Motion is procedurally improper because the deadline for filing dispositive motions in the State Court litigation expired on October 17, 2013. Opposition p. 22. UBS makes no effort to explain (i) how the Debtor could have sought summary judgment relating to the UBS Bar Date (a bankruptcy-specific issue) in the State Court litigation, (ii) how the Debtor could have sought summary judgment on the *res judicata* issue in the State Court litigation, given that UBS did not seek alter ego relief against the Debtor in the State Court, or (iii) how the Debtor could have sought summary judgment in October 2013 to enforce releases that were not granted until June 2015. In any event, as UBS is well aware, the Debtor filed the Motion in accordance with the *Scheduling Order With Respect to Proof of Claim Nos. 190 and 191 of UBS Securities LLC and UBS AG, London Branch* [D.E. 1163], which the Court entered after the October 6, 2020 status conference regarding the UBS Claim. The Motion therefore is procedurally proper.

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CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court grant the Motion in its entirety, and grant the Debtor such other and further relief as the Court deems just and proper.

Dated: November 16, 2020.

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ATTORNEYS FOR JAMES DONDERO

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

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

JAMES DONDERO'S MOTION FOR ENTRY OF AN ORDER REQUIRING NOTICE AND HEARING FOR FUTURE ESTATE TRANSACTIONS OCCURRING OUTSIDE THE ORDINARY COURSE OF BUSINESS

James Dondero ("Movant"), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, pursuant to sections 1108, 363, and 105(a) of title 11 of the United States Code (the "Bankruptcy Code"), hereby files this *Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside the Ordinary Course of Business* (the "Motion"). In support thereof, Movant respectfully represents as follows:

I. SUMMARY OF ARGUMENT

1. Since the Court's approval of the Debtor's settlement with the Committee in January 2020, the Debtor has been operating under certain protocols governing its operations. Under these protocols (the "Protocols") the Debtor has sold a number of significant assets

providing notice only to the Committee. The Debtor, under these Protocols, has been selling significant assets of value to the estate outside the ordinary course of business without giving creditors, equity holders, parties in interest, and the U.S. trustee notice and opportunity to be heard. Doing so is inconsistent with the spirit, if not the letter, of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

2. Until confirmation of a plan that provides otherwise, the sale of assets of the Debtor or its wholly-owned or controlled subsidiaries should occur only after notice and an opportunity for a hearing. While the Protocols may arguably have excused the Debtor from the Bankruptcy Code's requirement that transactions outside the ordinary course be subject to notice and a hearing, there is ample justification for the Court to require them for future transactions. Transparency is a key concept in chapter 11 under the Bankruptcy Code and Bankruptcy Rules, and notice and an opportunity for a hearing before a trustee or debtor in possession acts outside the ordinary course of business is essential to that transparency.

3. Clearly, the sale of a substantial asset owned by a subsidiary of the Debtor is outside the ordinary course of a debtor's business and Bankruptcy Code § 363(b) requires notice and an opportunity for hearing before such an act. Indeed, requiring notice and an opportunity for a hearing increases transparency and provides disclosure to creditors and other parties in interest. Moreover, requiring notice and a hearing often results in competitive bidding, increasing the value received for the asset by the Debtor's estate.

4. For these reasons, the Court should require that, at least until confirmation of a plan, transactions outside the ordinary course, including the disposition of assets held by Debtor's wholly-owned or controlled subsidiaries, only occur after notice and hearing.

II. BACKGROUND

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

6. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. trustee in Delaware.

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

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

9. In connection with the Settlement Order, an independent board of directors was appointed on January 9, 2020, for the Debtor's general partner, Strand Advisors, Inc. (the "Independent Board"). The members of the Independent Board are James P. Seery, Jr., John S. Dubel, and Russell F. Nelms. Mr. Seery was later retained as the Debtor's Chief Executive Officer.

10. The Settlement Order also approved the Protocols governing the "Debtor's operation in the ordinary course of business."[1]

11. Among other things, the Protocols provide that, for transactions involving the assets held directly on the Debtor's balance sheet or the balance sheet of a wholly-owned subsidiary, the

[1] Term Sheet, Docket No. 354-1, p. 5.

Debtor may (i) undertake Ordinary Course Transactions[2] without Court approval; and (ii) with respect to third party transactions in excess of $2,000,000, proceed so long as it receives no objection from the Committee after having provided three business days advance notice.[3]

12. While the Settlement Motion and the underlying Term Sheet appear to state that the Protocols govern the Debtor's operations in the ordinary course of business, the terms of the Protocols seemingly provide the Debtor with authority to conduct transactions outside the ordinary course of business without notice and hearing so long as the Committee (but only the Committee) does not object and the transactions are not with any Related Entity.

13. Pursuant to the authority arguably granted under the Protocols, the Debtor has conducted a number of substantial asset sales outside the ordinary course of business without notice other than to the Committee. Among these are the sale of certain assets held by Highland Multi Strategy Credit Fund, L.P. and Highland Restoration Capital Partners. Most recently, the Debtor, through its wholly-owned subsidiary Trussway, conducted a transaction in which it, on information and belief, sold a Trussway division, d/b/a SSP Holdings, for $50,000,000, netting proceeds to the Debtor's estate of $10,000,000. On information and belief, this transaction has already closed.

14. It is Movant's belief that there was no arm's length competitive process undertaken with respect to this sale. As a result, though certain metrics of SSP had improved materially since it was acquired in 2014, the price to be paid was markedly less than might have been produced through competitive bidding.

15. It is unclear whether the Court or other parties contemplated that the Debtor would

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Term Sheet and incorporated Protocols.
[3] See Amended Operating Protocols, Docket No. 466-1, p. 4.

dispose of such significant assets without an opportunity for this Court to review the transactions to ensure that they satisfy the requirements of section 363(b) and for creditors and parties in interest to be heard.

16. This is significant in part because, in early October, Movant submitted a proposal to the Debtor and the Committee for a consensual "Pot Plan," which would include a substantial infusion of cash and notes by the Movant for the benefit of creditors and would continue the Debtor's business in its current form, rather than the liquidating of the company under the pending Third Amended Plan (Movant had previously made proposals that were rejected). Movant and the Debtor have engaged in discussions and exchanged term sheets regarding the terms of a Pot Plan, but no agreement has yet been reached. The Movant has also reached out to Committee counsel and members of the Committee, but has not received any definitive response to his proposal. If the Debtor continues to sell significant assets (at what Movant believes to be less than fair value), the amount to be contributed by Movant under such a plan—and even the recoveries to be received under Debtor's Third Amended Plan—may be significantly reduced, which will ultimately lower the recovery to creditors.

17. The Term Sheet governing the Protocols provides the Protocols may be modified either with consent of the Committee or by order of this Court.[4]

III. RELIEF REQUESTED AND BASIS FOR RELIEF

18. By this Motion, pursuant to sections 1108, 363, and 105(a) of the Bankruptcy Code, Movant respectfully requests that the Court enter an order modifying the Protocols and requiring that, at least until confirmation of a plan, all transactions outside the ordinary course of business, including the disposition of substantial assets held by Debtor's wholly-owned or controlled

[4] *See* Term Sheet, Docket No. 354-1, p. 5.

subsidiaries, only occur after notice and an opportunity for hearing.

19. Section 1108 of the Bankruptcy Code provides authorization for the debtor in possession to operate the debtor's business unless the court, on a request of a party in interest and after notice and a hearing, limits that authority. 11 U.S.C. § 1108.

20. Section 363(b)(1) of the Bankruptcy Code authorizes a debtor in possession to "use, sell, or lease, other than in the ordinary course of business, property of the estate," after notice and a hearing. To sell property under section 363(b), the Trustee must demonstrate a legitimate business justification for the proposed transaction. *Comm. of Equity Sec. Holders v. Lionel Corp*. (*In re Lionel*), 722 F.2d 1063, 1071 (2d Cir. 1983); *In re Cont'l Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986). "In determining whether a good business reason exists to grant a motion to approve a sale pursuant to section 363(b), a court should consider all of the salient factors pertaining to the proceeding and act to further the diverse interests of the debtor, creditors, and equity holders." *In re GSC, Inc.*, 453 B.R. 132, 155 (Bankr. S.D.N.Y. 2011) (internal quotations omitted).

21. Section 105(a) of the Bankruptcy Code provides in relevant part that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 105(a) "authorizes bankruptcy courts to fashion such orders as are necessary to further the substantive provisions of the Code." *Southmark Corp. v. Grosz (In re Southmark Corp.)*, 49 F.3d 1111, 1116 (5th Cir. 1995).

A. The Court should require notice and hearing for all transactions occurring outside the ordinary course of business as required under section 363(b)

22. The Court should require that the sale of assets of the Debtor directly or through its wholly-owned subsidiaries be subject to notice and a hearing. While the Protocols may arguably have given the Debtor authority to sidestep the Bankruptcy Code's requirement that transactions

outside the ordinary course be subject to notice and a hearing, there is ample justification here for the Court to require them for future transactions. Further, it is unclear whether (i) the Protocols actually provide the Debtor with the authority to dispose of significant direct or indirect estate assets without an opportunity for this Court to review the transactions and for creditors and parties in interest to be heard; and (ii) in the event the Protocols do provide that authority, the Court and other parties contemplated such a result. Accordingly, and in the interest of transparency, the Court should require that all future transactions occurring outside the ordinary course of business be subject to notice and hearing.

i. Requiring notice and hearing ensures compliance with section 363(b) of the Bankruptcy Code, ensures due process, and increases transparency.

23. First, the Court should approve this request because it ensures compliance with the requirements of section 363(b)(1), ensures due process, and increases transparency.

24. Under section 363(b), a debtor in possession is required not only to provide notice and hearing for a transaction outside the ordinary course, but also to articulate a sound business purpose for the transaction. *See In re Cont'l Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986).

25. The Protocols, as the Debtor and Committee have interpreted them, conflict with section 363(b) and deprive various parties of due process. Unlike the requirements of section 363(b), where all creditors, equity holders, parties in interest, and the Office of the United States trustee are entitled to notice, under the Protocols, as they have been construed, the Debtor is only required to provide notice to the Committee of the proposed transaction and it is only if the Committee objects that the matter is brought before the Court. Such notice is of doubtful value to others, especially given intra-Committee disputes.

26. Without proper notice and hearing, there is the potential that the Debtor will dispose of significant assets without all constituents having an opportunity to be heard. Under the

Bankruptcy Code and Bankruptcy Rules, creditors, equity holders, and parties in interest are entitled to notice and an opportunity to be heard before their rights are impacted. *In re Bombay Co.*, 2007 Bankr. LEXIS 3218, at *7 (Bankr. N.D. Tex. Sep. 26, 2007) ("[A] party in interest . . . is entitled to notice and an opportunity to be heard before its rights are affected."); *see also* 2 Collier on Bankruptcy P 102.02 (16th Ed. 2020) ("Notwithstanding section 102(1) and the desire for flexibility, an adversely affected party is entitled, consistent with the due process requirements of the Constitution, and with the wording of section 102(1), to notice reasonably calculated to apprise it of the proposed action and an opportunity to be heard.").

27. This Court has stated many times on the record that this case is all about transparency. The Court has provided the Committee and other parties various forms of relief to ensure transparency is achieved. Movant believes the relief requested herein will only increase transparency and is asking for the same treatment here on behalf of himself and other creditors and equity holders.

28. Finally, neither the Debtor nor any other party will be prejudiced by this request. The transactions undertaken by the Debtor and contemplated by this Motion generally take time to consummate. Allowing time for proper notice and a hearing is unlikely to significantly delay any transaction or prejudice any other party to a sale, and in the exceptional case, section 102(1) of the Bankruptcy Code gives the Court great flexibility in fixing notice periods.

ii. Consistent with section 363(b), requiring notice and hearing may produce competitive bidding and increase the value received by the Debtor's estate.

29. Second, requiring notice and hearing may elicit competitive bidding and therefore increase the value received by the Debtor's estate, consistent with one of the purposes of the Bankruptcy Code.

30. The courts have long recognized the need for competitive bidding at hearings on

private sales. *In re Muscongus 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).

31. "It is a well-established principle of bankruptcy law that the objective of bankruptcy rules and the trustee's duty with respect to such sales is to obtain the highest price or greatest overall benefit possible for the estate." *In re Atlanta Packaging Prods.*, Inc., 99 B.R. 124, 130 (N.D. Ga. 1988). Competitive bidding yields higher offers and thus benefits the estate. Therefore, 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)).

32. In this case, the Debtor's actions under the Protocols have not always been consistent with this fundamental bankruptcy purpose. The Debtor has conducted several significant asset sales with advance notice only to the Committee. There has been no opportunity for the other creditors, equity holders, the U.S. trustee, or the Court to scrutinize the transactions or for a competitive bidding process to occur. Case law makes clear that the entirety of the *estate*, not just a few creditors, has an interest in these sales and in ensuring value is maximized. *See In re Fin. News Networks, Inc.*, 126 B.R. 152, 157 (S.D.N.Y. 1991) (a trustee maximizes value for creditors by selecting the "highest and best bid, and thereby protecting the interests of [the debtor], its creditors, and its equity holders); *In re Lionel*, 722 F.2d at 1071 ("In fashioning its findings, a bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, he should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike."); *ASARCO, Inc. v. Elliott Mgmt. (In re Asarco, L.L.C.)*, 650 F.3d 593, 601 (5th Cir. 2011) (same).

33. The U.S. Court of Appeals for the Second Circuit, in the case of *In re Lionel Corp.*,

722 F.2d. 1063 (2d Cir. 1983), affirmed the notion that, under section 363(b), the debtor in possession must articulate a good business reason to enter into a substantial sale outside the ordinary course and that a creditors' committee's insistence on such a transaction is, standing alone, not a sound business reason because it ignores the equity interests that are required to be considered. *See also In re Cont'l Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986) ("for the debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business").

34. In *Lionel*, the Court stated that a bankruptcy judge should consider a number of factors in deciding whether a sale under section 363(b) furthers the "diverse interests of the debtor, creditors and equity holders, alike." *Lionel*, 722 F.2d. at 1071. Those factors may include "the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value." *Id.*

35. Here, in conflict with section 363(b), the Protocols arguably allow the Debtor to dispose of assets outside the ordinary course without notice, without any opportunity for a hearing, and without providing a sound business justification as mandated by section 363(b). That the Debtor may dispose of significant assets the value of which runs to the estate without notice, without the opportunity for court review as contemplated by section 363(b), and outside of a plan of reorganization may well disservice the estate. In addition, many of the factors articulated by the

Second Circuit in *Lionel* might well, in e.g., the SSP transaction, have weighed against undertaking the sale.

36. These concerns are particularly relevant in this case for at least two reasons.

37. First, because the Debtor's Third Amended Plan is essentially a liquidation plan that will provide for the "monetization" of the assets held by the Debtor and its subsidiaries, these preconfirmation transactions have the taint of being part of a "creeping" or *sub rosa* plan of reorganization that may fundamentally alter the rights of creditors and equity holders in this case. *In re Cont'l Air Lines, Inc.*, 780 F.2d 1223, 1227 (5th Cir. 1986) ("In *Braniff* we recognized that a debtor in Chapter 11 cannot use § 363(b) to sidestep the protection creditors have when it comes time to confirm a plan of reorganization. Likewise, if a debtor were allowed to reorganize the estate in some fundamental fashion pursuant to § 363(b), creditors' rights under, for example, 11 U.S.C. §§ 1125, 1126, 1129(a)(7), and 1129(b)(2) might become meaningless."); *In re Terrace Gardens Park P'ship*, 96 B.R. 707, 714 (Bankr. W.D. Tex. 1989) ("Undertaking reorganization piecemeal pursuant to § 363(b) should not deny creditors the protection they would receive if the proposals were first raised in the reorganization plan.").

38. Similarly, the disposition of significant assets outside of a plan and without notice raises a number of questions, including why the sale must proceed so quickly that adequate notice cannot be given, whether the asset is increasing or decreasing in value, what the proportionate value of the asset is to the estate as a whole, and other "salient factors pertaining to the proceeding." The constituents in this case (with the exception of the Committee and its few members) and this Court have largely been deprived of the chance to ask these questions.

39. Second, because equity may receive a recovery in this case, equity holders should receive notice and an opportunity to be heard on all significant transactions outside the ordinary

course of business. The Debtor, through the Independent Board, has represented on the record that it believes the Debtor is solvent and that there is a reasonable chance that equity may receive a recovery in this case. The possibility that equity may receive a recovery is all the more reason for the Court to scrutinize closely these transactions to ensure that they satisfy the requirements of section 363(b) and they "further the diverse interests of the debtor, creditors and equity holders."

CONCLUSION

For the foregoing reasons, Movant respectfully requests that the Court enter an order (i) granting this Motion, (ii) requiring that, at least until confirmation of a plan, transactions outside the ordinary course, including the disposition of assets held by Debtor's wholly-owned or controlled subsidiaries, only be authorized after notice and an opportunity for hearing, and (iii) granting Movant such other and further relief to which he may be justly entitled.

Dated: November 19, 2020

Respectfully submitted,

/s/ D. Michael Lynn

D. Michael Lynn
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ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on November 19, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Debtor and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink
Bryan C. Assink

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

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

ORDER GRANTING JAMES DONDERO'S MOTION FOR ENTRY OF AN ORDER REQUIRING NOTICE AND HEARING FOR FUTURE ESTATE TRANSACTIONS OCCURING OUTSIDE THE ORDINARY COURSE OF BUSINESS

Having considered the *Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside the Ordinary Course of Business* (the "Motion")[1] filed by James Dondero ("Movant"); 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

[1] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Motion.

in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the 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 reviewed the Motion, any and all other documents filed in support of the Motion and any responses thereto; 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, it is **HEREBY ORDERED THAT**:

1. The Motion is **GRANTED** as set forth herein.

2. The Debtor is hereby required to provide notice and an opportunity for hearing to all creditors, equity security holders, and parties in interest, including Movant, in accordance with Bankruptcy Code § 363(b) and Bankruptcy Rule 2002 on any transactions outside the ordinary course of business, including the disposition of assets held by Debtor's wholly-owned or controlled subsidiaries.

3. The 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

Respectfully submitted by:

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State Bar I.D. No. 02589100
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ATTORNEYS FOR JAMES DONDERO

Appendix Exhibit 65

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.	)	

DISCLOSURE STATEMENT FOR THE FIFTH AMENDED PLAN OF REORGANIZATION OF HIGHLAND CAPITAL MANAGEMENT, L.P.

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Counsel for the 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.

HIGHLAND CAPITAL MANAGEMENT, L.P., as debtor and debtor-in-possession in the above-captioned cases (the "Debtor"), is sending you this document and the accompanying materials (the "Disclosure Statement") because you are a creditor or interest holder in connection with the *Fifth Amended Chapter 11 Plan of Reorganization of Highland Capital Management, L.P.*, dated November 24, 2020, as the same may be amended from time to time (the "Plan").[2] The Debtor has filed a voluntary petition under chapter 11 of title 11 of the United States Code, as amended (the "Bankruptcy Code").

This Disclosure Statement has not yet been approved by the Bankruptcy Court as containing adequate information within the meaning of section 1125(a) of the Bankruptcy Code. The Debtor intends to seek an order or orders of the Bankruptcy Court (a) approving this Disclosure Statement as containing adequate information and (b) confirming the Plan.

A copy of the Plan is attached hereto as **Exhibit A**.

The Debtor believes that the Plan is fair and equitable, will maximize the value of the Debtor's Estate, and is in the best interests of the Debtor and its constituents. Notably, the Plan provides for the transfer of the majority of the Debtor's Assets to a Claimant Trust. The balance of the Debtor's Assets, including the management of the Managed Funds, will remain with the Reorganized Debtor. The Reorganized Debtor will be managed by New GP LLC – a wholly-owned subsidiary of the Claimant Trust. This structure will allow for continuity in the Managed Funds and an orderly and efficient monetization of the Debtor's Assets.

The Claimant Trust, the Litigation Trust, or the Reorganized Debtor, as applicable, will institute, file, prosecute, enforce, abandon, settle, compromise, release, or withdraw any and all Causes of Action without any further order of the Bankruptcy Court, and the Claimant Trust and Reorganized Debtor, as applicable, will sell, liquidate, or otherwise monetize all Claimant Trust Assets and Reorganized Debtor Assets and resolve all Claims, except as otherwise provided in the Plan, the Claimant Trust Agreement, or the Reorganized Limited Partnership Agreement.

IMPORTANT INFORMATION ABOUT THIS DISCLOSURE STATEMENT FOR YOU TO READ

The Debtor is providing the information in this Disclosure Statement to Holders of Claims and Equity Interests in connection with the Debtor's Plan. Nothing in this Disclosure Statement may be relied upon or used by any Entity for any purpose other than with respect to confirmation of the Plan. The information contained in this Disclosure Statement is included for purposes of soliciting acceptances to, and confirmation of, the Plan and may not be relied on for any other purpose.

This Disclosure Statement has not been filed for approval with the Securities and Exchange Commission ("SEC") or any state authority and neither the SEC nor any state authority has passed upon the accuracy or adequacy of this Disclosure Statement or upon

[2] All capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Plan. To the extent that a definition of a term in the text of this Disclosure Statement and the definition of such term in the Plan are inconsistent, the definition included in the Plan shall control and govern.

the merits of the Plan. Any representation to the contrary is a criminal offense. This Disclosure Statement does not constitute an offer to sell or the solicitation of an offer to buy securities in any state or jurisdiction.

This Disclosure Statement contains "forward-looking statements" within the meaning of the Private Securities Litigation Reform Act of 1995. Such statements consist of any statement other than a recitation of historical fact and can be identified by the use of forward-looking terminology such as "may," "expect," "anticipate," "estimate" or "continue" or the negative thereof or other variations thereon or comparable terminology. The Debtor considers all statements regarding anticipated or future matters to be forward-looking statements. Forward-looking statements may include statements about:

- **the effects of insolvency proceedings on the Debtor's business and relationships with its creditors;**
- **business strategy;**
- **financial condition, revenues, cash flows, and expenses;**
- **financial strategy, budget, projections, and operating results;**
- **variation from projected operating and financial data;**
- **substantial capital requirements;**
- **availability and terms of capital;**
- **plans, objectives, and expectations;**
- **the adequacy of the Debtor's capital resources and liquidity; and**
- **the Claimant Trust's or the Reorganized Debtor's ability to satisfy future cash obligations.**

Statements concerning these and other matters are not guarantees of the Claimant Trust's or Reorganized Debtor's future performance. There are risks, uncertainties, and other important factors that could cause the Claimant Trust's or Reorganized Debtor's actual performance or achievements to be different from those that may be projected. The reader is cautioned that all forward-looking statements are necessarily speculative and there are certain risks and uncertainties that could cause actual events or results to differ materially from those referred to in such forward-looking statements. Therefore, any analyses, estimates, or recovery projections may or may not turn out to be accurate.

This Disclosure Statement has been prepared pursuant to section 1125 of the Bankruptcy Code and Bankruptcy Rule 3016 and is not necessarily in accordance with federal or state securities laws or other similar laws.

No legal or tax advice is provided to you by this Disclosure Statement. The Debtor urges each Holder of a Claim or an Equity Interest to consult with its own advisers with respect to any legal, financial, securities, tax or business advice in reviewing this Disclosure Statement, the Plan and each of the proposed transactions contemplated thereby. Further, the Bankruptcy Court's approval of the adequacy of disclosures contained in this Disclosure Statement does not constitute the Bankruptcy Court's approval of the merits of the Plan or a guarantee by the Bankruptcy Court of the accuracy or completeness of the information contained herein.

Pachulski Stang Ziehl & Jones LLP ("PSZ&J") is general insolvency counsel to the Debtor. Development Specialists, Inc. ("DSI") is the Debtor's financial advisor. PSZ&J, DSI, and the Independent Board (as defined below) have relied upon information provided by the Debtor in connection with preparation of this Disclosure Statement. PSZ&J has not independently verified the information contained herein.

This Disclosure Statement contains, among other things, summaries of the Plan, the management of the Reorganized Debtor, the Claimant Trust, certain statutory provisions, certain events in the Debtor's Chapter 11 Case, and certain documents related to the Plan that are attached hereto and incorporated herein by reference or that may be filed later with the Plan Supplement. Although the Debtor believes that these summaries are fair and accurate, these summaries are qualified in their entirety to the extent that the summaries do not set forth the entire text of such documents or statutory provisions or every detail of such events. In the event of any conflict, inconsistency or discrepancy between a description in this Disclosure Statement and the terms and provisions of the Plan or any other documents incorporated herein by reference, the Plan or such other documents will govern and control for all purposes. Except where otherwise specifically noted, factual information contained in this Disclosure Statement has been provided by the Debtor's management. The Debtor does not represent or warrant that the information contained herein or attached hereto is without any material inaccuracy or omission.

In preparing this Disclosure Statement, the Debtor relied on financial data derived from the Debtor's books and records and on various assumptions regarding the Debtor's business. The Debtor's management has reviewed the financial information provided in this Disclosure Statement. Although the Debtor has used its reasonable business judgment to ensure the accuracy of this financial information, the financial information contained in, or incorporated by reference into, this Disclosure Statement has not been audited (unless otherwise expressly provided herein) and no representations or warranties are made as to the accuracy of the financial information contained herein or assumptions regarding the Debtor's business and its, the Reorganized Debtor's, and the Claimant Trust's future results. The Debtor expressly cautions readers not to place undue reliance on any forward-looking statements contained herein.

This Disclosure Statement does not constitute, and may not be construed as, an admission of fact, liability, stipulation or waiver. Rather, this Disclosure Statement shall constitute a statement made in settlement negotiations related to potential contested matters, potential adversary proceedings and other pending or threatened litigation or actions.

No reliance should be placed on the fact that a particular litigation claim or projected objection to a particular Claim or Equity Interest is, or is not, identified in the Disclosure Statement. Except as provided under the Plan, the Debtor, the Reorganized Debtor, or the Claimant Trust, as applicable, may seek to investigate, file and prosecute Claims and Causes of Action and may object to Claims or Equity Interests after the Confirmation Date or Effective Date of the Plan irrespective of whether the Disclosure Statement identifies any such Claims or Equity Interests or objections to Claims or Equity Interests on the terms specified in the Plan.

The Debtor is generally making the statements and providing the financial information contained in this Disclosure Statement as of the date hereof where feasible, unless otherwise specifically noted. Although the Debtor may subsequently update the information in this Disclosure Statement, the Debtor has no affirmative duty to do so. Holders of Claims and Equity Interests reviewing this Disclosure Statement should not infer that, at the time of their review, the facts set forth herein have not changed since the Disclosure Statement was sent. Information contained herein is subject to completion, modification, or amendment. The Debtor reserves the right to file an amended or modified Plan and related Disclosure Statement from time to time.

The Debtor has not authorized any Entity to give any information about or concerning the Plan other than that which is contained in this Disclosure Statement. The Debtor has not authorized any representations concerning the Debtor or the value of its property other than as set forth in this Disclosure Statement.

Holders of Claims or Equity Interests must rely on their own evaluation of the Debtor and their own analyses of the terms of the Plan in considering the Plan. Importantly, each Holder of a Claim should review the Plan in its entirety and consider carefully all of the information in this Disclosure Statement and any exhibits hereto, including the risk factors described in greater detail in ARTICLE IV herein, "Risk Factors."

If the Plan is confirmed by the Bankruptcy Court and the Effective Date occurs, all Holders of Claims against, and Holders of Equity Interests in, the Debtor will be bound by the terms of the Plan and the transactions contemplated thereby.

The effectiveness of the Plan is subject to certain material conditions precedent described herein and set forth in Article IX of the Plan. There is no assurance that the Plan will be confirmed, or if confirmed, that the conditions required to be satisfied for the Plan to become effective will be satisfied (or waived).

EXHIBITS

EXHIBIT A – Plan of Reorganization

EXHIBIT B – Organizational Chart of the Debtor

EXHIBIT C – Liquidation Analysis/Financial Projections

THE DEBTOR HEREBY ADOPTS AND INCORPORATES EACH EXHIBIT ATTACHED TO THIS DISCLOSURE STATEMENT BY REFERENCE AS THOUGH FULLY SET FORTH HEREIN.

ARTICLE I.
EXECUTIVE SUMMARY

This Disclosure Statement is provided for informational purposes only.

In the opinion of the Debtor, the Plan is preferable to the alternatives described in this Disclosure Statement because it provides for the highest distributions to the Debtor's creditors and interest holders. The Debtor believes that any delay in confirmation of the Plan would result in significant administrative expenses resulting in less value available to the Debtor's constituents. In addition, any alternative other than confirmation of the Plan could result in extensive delays and increased administrative expenses resulting in smaller distributions to Holders of Allowed Claims and Equity Interests than that which is proposed under the Plan. Accordingly, the Debtor recommends that all Holders of Claims and Equity Interests support confirmation of the Plan.

This Executive Summary is being provided to Holders of Allowed Claims and Equity Interests as an overview of the material items addressed in the Disclosure Statement and the Plan, which is qualified by reference to the entire Disclosure Statement and by the actual terms of the Plan (including all exhibits attached hereto and to the Plan and the Plan Supplement), and should not be relied upon for a comprehensive discussion of the Disclosure Statement and/or the Plan. Section 1125 of the Bankruptcy Code requires a debtor to prepare a disclosure statement containing information of a kind, and in sufficient detail, to enable a hypothetical reasonable investor to make an informed judgment regarding acceptance or rejection of the plan of reorganization or liquidation. As such, this Disclosure Statement is being submitted in accordance with the requirements of section 1125 of the Bankruptcy Code. This Disclosure Statement includes, without limitation, information about:

- the Debtor's operating and financial history;
- the significant events that have occurred to date;
- the Confirmation process; and
- the terms and provisions of the Plan, including key aspects of the Claimant Trust and the Reorganized Debtor, certain effects of Confirmation of the Plan, certain risk factors relating to the Plan, and the manner in which distributions will be made under the Plan.

The Debtor believes that any alternative to Confirmation of the Plan would result in significant delays, litigation, and additional costs, and ultimately would diminish the Debtor's value. **Accordingly, the Debtor strongly supports confirmation of the Plan.**

A. Summary of the Plan

The Plan represents a significant achievement for the Debtor. As discussed herein, the Plan provides that the Claimant Trust will receive the majority of the Debtor's assets, including Causes of Action. The assets being transferred to the Claimant Trust are referred to, collectively, as the Claimant Trust Assets. The Claimant Trust will – for the benefit of the Claimant Trust

Beneficiaries – monetize the Claimant Trust Assets, pursue the Causes of Action, and work to conclude the various lawsuits and litigation claims pending against the Estate.

The Plan also provides for the reorganization of the Debtor. This will be accomplished by the cancellation of the Debtor's current Equity Interests, which consist of partnership interests held by: The Dugaboy Investment Trust;[3] the Hunter Mountain Investment Trust ("Hunter Mountain"); Mark Okada, personally and through family trusts; and Strand, the Debtor's general partner. 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. The Reorganized Debtor will be managed by the Claimant Trust, as the managing member of New GP LLC.

The Reorganized Debtor will oversee the monetization of the Reorganized Debtor Assets, which consist of, among other Assets, the management of the Managed Funds. The net proceeds from the Reorganized Debtor Assets will ultimately be distributed to the Claimant Trust and available for distribution to the Claimant Trust Beneficiaries.

The following is an overview of certain other material terms of the Plan:

- Allowed Priority Non-Tax Claims will be paid in full;
- Allowed Retained Employee Claims will be Reinstated;
- Allowed Convenience Claims will receive the lesser of (i) 85% of their Allowed Claim or (ii) such Holder's Pro Rata share of the Convenience Claims Cash Pool (*i.e.*, $13,150,000). Holders of Convenience Claims can elect the treatment provided to General Unsecured Claims by making the GUC Election on their Ballots;
- Allowed General Unsecured Claims and Allowed Subordinated Claims will receive their Pro Rata share of Claimant Trust Interests. The Claimant Trust Interests distributed to Allowed General Unsecured Claims will be senior to those distributed to Allowed Subordinated Claims as set forth in the Claimant Trust Agreement. Holders of General Unsecured Claims that are liquidated as of the Confirmation Date can elect the treatment provided to Convenience Class Election by reducing their Claims to $1,000,000 and making the Convenience Class Election on their Ballots; and
- Allowed Class B/C Limited Partnership Interests and Allowed Class A Limited Partnership Interests will receive their Pro Rata share of the Contingent Claimant Trust Interests.

[3] The Dugaboy Investment Trust is a Delaware trust created to manage the assets of James Dondero and his family.

B. An Overview of the Chapter 11 Process

Chapter 11 is the principal business reorganization chapter of the Bankruptcy Code. Pursuant to chapter 11 of the Bankruptcy Code, a debtor may remain in possession of its assets and business and attempt to reorganize its business for the benefit of such debtor, its creditors, and other parties in interest. A plan of reorganization sets forth the means for satisfying claims against and interests in a debtor. Confirmation of a plan of reorganization by a bankruptcy court makes the plan binding upon the debtor and any creditor of or interest holder in the debtor, whether or not such creditor or interest holder (i) is impaired under or has accepted the plan or (ii) receives or retains any property under the plan.

The commencement of a Chapter 11 case creates an estate comprised of all of the legal and equitable interests of a debtor in property as of the date that the bankruptcy petition is filed. Sections 1107 and 1108 of the Bankruptcy Code provide that a debtor may continue to operate its business and remain in possession of its property as a "debtor-in-possession," unless the bankruptcy court orders the appointment of a trustee. The filing of a bankruptcy petition also triggers the automatic stay provisions of section 362 of the Bankruptcy Code which provide, among other things, for an automatic stay of all attempts to collect prepetition claims from a debtor or otherwise interfere with its property or business. Except as otherwise ordered by the bankruptcy court, the automatic stay generally remains in full force and effect until the consummation of a plan of reorganization or liquidation, following confirmation of such plan of reorganization.

The Bankruptcy Code provides that upon commencement of a chapter 11 bankruptcy case, the Office of the United States Trustee may appoint a committee of unsecured creditors and may, in its discretion, appoint additional committees of creditors or of equity interest holders if necessary to assure adequate representation. Please see ARTICLE II for a discussion of the U.S. Trustee and the statutory committees.

Upon the commencement of a chapter 11 bankruptcy case, all creditors and equity interest holders generally have standing to be heard on any issue in the chapter 11 proceedings pursuant to section 1109(b) of the Bankruptcy Code.

The formulation and confirmation of a plan is the principal objective of a chapter 11 case. The plan sets forth the means of satisfying the claims against and equity interests in the debtor.

C. Purpose and Effect of the Plan

1. The Plan of Reorganization

The Debtor is reorganizing pursuant to chapter 11 of the Bankruptcy Code. As a result, the Confirmation of the Plan means that the Debtor's business will continue to operate following confirmation of the Plan through the Claimant Trust and the Reorganized Debtor to monetize assets for distribution to Holders of Allowed Claims. The Claimant Trust will hold the Claimant Trust Assets and manage the efficient monetization of, the Claimant Trust Assets. The Claimant Trust will also manage the Reorganized Debtor through the Claimant Trust's ownership of the Reorganized Debtor's general partner, New GP LLC. The Claimant Trust will also be the sole limited partner in the Reorganized Debtor. The Reorganized Debtor will manage the wind down

of the Managed Funds as well as the monetization of the balance of the Reorganized Debtor Assets. The Claimant Trust will also establish a Litigation Sub-Trust in accordance with the Plan, which will also be for the benefit of the Claimant Trust Beneficiaries. The Litigation Sub-Trust will receive the Estate Claims. The Litigation Trustee shall be the exclusive trustee of the Estate Claims included in the Claimant Trust Assets subject to oversight by the Claimant Trust Oversight Committee

A bankruptcy court's confirmation of a plan binds the debtor, any entity acquiring property under the plan, any holder of a claim or an equity interest in a debtor and all other entities as may be ordered by the bankruptcy court in accordance with the applicable provisions of the Bankruptcy Code to the terms and conditions of the confirmed plan, whether or not such Entity voted on the plan or affirmatively voted to reject the plan.

2. Plan Overview

The Plan provides for the classification and treatment of Claims against and Equity Interests in the Debtor. For classification and treatment of Claims and Equity Interests, the Plan designates Classes of Claims and Classes of Equity Interests. These Classes and Plan treatments take into account the differing nature and priority under the Bankruptcy Code of the various Claims and Equity Interests.

The following chart briefly summarizes the classification and treatment of Claims and Equity Interests under the Plan.[4] Amounts listed below are estimated.

In accordance with section 1122 of the Bankruptcy Code, the Plan provides for eight Classes of Claims against and/or Equity Interests in the Debtor.

The projected recoveries set forth in the table below are estimates only and therefore are subject to change. For a complete description of the Debtor's classification and treatment of Claims or Equity Interests, reference should be made to the entire Plan and the risk factors described in ARTICLE IV below. For certain classes of Claims, the actual amount of Allowed Claims could be materially different than the estimated amounts shown in the table below.

[4] This chart is only a summary of the classification and treatment of Claims and Equity Interests under the Plan. References should be made to the entire Disclosure Statement and the Plan for a complete description.

Class	Type of Claim or Interest	Estimated Prepetition Claim Amount [1]	Impaired	Entitled to Vote	Estimated Recovery
1	Jefferies Secured Claim	$0.00	No	No	100%
2	Frontier Secured Claim[2]	$5,209,964	Yes	Yes	100%
3	Other Secured Claims	$551,116	No	No	100%
4	Priority Non-Tax Claim	$16,489	No	No	100%
5	Retained Employee Claim	$0	No	No	100%
6	PTO Claims [3]	$1,181,886	No	No	100%
7	Convenience Claims[4]	$12,064,333	Yes	Yes	85.00%
8	General Unsecured Claims[5]	$180,442,199	Yes	Yes	85.31%
9	Subordinated Claims	Undetermined	Yes	Yes	Undetermined
10	Class B/C Limited Partnership Interests	N/A	Yes	Yes	Undetermined
11	Class A Limited Partnership Interests	N/A	Yes	Yes	Undetermined

[1] Excludes Priority Tax Claims and certain other unclassified amounts totaling approximately $1.1 million owed to Joshua and Jennifer Terry and Acis under a settlement agreement.

[2] Excludes interest accrued postpetition estimated at $318,000, which will be paid on the Effective Date. The Liquidation Analysis/Financial Projections provide for the payment of postpetition interest.

[3] Represents outstanding PTO Claims as of September 30, 2020. PTO Claims are subject to adjustment depending on the amount of actual prepetition PTO Claims outstanding as of the Effective Date. PTO claims are accounted for in the Liquidation Analysis/Financial Projections as an administrative claim and will be paid out in ordinary courses pursuant to applicable state law.

[4] Represents the estimated gross prepetition amount of Convenience Claims with a total payout amount estimated at 85% of $12.06 million, or $10.25 million. This number includes approximately $1.113 million of potential Rejection Claims and assumes that Holders of Allowed General Unsecured Claims that are each less than $2.50 million opt into the Convenience Class.

[5] Assumes no recovery for UBS, the HarbourVest Entities, IFA, Hunter Mountain, and an Allowed Claim of only $3,722,019 for Mr. Daugherty (each as discussed further below). Assumes $1.440 million of potential rejection damage claims. The Liquidation Analysis/Financial Projections assume Highland RCP, LP and Highland RCP Offshore, LP offset their Claim of $4.4 million against amounts owed to the Debtor.

3. Voting on the Plan

Under the Bankruptcy Code, acceptance of a plan by a Class of Claims or Equity Interests is determined by calculating the number and the amount of Claims voting to accept, based on the actual total Allowed Claims or Equity Interests voting on the Plan. Acceptance by a Class of Claims requires more than one-half of the number of total Allowed Claims in the Class to vote in favor of the Plan and at least two-thirds in dollar amount of the total Allowed Claims in the Class to vote in favor of the Plan. Acceptance by a Class of Equity Interests requires at least two-thirds in amount of the total Allowed Equity Interests in the Class to vote in favor of the Plan.

Under the Bankruptcy Code, only Classes of Claims or Equity Interests that are "Impaired" and that are not deemed as a matter of law to have rejected a plan under Section 1126 of the Bankruptcy Code are entitled to vote to accept or reject the Plan. Any Class that is "Unimpaired" is not entitled to vote to accept or reject a plan and is conclusively presumed to have accepted the Plan. As set forth in Section 1124 of the Bankruptcy Code, a Class is "Impaired" if the legal, equitable, or contractual rights attaching to the claims or equity interests of that Class are modified or altered.

Pursuant to the Plan, Claims and Equity Interests in Class 2 and Class 7 through Class 11 are Impaired by the Plan, and only the Holders of Claims and Equity Interests in those Classes are entitled to vote to accept or reject the Plan. Whether a Holder of a Claim or Equity Interest in Class 2 and Class 7 through Class 11 may vote to accept or reject the Plan will also depend on whether the Holder held such Claim or Equity Interest as of November 23, 2020 (the "Voting Record Date"). The Voting Record Date and all of the Debtor's solicitation and voting procedures shall apply to all of the Debtor's Creditors and other parties in interest.

Pursuant to the Plan, 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.

Pursuant to the Plan, there are no Classes that will not receive or retain any property and no Classes are deemed to reject the Plan.

4. Confirmation of the Plan

(a) Confirmation Generally

"Confirmation" is the technical term for the Bankruptcy Court's approval of a plan of reorganization or liquidation. The timing, standards and factors considered by the Bankruptcy Court in deciding whether to confirm a plan of reorganization are discussed below.

The confirmation of a plan by the Bankruptcy Court binds the debtor, any issuer of securities under a plan, any person acquiring property under a plan, any creditor or equity interest holder of a debtor, and any other person or entity as may be ordered by the Bankruptcy Court in accordance with the applicable provisions of the Bankruptcy Code. Subject to certain limited exceptions, the order issued by the Bankruptcy Court confirming a plan discharges a debtor from any debt that arose before the confirmation of such plan and provides for the treatment of such debt in accordance with the terms of the confirmed plan.

(b) The Confirmation Hearing

Section 1128(a) of the Bankruptcy Code requires the Bankruptcy Court, after notice, to hold a hearing on Confirmation of the Plan. Section 1128(b) of the Bankruptcy Code provides that any party in interest may object to Confirmation of the Plan.

The Debtor will provide notice of the Confirmation Hearing to all necessary parties. The Confirmation Hearing may be adjourned from time to time without further notice except for an

announcement of the adjourned date made at the Confirmation Hearing of any adjournment thereof.

5. Confirming and Effectuating the Plan

It is a condition to the Effective Date of the Plan that the Bankruptcy Court shall have entered the Confirmation Order in form and substance reasonably acceptable to the Debtor and the Official Committee of Unsecured Creditors (the "Committee"). Certain other conditions contained in the Plan must be satisfied or waived pursuant to the provisions of the Plan.

6. Rules of Interpretation

The following rules for interpretation and construction shall apply to this Disclosure Statement: (1) capitalized terms used in the Disclosure Statement and not otherwise defined shall have the meaning ascribed to such terms in the Plan; (2) unless otherwise specified, any reference in this Disclosure Statement to a contract, instrument, release, indenture, or other agreement or document shall be a reference to such document in the particular form or substantially on such terms and conditions described; (3) unless otherwise specified, any reference in this Disclosure Statement to an existing document, schedule, or exhibit, whether or not filed, shall mean such document, schedule, or exhibit, as it may have been or may be amended, modified, or supplemented; (4) any reference to an entity as a Holder of a Claim or Equity Interest includes that Entity's successors and assigns; (5) unless otherwise specified, all references in this Disclosure Statement to Sections are references to Sections of this Disclosure Statement; (6) unless otherwise specified, all references in this Disclosure Statement to exhibits are references to exhibits in this Disclosure Statement; (7) unless otherwise set forth in this Disclosure Statement, the rules of construction set forth in section 102 of the Bankruptcy Code shall apply; and (8) any term used in capitalized form in this Disclosure Statement that is not otherwise defined in this Disclosure Statement or the Plan but that is used in the Bankruptcy Code or the Bankruptcy Rules shall have the meaning assigned to such term in the Bankruptcy Code or the Bankruptcy Rules, as applicable.

7. Distribution of Confirmation Hearing Notice and Solicitation Package to Holders of Claims and Equity Interests

As set forth above, Holders of Claims in Class 1 and Class 3 through Class 6 are not entitled to vote on the Plan. As a result, such parties will not receive solicitation packages or ballots but, instead, will receive this a notice of non-voting status, a notice of the Confirmation Hearing, and instructions on how to receive a copy of the Plan and Disclosure Statement.

The Debtor, with the approval of the Bankruptcy Court, has engaged Kurtzman Carson Consultants LLC (the "Voting Agent") to serve as the voting agent to process and tabulate Ballots for each Class entitled to vote on the Plan and to generally oversee the voting process. The following materials shall constitute the solicitation package (the "Solicitation Package"):

- This Disclosure Statement, including the Plan and all other Exhibits annexed thereto;

- The Bankruptcy Court order approving this Disclosure Statement (the "Disclosure Statement Order") (excluding exhibits);

- The notice of, among other things, (i) the date, time, and place of the hearing to consider Confirmation of the Plan and related matters and (ii) the deadline for filing objections to Confirmation of the Plan (the "Confirmation Hearing Notice");

- A single Ballot, to be used in voting to accept or to reject the Plan and applicable instructions with respect thereto (the "Voting Instructions");

- A pre-addressed, postage pre-paid return envelope; and

- Such other materials as the Bankruptcy Court may direct or approve.

The Debtor, through the Voting Agent, will distribute the Solicitation Package in accordance with the Disclosure Statement Order. The Solicitation Package is also available at the Debtor's restructuring website at www.kccllc.net/hcmlp.

On November 13, 2020, the Debtor filed the Plan Supplement [D.I. 1389] that included, among other things, the form of Claimant Trust Agreement, the Litigation Sub-Trust Agreement, the Reorganized Limited Partnership Agreement, New GP LLC Documents, the New Frontier Note, the Senior Employee Stipulation, and the identity of the initial members of the Claimant Trust Oversight Committee. The Plan Supplement also includes a schedule of the Causes of Action that will be retained after the Effective Date. The Plan Supplement may be supplemented or amended through and including December 18, 2020. If the Plan Supplement is supplemented, such supplemented documents will be made available on the Debtor's restructuring website at www.kccllc.net/hcmlp.

If you are the Holder of a Claim or Equity Interest and believe that you are entitled to vote on the Plan, but you did not receive a Ballot or your Ballot is damaged or illegible, or if you have any questions concerning voting procedures, you should contact the Voting Agent by writing to Kurtzman Carson Consultants LLC, via email at HighlandInfo@kccllc.com and reference "Highland Capital Management, L.P." in the subject line or by telephone at toll free: (877) 573-3984, or international: (310) 751-1829. If your Claim or Equity Interest is subject to a pending claim objection and you wish to vote on the Plan, you must file a motion pursuant to Bankruptcy Rule 3018 with the Bankruptcy Court for the temporary allowance of your Claim or Equity Interest for voting purposes or you will not be entitled to vote to accept or reject the Plan. Any such motion must be filed so that it is heard in sufficient time prior to the Voting Deadline to allow for your vote to be tabulated.

THE DEBTOR, THE REORGANIZED DEBTOR, AND THE CLAIMANT TRUSTEE, AS APPLICABLE, RESERVE THE RIGHT THROUGH THE CLAIM OBJECTION PROCESS TO OBJECT TO OR SEEK TO DISALLOW ANY CLAIM OR EQUITY INTEREST FOR DISTRIBUTION PURPOSES.

8. Instructions and Procedures for Voting

All votes to accept or reject the Plan must be cast by using the Ballots enclosed with the Solicitation Packages or otherwise provided by the Debtor or the Voting Agent. No votes other than ones using such Ballots will be counted, except to the extent the Bankruptcy Court orders otherwise. The Bankruptcy Court has fixed November 23, 2020, as the Voting Record Date for the determination of the Holders of Claims and Equity Interests who are entitled to (a) receive a copy of this Disclosure Statement and all of the related materials and (b) vote to accept or reject the Plan. The Voting Record Date and all of the Debtor's solicitation and voting procedures shall apply to all of the Debtor's Creditors and other parties in interest.

After carefully reviewing the Plan, this Disclosure Statement, and the detailed instructions accompanying your Ballot, you are asked to indicate your acceptance or rejection of the Plan by voting in favor of or against the Plan on the accompanying Ballot.

The deadline to vote on the Plan is January 5, 2021 at 5:00 p.m. (prevailing Central Time) (the "Voting Deadline"). In order for your vote to be counted, your Ballot must be properly completed in accordance with the Voting Instructions on the Ballot, and received no later than the Voting Deadline at the following address, as applicable:

If by first class mail, personal delivery, or overnight mail to:

HCMLP Ballot Processing Center
c/o KCC
222 N. Pacific Coast Highway, Suite 300
El Segundo, CA 90245

If by electronic voting:

You may submit your Ballot via the Balloting Agent's online portal. Please visit http://www.kccllc.net/hcmlp and click on the "Submit Electronic Ballot" section of the website and follow the instructions to submit your Ballot. IMPORTANT NOTE: You will need the Unique Electronic Ballot ID Number and the Unique Electronic Ballot PIN Number set forth on your customized ballot in order to vote via the Balloting Agent's online portal. Each Electronic Ballot ID Number is to be used solely for voting on those Claims or Interests on your electronic ballot. You must complete and submit an electronic ballot for each Electronic Ballot ID Number you receive, as applicable. Parties who cast a Ballot using the Balloting Agent's online portal should NOT also submit a paper Ballot.

Only the Holders of Claims and Equity Interests in Class 2 and Class 7 through Class 11 as of the Voting Record Date are entitled to vote to accept or reject the Plan, and they may do so by completing the appropriate Ballots and returning them in the envelope provided to the Voting Agent so as to be actually received by the Voting Agent by the Voting Deadline. Each Holder of a Claim and Equity Interest must vote its entire Claim or Equity Interest, as applicable, within a particular Class either to accept or reject the Plan and may not split such votes. If multiple Ballots are received from the same Holder with respect to the same Claim or Equity Interest prior to the Voting Deadline, the last timely received, properly executed Ballot will be deemed to

reflect that voter's intent and will supersede and revoke any prior Ballot. The Ballots will clearly indicate the appropriate return address. It is important to follow the specific instructions provided on each Ballot.

ALL BALLOTS ARE ACCOMPANIED BY VOTING INSTRUCTIONS. IT IS IMPORTANT THAT THE HOLDER OF A CLAIM OR EQUITY INTEREST IN THE CLASSES ENTITLED TO VOTE FOLLOW THE SPECIFIC INSTRUCTIONS PROVIDED WITH EACH BALLOT.

If you have any questions about (a) the procedure for voting your Claim or Equity Interest, (b) the Solicitation Package that you have received, or (c) the amount of your Claim or Equity Interest, or if you wish to obtain an additional copy of the Plan, this Disclosure Statement, or any appendices or Exhibits to such documents, please contact the Voting Agent at the address specified above. Copies of the Plan, Disclosure Statement and other documents filed in these Chapter 11 Case may be obtained free of charge on the Voting Agent's website at www.kccllc.net/hcmlp or by calling toll free at: (877) 573-3984, or international at: (310) 751-1829. You may also obtain copies of pleadings filed in the Debtor's case for a fee via PACER at pacer.uscourts.gov. Subject to any rules or procedures that have or may be implemented by the Court as a result of the COVID 19 Pandemic, documents filed in this case may be examined between the hours of 8:00 a.m. and 4:00 p.m., prevailing Central Time, Monday through Friday, at the Office of the Clerk of the Bankruptcy Court, Earle Cabell Federal Building, 1100 Commerce Street, Room 1254, Dallas, Texas 75242-1496.

The Voting Agent will process and tabulate Ballots for the Classes entitled to vote to accept or reject the Plan and will file a voting report (the "Voting Report") by January 11, 2021. The Voting Report will, among other things, describe every Ballot that does not conform to the Voting Instructions or that contains any form of irregularity, including, but not limited to, those Ballots that are late, illegible (in whole or in material part), unidentifiable, lacking signatures, lacking necessary information, or damaged.

THE DEBTOR URGES HOLDERS OF CLAIMS AND EQUITY INTERESTS WHO ARE ENTITLED TO VOTE TO TIMELY RETURN THEIR BALLOTS AND TO VOTE TO ACCEPT THE PLAN BY THE VOTING DEADLINE.

9. The Confirmation Hearing

The Bankruptcy Court has scheduled Confirmation Hearing Dates on January 13, 2021, and January 14, 2021, at 9:30 a.m. prevailing Central time. The Confirmation Hearing may be continued from time to time by the Bankruptcy Court or the Debtor without further notice other than by such adjournment being announced in open court or by a notice of adjournment filed with the Bankruptcy Court and served on such parties as the Bankruptcy Court may order. Moreover, the Plan may be modified or amended, if necessary, pursuant to section 1127 of the Bankruptcy Code, prior to, during or as a result of the Confirmation Hearing, without further notice to parties-in-interest.

10. The Deadline for Objecting to Confirmation of the Plan

The Bankruptcy Court has set a deadline of January 5, 2021, at 5:00 p.m. prevailing Central time, for the filing of objections to confirmation of the Plan (the "Confirmation Objection Deadline"). Any objection to confirmation of the Plan must: (i) be in writing; (ii) conform to the Bankruptcy Rules and the Local Rules; (iii) state the name of the objecting party and the amount and nature of the Claim of such Entity or the amount of Equity Interests held by such Entity; (iv) state with particularity the legal and factual bases and nature of any objection to the Plan and, if practicable, a proposed modification to the Plan that would resolve such objection; and (v) be filed, contemporaneously with a proof of service, with the Bankruptcy Court and served so that it is **actually received** no later than the Confirmation Objection Deadline by the parties set forth below (the "Notice Parties").

CONFIRMATION OBJECTIONS NOT TIMELY FILED AND SERVED IN THE MANNER SET FORTH HEREIN MAY NOT BE CONSIDERED BY THE BANKRUPTCY COURT AND MAY BE OVERRULED WITHOUT FURTHER NOTICE. INSTRUCTIONS WITH RESPECT TO THE CONFIRMATION HEARING AND DEADLINES WITH RESPECT TO CONFIRMATION WILL BE INCLUDED IN THE NOTICE OF CONFIRMATION HEARING APPROVED BY THE BANKRUPTCY COURT.

11. Notice Parties

- Debtor: Highland Capital Management, L.P., 300 Crescent Court, Suite 700, Dallas, Texas 75201 (Attn: James P. Seery, Jr.);
- Counsel to the Debtor: Pachulski Stang Ziehl & Jones LLP, 10100 Santa Monica Boulevard, 13th Floor, Los Angeles, California 90067-4003 (Attn: Jeffrey Pomerantz, Esq.; Ira Kharasch, Esq., and Gregory Demo, Esq.);
- Counsel to the Committee: Sidley Austin, LLP, One South Dearborn, Chicago, Illinois 60603 (Attn: Matthew Clemente, Esq., and Alyssa Russell, Esq.); and
- Office of the United States Trustee, 1100 Commerce Street, Room 976, Dallas, Texas 75242 (Attn: Lisa Lambert, Esq.).

12. Effect of Confirmation of the Plan

The Plan contains certain provisions relating to (a) the compromise and settlement of Claims and Equity Interests; (b) exculpation of certain parties; and (c) the release of claims against certain parties by the Debtor.

The Plan shall bind all Holders of Claims against and Equity Interests in the Debtor to the maximum extent permitted by applicable law, notwithstanding whether or not such Holder (i) will receive or retain any property or interest in property under the Plan, (ii) has filed a proof of claim in the Chapter 11 Case, or (iii) did not vote to accept or reject the Plan.

D. Effectiveness of the Plan

It will be a condition to the Effective Date of the Plan that all provisions, terms and conditions of the Plan are approved in the Confirmation Order unless otherwise satisfied or waived pursuant to the provisions of Article IX of the Plan. Following confirmation, the Plan will go into effect on the Effective Date.

E. RISK FACTORS

Each Holder of a Claim or an Equity Interest is urged to consider carefully all of the information in this Disclosure Statement, including the risk factors described in ARTICLE IV herein titled, "Risk Factors."

ARTICLE II.
BACKGROUND TO THE CHAPTER 11 CASE AND SUMMARY OF BANKRUPTCY PROCEEDINGS TO DATE

A. Description and History of the Debtor's Business

Prior to the Petition Date, the Debtor was a multibillion-dollar global alternative investment manager founded in 1993 by James Dondero and Mark Okada. A pioneer in the leveraged loan market, the firm evolved over twenty-five years, building on its credit expertise and value-based approach to expand into other asset classes.

As of the Petition Date, the Debtor operated a diverse investment platform, serving both institutional and retail investors worldwide. In addition to high-yield credit, the Debtor's investment capabilities include public equities, real estate, private equity and special situations, structured credit, and sector- and region-specific verticals built around specialized teams. Additionally, the Debtor provided shared services to its affiliated registered investment advisers.

B. The Debtor's Corporate Structure

The Debtor is headquartered in Dallas, Texas. The Debtor itself is a Delaware limited partnership and one of the principal operating arms of the Debtor's business. As of the Petition Date, the Debtor employed approximately 76 people, including executive-level management employees, finance and legal staff, investment professionals, and back-office accounting and administrative personnel.

Pursuant to various contractual arrangements, the Debtor, as of the Petition Date, provided money management and advisory services for approximately $2.5 billion of assets under management shared services for approximately $7.5 billion of assets managed by a variety of affiliated and unaffiliated entities, including other affiliated registered investment advisors. None of these affiliates filed for Chapter 11 protection. As of September 30, 2020, the Debtor provided money management and advisory services for approximately $1.641 billion of assets under management and shared services for approximately $7.136 billion of assets managed by a variety of affiliated and unaffiliated entities, including other affiliated registered investment advisors. Further, on the Petition Date, the value of the Debtor's Assets was approximately

$566.5 million. As of September 30, 2020, the total value of Debtor's Assets totaled approximately $328.3 million.

The drop in the value of the Debtor's Assets and assets under management was caused, in part, by the COVID-19 global pandemic. Specifically, the decline was the result of, among other things, the drop in value of the Debtor's assets generally, the loss of value in the Prime Accounts discussed below, the professional and other costs associated with the Chapter 11 Case, and the reserve of approximately $59 million against a loan receivable listed as an asset.

Asset	10/16/2019	9/30/2020
Investments (FV)[1]	$232,620,000	$109,479,000
Investments (Equity)	$161,819,000	$101,213,000
Cash/Cash Equivalents	$2,529,000	$5,888,000
Management/Incentive Fees Receivable	$2,579,000	$3,350,000
Fixed Assets, net	$3,754,000	$2,823,000
Loan Receivables	$151,901,000	$93,445,000[2]
Other Assets	$11,311,000	$12,105,000
Totals	$566,513,000	$328,302,000

[1] Includes decrease in value of assets, costs of Chapter 11 Cases, and assets sold to satisfy liabilities.

[2] Net of reserve of $59 million.

The Debtor's organizational chart is attached hereto as Exhibit B. The organizational chart is not all inclusive and certain entities have been excluded for the sake of brevity.

C. Business Overview

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 held through its prime brokerage account at Jefferies, LLC ("Jefferies"), as described in additional detail below. The Debtor would also, from time to time, sell assets at non-Debtor subsidiaries and distribute those proceeds to the Debtor in the ordinary course of business. During calendar year 2018, the Debtor's stand-alone annual revenue totaled approximately $50 million. During calendar year 2019, the Debtor's stand-alone revenue totaled approximately $36.1 million.

D. Prepetition Capital Structure

1. Jefferies Margin Borrowings (Secured)

The Debtor is party to that certain *Prime Brokerage Customer Agreement* with Jefferies dated May 24, 2013 (the "Brokerage Agreement"). Pursuant to the terms of the Brokerage Agreement and related documents, the Debtor maintains a prime brokerage account with

Jefferies (the "Prime Account"). A prime brokerage account is a unique type of brokerage account that allows sophisticated investors to, among other things, borrow both money on margin to purchase securities and common stock to facilitate short positions. A prime brokerage account also serves as a custodial account and holds client securities in the prime broker's street name.

As of the Petition Date, the Debtor held approximately $57 million of equity in liquid and illiquid securities (the "Securities") in the Prime Account. Pursuant to the Brokerage Agreement, the Debtor granted a lien in favor of Jefferies in the Securities and all of the proceeds thereof.

However, because of the economic distress caused by the COVID-19 global pandemic, the value of the Securities held in the Prime Account dropped since the Petition Date, and Jefferies has exerted significant pressure on the Debtor to liquidate the Securities to satisfy margin calls. As of September 30, 2020, the equity value of the Securities in the Prime Account was approximately $23.3 million, and the Debtor owed no amounts to Jefferies. The Debtor has been actively selling Securities to cover operating expenses and professional fees.

2. The Frontier Bank Loan (Secured)

The Debtor and Frontier State Bank ("Frontier Bank") are parties to that certain *Loan Agreement* dated as of August 17, 2015 (the "Original Frontier Loan Agreement"), pursuant to which Frontier Bank loaned to the Debtor the aggregate principal amount of $9.5 million. On March 29, 2018, the Debtor and Frontier Bank entered into that certain First Amended and Restated Loan Agreement (the "Amended Frontier Loan Agreement"), amending and superseding the Original Frontier Loan Agreement. Pursuant to the Amended Frontier Loan Agreement, Frontier Bank made an additional $1 million loan to the Debtor (together with the borrowings under the Original Frontier Loan Agreement, the "Frontier Loan"). The Frontier Loan matures on August 17, 2021.

Pursuant to that certain Security and Pledge Agreement dated August 17, 2015, between Frontier Bank and the Debtor, as amended by the Amended Frontier Loan Agreement, the Debtor's obligations under the Frontier Loan are secured by 171,724 shares of voting common stock of MGM Holdings, Inc. (collectively, the "Frontier Collateral").

The aggregate principal balance of the Frontier Loan was approximately $5.2 million. As of September 30, 2020, the value of the Frontier Collateral was approximately $13.1 million, and approximately $318,000 in postpetition interest had accrued.

3. Other Unsecured Obligations

As discussed below, the Plan provides for four Classes of unsecured claims: (i) PTO Claims, (ii) the Convenience Claims, (iii) the General Unsecured Claims, and (iv) the Subordinated Claims.

The Debtor has various substantial litigation claims asserted against it, which have been classified as General Unsecured Claims. In addition, as of the Petition Date, the Debtor had ordinary course trade debt, unaccrued employee bonus obligations and loan repayment, and

contractual commitments to various affiliated and unaffiliated non-Debtor entities for capital calls, contributions, and other potential reimbursement or funding obligations that were potentially in the tens of millions of dollars. The Debtor is still assessing these claims and its liability for such amounts. These Claims have been classified as Convenience Claims and Subordinated Claims.

4. Equity Interests

The Debtor is a Delaware limited partnership. As of the Petition Date, the Debtor had three classes of limited partnership interest (Class A, Class B, and Class C). The Class A interests were held by The Dugaboy Investment Trust, Mark Okada, personally and through family trusts, and Strand, the Debtor's general partner. The Class B and C interests were held by Hunter Mountain.

In the aggregate, the Debtor's limited partnership interests were held: (a) 99.5% by Hunter Mountain; (b) 0.1866% by The Dugaboy Investment Trust, (c) 0.0627% by Mark Okada, personally and through family trusts, and (d) 0.25% by Strand.

E. SEC Filings

The Debtor is an investment adviser registered with the SEC as required by the Investment Advisers Act of 1940. As a registered investment adviser, the Debtor is required to file (at least annually) a Form ADV. The Debtor's current Form ADV is available at https://adviserinfo.sec.gov/.

Following the Effective Date, it is anticipated that the Reorganized Debtor will maintain its registration with the SEC as a registered investment adviser.

F. Events Leading Up to the Debtor's Bankruptcy Filings

The Chapter 11 Case was precipitated by the rendering of an Arbitration Award (as that term is defined below) against the Debtor on May 9, 2019, by a panel of the American Arbitration Association (the "Panel"), in favor of the Redeemer Committee of the Highland Crusader Fund (the "Redeemer Committee").

The Debtor was formerly the investment manager for the Highland Crusader Funds (the "Crusader Funds") that were formed between 2000 and 2002. In September and October 2008, as the financial markets in the United States began to fail, the Debtor was flooded with redemption requests from Crusader Funds' investors, as the Crusader Funds' assets lost significant value.

On October 15, 2008, the Debtor placed the Crusader Funds in wind-down, thereby compulsorily redeeming the Crusader Funds' limited partnership interests. The Debtor also declared that it would liquidate the Crusader Funds' remaining assets and distribute the proceeds to investors.

However, disputes concerning the distribution of the assets arose among certain investors. After several years of negotiations, a Joint Plan of Distribution of the Crusader Funds

(the "Crusader Plan"), and the Scheme of Arrangement between Highland Crusader Fund and its Scheme Creditors (the "Crusader Scheme"), were adopted in Bermuda and became effective in August 2011. As part of the Crusader Plan and the Crusader Scheme, the Redeemer Committee was elected from among the Crusader Funds' investors to oversee the Debtor's management of the Crusader Funds.

Between October 2011 and January 2013, in accordance with the Crusader Plan and the Crusader Scheme, the Debtor distributed in excess of $1.2 billion to the Crusader Funds' investors. The Debtor distributed a further $315.3 million through June 2016.

However, disputes subsequently arose between the Redeemer Committee and the Debtor. On July 5, 2016, the Redeemer Committee (a) terminated and replaced the Debtor as investment manager of the Crusader Fund, (b) commenced an arbitration against the Debtor (the "Arbitration"), and (c) commenced litigation in Delaware Chancery Court, to, among other things, obtain a status quo order in aid of the arbitration, which order was subsequently entered.

Following an evidentiary hearing, the Panel issued (a) a *Partial Final Award,* dated March 6, 2019 (the "March Award"), (b) a *Disposition of Application for Modification of Award,* dated March 14, 2019 (the "Modification Award"), and (c) a *Final Award,* dated May 9, 2019 (the "Final Award" and together with the March Award and the Modification Award, the "Arbitration Award"). Pursuant to the Arbitration Award, the Redeemer Committee was awarded gross damages against the Debtor in the aggregate amount of $136,808,302; as of the Petition Date, the total value of the Arbitration Award was $190,824,557, inclusive of interest

Prior to the Petition Date, the Redeemer Committee moved in the Chancery Court to confirm the Arbitration Award. For its part, the Debtor moved to vacate parts of the Final Award contending that certain aspects were procedurally improper. The Redeemer Committee's motion to confirm the Arbitration Award and the Debtor's motion to vacate were fully briefed and were scheduled to be heard by the Chancery Court on the day the Debtor filed for bankruptcy

On the Petition Date, the Debtor believed that the aggregate value of its assets exceeded the amount of its liabilities; however, the Debtor filed the Chapter 11 Case because it did not have sufficient liquidity to immediately satisfy the Award or post a supersedeas bond necessary to pursue an appeal.

G. Additional Prepetition Litigation

In addition to the litigation with the Redeemer Committee described above, the Debtor, both directly and through certain subsidiaries, affiliates, and related entities, was party to substantial prepetition litigation. Although the Debtor disputes the allegations raised in this litigation and believes it has substantial defenses, this litigation has resulted in substantial Claims against the Debtor's Estate, each of which has been classified as a General Unsecured Claim. To the extent that these litigation Claims cannot be resolved consensually, they will be litigated by the Claimant Trustee or Reorganized Debtor, as applicable. The Debtor's major prepetition litigation is as follows:

- Redeemer Committee: The dispute with the Redeemer Committee is described in ARTICLE II.F above. As discussed in ARTICLE II.R, the Bankruptcy Court entered an order approving a settlement that resolves the Redeemer Committee's claims against the Estate; however, that order is currently subject to appeal.

- Acis Capital Management, L.P., & Acis Capital Management GP, LLC: On January 30, 2018, Joshua Terry filed involuntary bankruptcy petitions against both Acis Capital Management, L.P. ("Acis LP") and its general partner, Acis Capital Management GP, LLC ("Acis GP," and collectively with Acis LP, "Acis") in the Bankruptcy Court for the Northern District of Texas, Dallas Division, the Honorable Judge Jernigan presiding (the same judge presiding over the Chapter 11 Case), Case No. 18-30264-SGJ (the "Acis Case"). Mr. Terry had been an employee of the Debtor and a limited partner of Acis LP. Mr. Terry was terminated in June 2016, and obtained a multi-million dollar arbitration award against Acis. Overruling various objections, the Bankruptcy Court entered the orders for relief for the Acis debtors in April 2018, and a chapter 11 trustee was appointed. The Debtor filed a proof of claim against Acis and an administrative claim. Acis disputes the Debtor's claim, and the Debtor has not received any distributions on its claim to date. On January 31, 2019, Acis's chapter 11 plan was confirmed, and Mr. Terry become the sole owner of reorganized Acis. Several appeals remain pending, including an appeal of the entry of the Acis orders for relief and the Acis confirmation order.

  The Acis trustee commenced a lawsuit against the Debtor, among others, alleging fraudulent conveyance and other causes of action in relation to the Debtor's alleged prepetition effort to control and transfer away Acis's assets to avoid paying Mr. Terry's claim. After the confirmation of the Acis plan, reorganized Acis allegedly supplanted the Acis Trustee as plaintiff and filed an amended complaint against the Debtor and other defendants, which claims comprise Acis's pending proof of claim against the Debtor.

  As discussed in ARTICLE II.R, the Bankruptcy Court entered an order approving a settlement that resolves Acis's claims against the Estate; however, that order is currently subject to appeal.

- UBS Securities LLC and UBS AG London Branch: UBS Securities LLC ("UBS Securities") filed a proof of claim in the amount of $1,039,957,799.40 [Claim No. 190] (the "UBS Securities Claim"), and UBS AG, London Branch ("UBS London," and together with UBS Securities, "UBS") filed a substantively identical proof of claim in the amount of $1,039,957,799.40 [Claim No. 191] (the "UBS London Claim" and together with the UBS Securities Claim, the "UBS Claim"). The UBS Claim was based on the amount of a judgment UBS received on a breach of contract claim against funds related to the Debtor that were unable to honor margin calls in 2008. Although the Debtor had no obligation under UBS's contracts with the funds, UBS alleges the Debtor is liable for the judgment because it (i) breached an alleged duty to ensure that the funds could pay UBS, (ii) caused or permitted $233 million in alleged fraudulent transfers to be made by

Highland Financial Partners, L.P. ("HFP") in March 2009, and (iii) is an alter ego of the funds. The Debtor believes there are meritorious defenses to most, if not all, of the UBS Claim for numerous reasons, including: (i) decisions by the New York Appellate Division that limited UBS's claims to the March 2009 transfers that it alleges were fraudulent; (ii) those decisions should also apply to any alter ego claim (which at this time has not been formally asserted against the Debtor); (iii) UBS settled claims relating to $172 million of the $233 million in alleged fraudulent transfers and the Debtor is covered by the release; and (iv) the March 2009 transfers were in any event part of a wholly legitimate transaction that did not target UBS and for which HFP received fair consideration. Those and several additional defenses are described in the *Debtor's Objection to Proofs of Claim 190 and 191 of UBS Securities LLC and UBS AG, London Branch* [D.I. 928].

On October 19, 2020, both the Debtor and the Redeemer Committee filed motions seeking partial summary judgment of the UBS Claim, which, if granted, will significantly decrease the UBS Claim.[5] UBS responded to these motions on November 6, 2020 [D.I. 1341]. On November 20, 2020, the Bankruptcy Court granted partial summary judgment in favor of the Debtor and the Redeemer Committee. It is anticipated that the Bankruptcy Court will enter a formal order within the next couple of weeks.

- Patrick Daugherty: Patrick Daugherty has Filed a Proof of Claim for "at least $37,483,876.62" [Claim Nos. 67; 77] (the "Daugherty Claim").[6] Mr. Daugherty is a former limited partner and employee of the Debtor. The Daugherty Claim has three components, and Mr. Daugherty asserts claims: (1) for indemnification for any taxes Mr. Daugherty is required to pay as a result of the IRS audit of the Debtor's 2008-2009 tax return; (2) for defamation arising from a 2017 press release posted by the Debtor; and (3) arising from a pending Delaware lawsuit against the Debtor, which seeks to recover a judgment of $2.6 million in respect of Highland Employee Retention Assets ("HERA"), plus interest, from assets Mr. Daugherty claims were fraudulently transferred to the Debtor. The Daugherty Claim also seeks (a) the value of Mr. Daugherty's asserted interest in HERA, which he values at approximately $26 million; and (b) indemnification for fees incurred in the Delaware action and in previous litigation in Texas State Court. The Debtor believes that the Daugherty Claim should be allowed in the amount of

[5] See *Debtor's Motion for Partial Summary Judgment on Proof of Claim Nos. 190 and 191 of UBS Securities LLC and UBS AG, London Branch* [D.I. 1180]; *Debtor's Opening Brief in Support of Motion for Partial Summary Judgment on Proof of Claim Nos. 190 and 191 of UBS Securities LLC and UBS AG, London Branch* [D.I. 1181]; *Redeemer Committee of the Highland Crusader Fund and the Crusaders Funds' Motion for Partial Summary Judgment on Proof of Claim Nos. 190 and 191 of UBS AG, London Branch and UBS Securities LLC* [D.I. 1183]; and *Redeemer Committee of the Highland Crusader Fund and the Crusaders Funds' Brief in Support of Motion for Partial Summary Judgment and Joinder in the Debtor's Motion for Partial Summary Judgment on Proof of Claim No. 190 and 191 of UBS AG, London Branch and UBS Securities LLC* [D.I. 1186].

[6] On October 23, 2020, Mr. Daugherty filed *Patrick Hagaman Daugherty's Motion for Leave to Amend Proof of Claim No. 77* [D.I. 1280] pursuant to which Mr. Daugherty has asked leave to amend the Daugherty Claim to assert damages of $40,710,819.42. On November 17, 2020, the Bankruptcy Court approved Mr. Daugherty's request to amend the Daugherty Claim from the bench.

$3,722,019; however, the Debtor believes, for various reasons, that the balance of the Daugherty Claim lacks merit. The Debtor's defenses to the Daugherty Claim are described in the *Debtor's (i) Objection to Claim No. 77 of Patrick Hagaman Daugherty and (ii) Complaint to Subordinate Claim of Patrick Hagaman Daugherty* [D.I. 1008].

H. The Debtor's Bankruptcy Proceeding

On October 16, 2019, the Debtor commenced a voluntary case under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Delaware Bankruptcy Court"). On December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Chapter 11 Case to the Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court").[7] The Debtor continues to operate its business and manage its properties as debtor-in-possession under the jurisdiction of the Bankruptcy Court and in accordance with the applicable provisions of the Bankruptcy Code and orders of the Bankruptcy Court.

An immediate effect of commencement of the Chapter 11 Case was the imposition of the automatic stay under the Bankruptcy Code which, with limited exceptions, enjoins the commencement or continuation of all collection efforts, the enforcement of liens against property of the Debtor, and the continuation of litigation against the Debtor during the pendency of the Chapter 11 Case. The automatic stay will remain in effect, unless modified by the Bankruptcy Court, until the later of the Effective Date and the date indicated in any order providing for the implementation of such stay or injunction.

I. First Day Relief

On or about the Petition Date, the Debtor filed certain "first day" motions and applications (the "First Day Motions") with the Delaware Bankruptcy Court seeking certain immediate relief to aid in the efficient administration of this Chapter 11 Case and to facilitate the Debtor's transition to debtor-in-possession status. A brief description of each of the First Day Motions and the evidence in support thereof is set forth in the *Declaration of Frank Waterhouse in Support of First Day Motions* [D.I. 11] (the "First Day Declaration"). At a hearing on October 19, 2019, the Delaware Bankruptcy Court granted virtually all of the relief initially requested in the First Day Motions [D.I. 39, 40, 42-44].

The Delaware Bankruptcy Court subsequently entered an order authorizing the Debtor to pay critical vendor claims on a final basis [D.I. 168]. Following the transfer of the Chapter 11 Case to the Bankruptcy Court, the Bankruptcy Court entered an order authorizing the Debtor to continue its cash management system on a final basis [D.I. 379]

The First Day Motions, the First Day Declaration, and all orders for relief granted in this case can be viewed free of charge at https://www.kccllc.net/hcmlp.

[7] All docket reference numbers refer to the docket maintained by the Bankruptcy Court.

J. Other Procedural and Administrative Motions

On and after the Petition Date, the Debtor also filed a number of motions and applications to retain professionals and to streamline the administration of the Chapter 11 Case, including:

- Interim Compensation Motion. On October 29, 2019, the Debtor filed the *Debtor's Motion Pursuant o Sections 105(a), 330 and 331 of the Bankruptcy Code for Administrative Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals* [D.I. 72] (the "Interim Compensation Motion"). The Interim Compensation Motion sought to establish procedures for the allowance and payment of compensation and reimbursement of expenses for attorneys and other professionals whose retentions are approved by the Bankruptcy Court pursuant to section 327 or 1103 of the Bankruptcy Code and who will be required to file applications for allowance of compensation and reimbursement of expenses pursuant to section 330 and 331 of the Bankruptcy Code. On November 14, 2019, the Delaware Bankruptcy Court entered an order granting the Interim Compensation Motion [D.I. 141].

- Ordinary Course Professionals. On October 29, 2019, the Debtor filed the Motion of the Debtor for an Order Authorizing the Debtor to Retain, Employ, and Compensate Certain Professionals Utilized by the Debtor in the Ordinary Course of Business [D.I. 75] (the "OCP Motion"). The OCP Motion sought authority for the Debtor to retain and compensate certain professionals in the ordinary course of its business. On November 26, 2019, the Delaware Bankruptcy Court entered an order granting the OCP Motion [D.I. 176].

- Retention Applications. During the course of the chapter 11 case, the Delaware Bankruptcy Court or Bankruptcy Court, as applicable, have approved a number of applications by the Debtor seeking to retain certain professionals pursuant to sections 327, 328 and/or 363 of the Bankruptcy Code, including Pachulski Stang Ziehl & Jones LLP as legal counsel [D.I. 183], Development Specialists, Inc. as chief restructuring officer and financial advisor [D.I. 342], Kurtzman Carson Consultants LLC as administrative advisor [D.I. 74], Mercer (US) Inc. as compensation consultant [D.I. 381], Hayward & Associates PLLC as local counsel [D.I. 435], Foley Gardere, Foley & Lardner LLP as special Texas counsel [D.I. 513], Deloitte Tax LLP as tax services provider [D.I. 551], Wilmer Cutler Pickering Hale and Dorr LLP as regulatory and compliance counsel [D.I. 669], and Hunton Andrews Kurth LLP as special tax counsel [D.I. 763].

K. United States Trustee

While the Chapter 11 Case was pending in the Delaware Bankruptcy Court, the U.S. Trustee for Region 3 appointed Jane Leamy as the attorney for the U.S. Trustee in connection with this Chapter 11 Case (the "Delaware U.S. Trustee"). Following the transfer of the Chapter 11 Case to the Bankruptcy Court, the Delaware U.S. Trustee no longer represented the U.S. Trustee, and the U.S. Trustee for Region 6 appointed Lisa Lambert as the attorney for the U.S. Trustee in connection with this Chapter 11 Case (the "Texas U.S. Trustee," and together with the

Delaware U.S. Trustee, the "U.S. Trustee"). The Debtor has worked cooperatively to address concerns and comments from the U.S. Trustee's office during this Chapter 11 Case.

L. Appointment of Committee

On October 29, 2019, the Delaware U.S. Trustee appointed the Committee in this Chapter 11 Case [D.I. 65]. The members of the Committee are (a) Redeemer Committee of Highland Crusader Fund, (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, LLP. Meta-E Discovery is a vendor to the Debtor. The other members of the Committee are litigants in prepetition litigation with the Debtor as described in ARTICLE II.G. The Bankruptcy Court approved the retention of Sidley Austin LLP as counsel to the Committee [D.I. 334], Young Conaway Stargatt & Taylor, LLP as Delaware co-counsel to the Committee [D.I. 337], and FTI Consulting, Inc. as financial advisor to the Committee [D.I. 336].

M. Meeting of Creditors

The meeting of creditors under section 341(a) of the Bankruptcy Code was initially scheduled for November 20, 2019, at 9:30 a.m. (prevailing Eastern Time) at the J. Caleb Boggs Federal Building, 844 N. King Street, Room 3209, Wilmington, Delaware 19801, and was rescheduled to December 3, 2019, at 10:30 a.m. (prevailing Eastern Time). At the meeting of creditors, the Delaware U.S. Trustee and creditors asked questions of a representative of the Debtor.

Following the transfer of the Chapter 11 Case to the Bankruptcy Court, the Texas U.S. Trustee scheduled an additional meeting of creditors under section 341(a) for January 9, 2020, at 11:00 a.m. (prevailing Central Time) at the Office of the U.S. Trustee, 1100 Commerce Street, Room 976, Dallas, Texas 75242, at the conclusion of that meeting, the Texas U.S. Trustee continued the meeting to January 22, 2020. The Texas U.S. Trustee and creditors asked questions of a representative of the Debtor at the January 9 and January 22, 2020 meetings.

N. Schedules, Statements of Financial Affairs, and Claims Bar Date

The Debtor filed its Schedules of Assets and Liabilities and Statements of Financial Affairs (the "Schedules") on December 19, 2019 [D.I. 247-248]. A creditor whose Claim is set forth in the Schedules and not identified as contingent, unliquidated or disputed may have elected to file a proof of claim against the Debtor.

The Bankruptcy Court established (i) April 8, 2020 as the deadline for Creditors (other than governmental units) to file proofs of claim against the Debtor; (ii) April 13, 2020, as the deadline for any governmental unit (as such term is defined in section 101(27) of the Bankruptcy Code), (iii) April 23, 2020, and as the deadline for any investors in any fund managed by the Debtor to file proofs of claim against the Debtor; and (iv) May 26, 2020 as the deadline for the Debtor's employees to file proofs of claim against the Debtor pursuant to and accordance with Court's order entered on April 3, 2020 [D.I. 560].[8] Consequently, the bar date for filing proofs

[8] During the course of its Chapter 11 Case, the Debtor entered into stipulations to extend the Bar Date for certain other claimants or potential claimants.

of claims has passed and any claims filed after the applicable bar date will be considered late filed.

O. Governance Settlement with the Committee

On January 9, 2020, the Bankruptcy Court entered the *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [D.I. 339] (the "Settlement Order").

Among other things, the Settlement Order approved a term sheet (the "Term Sheet") agreed to by the Debtor and the Committee pursuant to which the Debtor agreed to abide by certain protocols governing the production of documents and certain protocols governing the operation of the Debtor's business (the "Operating Protocols"). Under the Operating Protocols, the Debtor agreed to seek consent from the Committee prior to entering into certain "Transactions" (as defined in the Operating Protocols. The Operating Protocols were amended on February 21, 2020, with the consent of the Committee [D.I. 466].

Pursuant to the Term Sheet, the Debtor also granted the Committee standing to pursue certain estate claims and causes of action against Mr. Dondero, Mr. Okada, other insiders of the Debtor, and the Related Entities (as defined in the Operating Protocols) (collectively, the "Estate Claims"). To the extent permitted, the Estate Claims and the ability to pursue the Estate Claims are being transferred to either the Claimant Trust or Litigation Sub-Trust pursuant to the Plan.

In connection with the Settlement Order, an independent board of directors was also appointed at Strand, the Debtor's general partner (the "Independent Board"). The members of the Independent Board are John S. Dubel, James P. Seery, Jr., and Russell Nelms. The Independent Board was tasked with managing the Debtor's operations during the Chapter 11 Case and facilitating a reorganization or orderly liquidation of the Debtor's Estate.

P. Appointment of James P. Seery, Jr., as Chief Executive Officer and Chief Restructuring Officer

Following their appointment in January 2020, the Independent Board determined that it would be more efficient for the Debtor to have a traditional corporate management structure, i.e. a fully engaged chief executive officer supervised by the Independent Board. The Independent Board ultimately determined that Mr. Seery – a member of the Independent Board – had the requisite experience and expertise to lead the Debtor. On June 23, 2020, the Debtor filed *Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc to March 15, 2020* [D.I. 774] (the "Seery Retention Motion") to retain Mr. Seery as chief executive officer, chief restructuring officer, and foreign representative.

The Bankruptcy Court entered an order approving the Seery Retention Motion on July 16, 2020 [D.I. 854]. Mr. Seery was retained as the Debtor's chief executive officer and the duties of Bradley Sharp of DSI as the Debtor's chief restructuring officer and foreign representative were transferred to Mr. Seery.

Q. Mediation

On August 3, 2020, the Bankruptcy Court entered the *Order Directing Mediation* [D.I. 912] pursuant to which the Bankruptcy Court ordered the Debtor, the Committee, UBS, Acis, the Redeemer Committee, and Mr. Dondero into mediation and appointed Sylvia Mayer and Allan Gropper as the mediators (the "Mediators"). The mediation began on August 27, 2020, and is still open as of the date of this Disclosure Statement

R. Postpetition Settlements

1. Settlement with Acis and the Terry Parties

With the assistance of the Mediators, on September 9, 2020, (i) the Debtor, (ii) Acis LP, (iii) Acis GP, and (iv) Joshua N. Terry, individually and for the benefit of his individual retirement accounts, and Jennifer G. Terry, individually and for the benefit of her individual retirement accounts and as trustee of the Terry Family 401-K Plan (together, the "Terry Parties") executed that certain Settlement Agreement and General Release. On September 23, 2020, the Debtor filed the *Debtor's Motion for Entry of an Order Approving Settlement with (a) Acis Capital Management, L.P. and Acis Capital Management GP LLC (Claim No. 23), (b) Joshua N. Terry and Jennifer G. Terry (Claim No. 156), and (c) Acis Capital Management, L.P. (Claim No. 159) and Authorizing Actions Consistent Therewith* [D.I. 1087] (the "Acis Settlement Motion").

The Settlement Agreement and General Release contain the following material terms, among others:

- The proof of claim filed by Acis [Claim No. 23] will be Allowed in the amount of $23,000,000 as a General Unsecured Claim.
- On the Effective Date of the Plan (or any other plan of reorganization confirmed by the Bankruptcy Court), the Debtor will pay in cash to:
    - Mr. and Mrs. Terry in the amount of $425,000 plus 10% simple interest (calculated on the basis of a 360-day year from and including June 30, 2016), in full and complete satisfaction of the proof of claim filed by the Terry Parties [Claim No. 156];
    - Acis LP in the amount of $97,000, which amount represents the legal fees incurred by Acis LP with respect to the N*WCC, LLC v. Highland CLO Management, LLC, et al.*, Index No. 654195/2018 (N.Y. Sup. Ct. 2018), in full and complete satisfaction of the proof of claim filed by Acis LP [Claim No. 159]; and
    - Mr. Terry in the amount of $355,000 in full and complete satisfaction of the legal fees assessed against Highland CLO Funding, Ltd., in *Highland CLO Funding v. Joshua Terry*, [No Case Number], pending in the Royal Court of the Island of Guernsey;

The Settlement Agreement also provides that within five days of the Bankruptcy Court's approval of the Settlement Agreement and the General Release, the Debtor will move to withdraw, with prejudice, the proofs of claim that the Debtor filed in the Acis bankruptcy cases and the motion filed by the Debtor in the Acis bankruptcy cases seeking an administrative claim for postpetition services provided to Acis.

On October 5, 2020, James Dondero filed an objection to the Acis Settlement Motion [D.I. 1121] (the "Dondero Objection"). On October 28, 2020, the Bankruptcy Court entered an order approving the Acis Settlement Motion and overruling the Dondero Objection in its entirety [DI.I. 1347]. On November 9, 2020, Mr. Dondero filed a notice of his intent to appeal the order approving the Acis Settlement Motion.

The foregoing is a summary only, and all parties are encouraged to review the Acis Settlement Motion and related documents for additional information on the Settlement Agreement and General Release.

2. Settlement with the Redeemer Committee

The Debtor, Eames, Ltd., the Redeemer Committee, and the Crusader Funds (collectively, the "Settling Parties") executed a settlement (the "Redeemer Stipulation"). The Redeemer Stipulation was also executed, solely with respect to paragraphs 10 through 15 thereof, by Hockney, Ltd., Strand, Highland CDO Opportunity Master Fund, L.P., Highland Credit Strategies Master Fund, L.P., Highland Credit Opportunities CDO, L.P., House Hanover, LLC, and Alvarez & Marsal CRF Management, LLC (collectively, the "Additional Release Parties"). On September 23, 2020, the Debtor filed *Debtor's Motion for Entry of an Order Approving Settlements with (A) the Redeemer Committee of the Highland Crusader Funds (Claim No. 72), and (B) the Highland Crusader Funds (Claim No. 81), and Authorizing Actions Consistent Therewith* [D.I. 1089] seeking approval of the Redeemer Stipulation (the "Redeemer Settlement Motion").

The Redeemer Stipulation contains the following material terms, among others:

- The proof of claim filed by the Redeemer Committee [Claim No. 72] will be Allowed in the amount of $137,696,610 as a General Unsecured Claim;
- The proof of claim filed by the Crusader Funds [Claim No. 81] will be Allowed in the amount of $50,000 as a General Unsecured Claim;
- The Debtor and Eames, Ltd., each (a) consented to the cancellation of certain interests in the Crusader Funds held by them, and (b) agreed that they will not object to the cancellation of certain interests in the Crusader Funds held by the Charitable Donor Advised Fund;4
- The Debtor and Eames each acknowledged that they will not receive any portion of certain reserved distributions, and the Debtor further acknowledged that it will not receive any payments from the Crusader Funds in respect of any deferred fees, distribution fees, or management fees;

- The Debtor and the Redeemer Committee agreed to a form of amendment to the shareholders' agreement for Cornerstone Healthcare Group and to a process to monetize Cornerstone Healthcare Group;

- Upon the effective date of the Redeemer Stipulation, the Settling Parties and the Additional Release Parties shall exchange releases as set forth in the Redeemer Stipulation; and

- All litigation between the Debtor, Eames, Ltd., and the Additional Highland Release Parties (as defined in the Redeemer Stipulation) on the one hand, and the Redeemer Committee and the Crusader Funds, on the other hand, will cease.

On October 16, 2020, UBS filed an objection to the Redeemer Settlement Motion [D.I. 1190] (the "UBS Objection"). On October 22, 2020, the Bankruptcy Court entered an order approving the Redeemer Settlement Motion and overruling the UBS Objection in its entirety [DI.I. 1273]. On November 6, 2020, UBS filed a notice of its intent to appeal the order approving the Redeemer Settlement Motion.

The foregoing is a summary only, and all parties are encouraged to review the Redeemer Settlement Motion and related documents for additional information on the Redeemer Stipulation.

S. Certain Outstanding Material Claims

As discussed above, April 8, 2020, was the general bar date for filing proofs of claim. The Debtor has begun the process of resolving those Claims. Although each Claim represents a potential liability of the Estate, the Debtor believes that, in addition to UBS's Claim, the Claims filed by Integrated Financial Associates, Inc. ("IFA"), the HarbourVest Entities,[9] and Hunter Mountain represent the largest unresolved Claims against the Estate.

- IFA Proof of Claim. IFA filed a proof of claim [Claim No. 93] (the "IFA Claim") seeking damages in the amount of $241,002,696.73 arising from the purported joint control of the Debtor and NexBank, SSB, and the Debtor's management of various lenders to IFA. The Debtor believes that IFA's claim should be disallowed in its entirety. IFA's claim and the Debtor's defenses thereto are described in greater detail in the *Objection to Proof of Claim No. 93 of Integrated Financial Associates, Inc.* [D.I. 868]. On October 4, 2020, the Bankruptcy Court entered the *Order Approving Stipulation Regarding Proof of Claim No. 93 of Integrated Financial Associates, Inc.* [D.I. 1126], which capped the IFA Claim, for all purposes, at $8,000,000.

- HarbourVest Entities Proofs of Claim. The HarbourVest Entities are investors in Highland CLO Funding, Ltd. ("HCLOF") and filed proofs of claim against the

[9] "HarbourVest Entities" means HarbourVest 2017 Global Fund, L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment, L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners, L.P.

Debtor's Estate [Claim No. 143, 147, 149, 150, 153, 154] (the "HarbourVest Claims"). The Debtor included an assertion of "no liability" in respect of the HarbourVest Claims in its Debtor's *First Omnibus Objection to Certain (a) Duplicate Claims; (b) Overstated Claims; (c) Late-Filed Claims; (d) Satisfied Claims; (e) No-Liability Claims; and (f) Insufficient Documentation Claims* [D.I. 906]. HarbourVest provided a response in its *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [D.I. 1057]. The HarbourVest Entities' response argued that the Debtor's objection should be overruled, and set forth allegations in support of claims under federal and state law and Guernsey law, including claims for fraud, violations of securities laws, breaches of fiduciary duties, and RICO violations. The Debtor intends to vigorously defend the HarbourVest Claims on various grounds, including, among others, the failure to state a claim upon which relief can be granted, the lack of reasonable reliance, the lack of misrepresentations, the lack of reasonable reliance, the failure to mitigate damages, the parties' agreements bar or otherwise limit the Debtor's liability, and waiver and estoppel. The HarbourVest Entities invested approximately $80 million in HCLOF but seek an allowed claim in excess of $300 million dollars (after giving effect to treble damages for the alleged RICO violations).

- Hunter Mountain Proof of Claim. Hunter Mountain is one of the Debtor's limited partners. Hunter Mountain filed a proof of claim [Claim No. 152] seeking a $60,298,739 indemnification claim against the Debtor because of the Debtor's alleged failures to make priority distributions to Hunter Mountain under the Debtor's Partnership Agreement. The Debtor believes that it has meritorious defenses to Hunter Mountain's claim. Hunter Mountain's claim and the Debtor's defenses to such claim are described in greater detail in the *Debtor's (i) Objection to Claim No. 152 of Hunter Mountain Investment Trust and (ii) Complaint to Subordinate Claim of Hunter Mountain Investment Trust and for Declaratory Relief* [D.I. 995]. The Debtor believes that Hunter Mountain's proof of claim should either be disallowed in its entirety or subordinated in its entirety.

In addition to the foregoing, the UBS Claim (in the amount of $1,039,957,799.40) and the Daugherty Claim (in the amount of $40,710,819.42) remain outstanding. As set forth above, partial summary judgment on the UBS Claim was granted in favor of the Debtor and the Redeemer Committee on November 20, 2020, and a formal order is expected to be entered within the next couple of weeks.

The Daugherty Claim has been allowed for voting purposes only in the amount of $9,134,019 [D.I. 1422]. In a bench ruling on November 20, 2020, the Bankruptcy Court allowed UBS Claims for voting purposes only in the amount of $94,761,076 [D.I. 1646].

T. Treatment of Shared Service and Sub-Advisory Agreements

As discussed in the Plan, the Reorganized Debtor will manage the wind down of the Managed Funds. However, it is not anticipated that either the Reorganized Debtor or the

Claimant Trust will assume or assume and assign the contracts between the Debtor and certain Related Entities[10] pursuant to which the Debtor provides shared services and sub-advisory services to those Related Entities.

Currently, the Debtor receives approximately $2.2 million per month in revenue from such contracts. However, in order to service those contracts, the Debtor must maintain a full staff and the cost of providing services under such contracts, among other factors, has historically resulted in a net loss to the Debtor. As such, the Debtor does not believe that assuming these contracts would benefit the Estate.

Further, the contracts generally contain anti-assignment provisions which the Debtor believes may be enforceable under 11 U.S.C. § 365(c). These provisions, therefore, would arguably prevent the assignment of such contracts without the consent of the Debtor's contract counterparty. However, even if 11 U.S.C. § 365(c) would not prevent assignment, the contracts are generally terminable at will by either party. As such, assuming and assigning such contracts without the consent of the contract counterparty would be of nominal or no benefit to the Estate. It is doubtful that any assignee would provide consideration to the Debtor for the assignment of such contract as the contract counterparty could simply terminate the contract immediately following assignment. As such, the Debtor does not believe that there is any benefit to the Estate in attempting to assign these contracts.

Notwithstanding the foregoing disclosure, the Debtor is currently assessing whether it is both possible and in the best interests of the Estate to assume and assign such shared services and sub-advisory agreements to a Related Entity.

During the course of this Chapter 11 Case, Mr. Daugherty stated that he would be willing to assume the Debtor's obligations under the shared service and sub-advisory contracts. The Independent Directors reviewed Mr. Daugherty's proposal and for the foregoing reasons, among others, determined that it was not workable and would provide no benefit to the Estate.

U. Portfolio Managements with Issuer Entities

The Debtor is party to certain portfolio management agreements (including any ancillary agreements relating thereto collectively being the "Portfolio Management Agreements" and each a "Portfolio Management Agreement") with ACIS CLO 2017-7 Ltd., 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, PamCo Cayman Ltd., Rockwall CDO II Ltd., Rockwall CDO Ltd., Southfork CLO Ltd., Stratford CLO Ltd., Westchester CLO, Ltd., Aberdeen Loan Funding, Ltd., Bristol Bay 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. (each an "Issuer" and collectively the "Issuers") wherein the Debtor agreed to generally provide certain services to each Issuer in the Debtor's capacity as a portfolio manager in exchange for certain fees as described in the applicable Portfolio Management Agreement.

[10] For the avoidance of doubt, the Debtor does not consider any of the Issuers (as defined herein) to be a Related Entity.

The Issuers filed proofs of claim [Claim No. 165, 168, and 169] asserting claims against the Debtor for damages arising from, relating to or otherwise concerning (i) such Issuer's Portfolio Management Agreement(s) with the Debtor, including, without limitation, failure to perform or other breach of the Portfolio Management Agreement(s), rejection of the Portfolio Management Agreement(s), any cure amount as a result of assumption of the Portfolio Management Agreement(s), any adequate assurance of future performance as a result of assumption of the Portfolio Management Agreement(s), and any failure to provide and pay for indemnification or other obligations under the Portfolio Management Agreement(s); and (ii) the action or inaction of the Debtor to the detriment of such Issuer (collectively, the "Issuer Claims"). The Debtor believes that it has satisfied its obligations to the Issuers; that the Issuer Claims lack merit; and that the Debtor will have no liability with respect to the Issuer Claims. However, such proofs of claim remain outstanding.

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.

V. Resignation of James Dondero

On October 9, 2020, Mr. Dondero resigned as an employee and portfolio manager of the Debtor.

W. Exclusive Periods for Filing a Plan and Soliciting Votes

Under the Bankruptcy Code, a debtor has the exclusive right to file and solicit acceptance of a plan or plans of reorganization for an initial period of 120 days from the date on which the debtor filed for voluntary relief. If a debtor files a plan within this exclusive period, then the debtor has the exclusive right for 180 days from the petition date to solicit acceptances to the plan. During these exclusive periods, no other party in interest may file a competing plan of reorganization; however, a court may extend these periods upon request of a party in interest and "for cause."

The Debtor filed motions to extend the exclusive period, and the Bankruptcy Court entered the following orders granting such applications:

- Order Granting Debtor's Motion for Entry of an Order Pursuant to 11 U.S.C. § 1121(d) and Local Rule 3016-1 Extending the Exclusivity Periods for the Filing and Solicitation of Acceptances of a Chapter 11 Plan [D.I. 460];

- Agreed Order Extending Exclusive Periods by Thirty Days [D.I. 668];

- Order Granting Debtor's Third Motion for Entry of an Order Pursuant to 11 U.S.C. § 1121(d) and Local Rule 3016-1 Further Extending the Exclusivity Periods for the Filing and Solicitation of Acceptances of a Chapter 11 Plan [D.I. 820]; and

- Order Further Extending the Debtor's Exclusive Period for Solicitation of Acceptance of a Chapter 11 Plan [D.I. 1092].

Pursuant to the foregoing orders, the Bankruptcy Court extended the exclusivity period through June 12, 2020, for the filing of a plan, which was subsequently extended through July 13, 2020, and again through August 12, 2020. The Bankruptcy Court also extended the exclusivity period for the solicitation of votes to accept such plan through August 11, 2020, which was subsequently extended through September 10, 2020, and again through October 13, 2020, and December 4, 2020.

X. Negotiations with Constituents

The Debtor, Mr. Dondero, and certain of the creditors have been negotiating a consensual reorganization plan for the Debtor that contemplates the Debtor continuing its business largely in its current form. Those negotiations have yet to reach conclusion but are continuing, and the negotiations were part of the previously discussed mediation. There is no certainty that those negotiations will reach a consensual resolution of the Debtor's bankruptcy case.

Y. 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 of the Pension Plan. As such, the PBGC asserts that Debtor is liable to contribute to the Pension Plan the amounts necessary to satisfy the minimum funding standards in ERISA and the Internal Revenue Code of 1986, as amended ("IRC"). *See* 29 U.S.C. §§ 1082, 1083; 26 U.S.C. §§ 412, 430. As the sponsor of the Pension Plan, the PBGC asserts Debtor is also liable for insurance premiums owed to PBGC. *See* 29 U.S.C. §§ 1306, 1307. The PBGC asserts that any members of the contributing sponsor's controlled-group within the meaning of 29 U.S.C. §§ 1301(a)(13), (14) are also jointly and severally liable with the Debtor for such obligations relating to the Pension Plan.

The Pension Benefit Guaranty Corporation ("PBGC"), the federal agency that administers the pension insurance program under Title IV of ERISA, filed contingent proofs of claims against the Debtors for (1) the Pension Plan's potential underfunded benefit liabilities; (2) the potential unliquidated unpaid minimum funding contributions owed to the Pension Plan; and (3) the potential unliquidated insurance premiums owed to PBGC. The PBGC acknowledges that, as of the date of this Disclosure Statement, there is nothing currently owed by the Debtor to the PBGC.

The Debtor reserves the right to contest any claims filed by the PBGC for any reason.

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.

No provision contained in the Disclosure Statement, the Plan, the Confirmation Order, or the Bankruptcy Code (including section 1141 thereof), shall be construed as discharging, releasing, exculpating, or relieving any person or entity, including 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, government 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 for satisfaction, release, injunction, exculpation, and discharge of claims in the Plan, Confirmation Order, or the Bankruptcy Code.

ARTICLE III.
SUMMARY OF THE PLAN

THIS ARTICLE III IS INTENDED ONLY TO PROVIDE A SUMMARY OF THE MATERIAL TERMS OF THE PLAN AND IS QUALIFIED BY REFERENCE TO THE ENTIRE DISCLOSURE STATEMENT AND THE PLAN AND SHOULD NOT BE RELIED ON FOR A COMPREHENSIVE DISCUSSION OF THE PLAN. TO THE EXTENT THERE ARE ANY INCONSISTENCIES OR CONFLICTS BETWEEN THIS ARTICLE III AND THE PLAN, THE TERMS AND CONDITIONS SET FORTH IN THE PLAN SHALL CONTROL AND GOVERN.

A. Administrative and Priority Tax Claims

1. 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.

2. 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.

3. 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, or (b) 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.

B. Classification and Treatment of Classified Claims and Equity Interests

1. 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.

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

2. 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.

3. 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.

Please refer to "Distribution of Confirmation Hearing Notice and Solicitation Package to Holders of Claims and Equity Interests" and "Instructions and Procedures for Voting" in ARTICLE I.C.7 and ARTICLE I.C.8 for a discussion of how the how votes on the Plan will be solicited and tabulated.

4. 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.

5. 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.

6. Cramdown

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

C. 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 the 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 the 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 the Plan.

  The New Frontier Note will include the following terms: (i) an extension of the maturity date to December 31, 2022; (ii) quarterly interest only payments; (iii) a payment on the New Frontier Note equal to fifty percent of the outstanding principal on December 31, 2021, if the New Frontier Note is not paid in full on or prior to such date; (iv) mandatory prepayments from the proceeds of the sale of any collateral securing the New Frontier Note; and (v) the payment of fees and expenses incurred in negotiating the terms of the New Frontier Note.

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 the 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 the 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 the 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 the 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 the 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 the 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 the 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 the Plan and will not be solicited.

  "*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.

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 the Plan.

"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.

"*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.

By making the GUC Election on their Ballots, each Holder of a Convenience Claim can elect the treatment provided to General Unsecured Claims.

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 the Convenience Class Election.

Notwithstanding anything to the contrary herein, after the Effective Date and subject to the other provisions of the 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 the Plan.

"*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.

"*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.

9. *Class 9 – Subordinated Claims*

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

- *Treatment*: On or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 9 Claim, in full satisfaction, settlement, discharge and release of, and in exchange for, such Claim shall receive either (i) the treatment provided to Allowed Class 8 Claims or (ii) if such Allowed Class 9 Claim is subordinated to the Convenience Claims and General Unsecured Claims pursuant to 11 U.S.C. § 510 or Final Order of the Bankruptcy Court, its 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 shall have agreed upon in writing.

Notwithstanding anything to the contrary herein, after the Effective Date and subject to the other provisions of the 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 the Plan.

"*Subordinated Claim*" means any Claim that (i) is or may be subordinated to the Convenience Claims and General Unsecured Claims pursuant to 11 U.S.C. § 510 or Final Order of the Bankruptcy Court or (ii) arises from a

Class A Limited Partnership Interest or a Class B/C Limited Partnership Interest.

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 the 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 the 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 the 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 the Plan.

D. 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.

E. 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, 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.

F. Means for Implementation of the Plan

1. Summary

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 the 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 the Plan and the Claimant Trust Agreement.

2. The Claimant Trust[11]

(a) *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

[11] 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.

Trust Agreement and shall include the authority and responsibility to, among other things, take the actions set forth in Article IV of the Plan, 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 Article IV of the Plan, 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.

(a) *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.

(b) *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 the 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 of the Plan.

(c) *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.

(d) *Claimant Trust Agreement and Litigation Sub-Trust Agreement.*

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

- the payment of the Claimant Trust Expenses;
- the payment of other reasonable expenses of the Claimant Trust;
- the retention of employees, counsel, accountants, financial advisors, or other professionals and the payment of their reasonable compensation;
- the investment of Cash by the Claimant Trustee within certain limitations, including those specified in the Plan;
- the orderly monetization of the Claimant Trust Assets;
- 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;
- the resolution of Claims and Equity Interests in Class 8 through Class 11, subject to reporting and oversight by the Claimant Trust Oversight Committee;

- the administration of the Disputed Claims Reserve and distributions to be made therefrom; and

- 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 Expenses 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. 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 Litigation Sub-Trust Agreement generally will provide for, among other things:

- the payment of other reasonable expenses of the Litigation Sub-Trust;

- the retention of employees, counsel, accountants, financial advisors, or other professionals and the payment of their reasonable compensation; and

- 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.

(e) *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.

(f) *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.

(g) *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.

(h) *Tax Reporting.*

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.

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.

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.

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

(i) *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 the 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.

(j) *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.

(k) *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.

(l) *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.

(m) *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 Clamant 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.

3. The Reorganized Debtor

(a) *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.

(b) *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.

(c) *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.

(d) *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.

(e) *Vesting of Assets in the Reorganized Debtor*

Except as otherwise provided in the 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 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.

(f) *Purpose of the Reorganized Debtor*

Except as may be otherwise provided in the 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

(g) *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 of the Plan, (ii) deemed Claimant Trust Assets, and (iii) administered as Claimant Trust Assets.

4. 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 the 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 the 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 the 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 the 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 the 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.

5. 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 of the Plan.

6. 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, 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. 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 of the Plan.

7. 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.

8. Control Provisions

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

9. Treatment of Vacant Classes

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

10. 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 of the Plan) and fully enforceable as if stated in full herein.

11. 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.

A. Treatment of Executory Contracts and Unexpired Leases

1. 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 a Final Order of the Bankruptcy Court entered prior to the Effective 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 Supplement, on the Effective 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 Effective 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* [D.I. 1122].

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

Any Executory Contract or Unexpired Lease not assumed or rejected on or before the Effective 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 the 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 the Plan.

3. 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 the 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 Article V.C of the Plan 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 Article V.C of the Plan, shall be deemed disallowed and expunged as of the Effective Date without the need for any objection thereto or any further notice to or action, order, or approval of the Bankruptcy Court.

B. Provisions Governing Distributions

1. Dates of Distributions

Except as otherwise provided in the 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 the 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 the 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 the Plan. Except as otherwise provided in the 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 the 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 the Plan and in the Confirmation Order. All payments and all distributions made by the Distribution Agent under the 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 the Plan to such Persons or the date of such distributions.

2. Distribution Agent

Except as provided herein, all distributions under the 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 the 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 the Plan, or as deemed by the Distribution Agent to be necessary and proper to implement the provisions of the Plan.

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.

3. 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.

4. 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.

As used above, "*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.

"*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.

HarbourVest and Mr. Daugherty have objected to the mechanisms for calculating the amount of the Disputed Claims Reserve with respect to the HarbourVest Claim and the Daugherty Claim, respectively, and intend to press their objections at the hearing for confirmation of the Plan.

5. 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 the Plan, within 30 days of the date on which such Disputed Claim becomes an Allowed Claim pursuant to the terms of the 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.

6. Rounding of Payments

Whenever the 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 the Plan remains undistributed as a result of the aforementioned rounding, such Cash or stock shall be treated as "Unclaimed Property" under the Plan.

7. *De Minimis* Distribution

Except as to any Allowed Claim that is Unimpaired under the 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.I of the Plan 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.

8. Distributions on Account of Allowed Claims

Except as otherwise agreed by the Holder of a particular Claim or as provided in the Plan, all distributions shall be made pursuant to the terms of the Plan and the Confirmation Order. Except as otherwise provided in the 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).

9. General Distribution Procedures

The Distribution Agent shall make all distributions of Cash or other property required under the Plan, unless the 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 the Plan shall not be subject to any claim by any Person.

10. Address for Delivery of Distributions

Distributions to Holders of Allowed Claims, to the extent provided for under the 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.

11. 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 the 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.

12. Withholding Taxes

In connection with the 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 the 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 the Plan, the Distribution Agent may require that the Holder of an Allowed Claim entitled to receive a distribution pursuant to the 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 the Plan.

13. 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 the 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 the 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.

14. Surrender of Cancelled Instruments or Securities

As a condition precedent to receiving any distribution pursuant to the Plan on account of an Allowed Claim evidenced by negotiable instruments, securities, or notes canceled pursuant to Article IV of the 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.

15. 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 the 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 the 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 the Plan, be deemed to have surrendered such security or note to the Distribution Agent.

C. Procedures for Resolving Contingent, Unliquidated and Disputed Claims

1. 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.

2. 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 or any other appropriate motion or adversary proceeding with respect thereto, which shall be litigated to Final Order 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 the Plan.

3. 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.

4. 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.

Allowance of Claims

After the Effective Date and subject to the other provisions of the 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 the 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 the 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.

Estimation

Subject to the other provisions of the 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 the 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.

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.

D. Effectiveness of the Plan

1. Conditions Precedent to the Effective Date

The Effective Date of the 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 the Plan of the following:

- the Plan and the Plan Documents, including the Claimant Trust Agreement and the Reorganized Limited Partnership Agreement, and all schedules, documents, supplements and exhibits to the Plan shall have been Filed in form and substance reasonably acceptable to the Debtor and the Committee.

- The Confirmation Order shall have been entered, not subject to stay pending appeal, 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 the 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 the Plan, (b) assuming the Executory Contracts and Unexpired Leases set forth in the Plan Supplement, (c) making all distributions and issuances as required under the Plan; and (d) entering into any transactions as set forth in the Plan Documents; (ii) the provisions of the Confirmation Order and the Plan are nonseverable and mutually dependent; (iii) the implementation of the 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 the Plan, including any deeds, bills of sale, or assignments executed in connection with any disposition or transfer of Assets contemplated under the 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 the Plan upon the Effective Date.

- All documents and agreements necessary to implement the 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 the 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 Professional Fee Reserve shall be funded pursuant to the Plan in an amount determined by the Debtor in good faith.

2. Waiver of Conditions

The conditions to effectiveness of the Plan set forth in Article VIII of the Plan (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 the 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.

3. Effect of Non-Occurrence of Conditions to Effectiveness

Unless waived as set forth in Article VIII.B of the Plan, if the Effective Date of the Plan does not occur within twenty calendar days of entry of the Confirmation Order, the Debtor may withdraw the Plan and, if withdrawn, the Plan shall be of no further force or effect.

4. 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.

E. Exculpation, Injunction, and Related Provisions

1. 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.

For purposes of the following provisions:

- "*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."

- "*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.

- "*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."

2. 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 the Plan or the 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 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.

3. 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. 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 the Plan, including Article IV.C.2 of the Plan, protecting such Exculpated Parties from liability.

4. 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 Article IX.D of the Plan (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 Article IX.D of the Plan will vest and the Employee will be indefeasibly released pursuant to Article IX.D of the Plan 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).

In addition to the obligations set forth in Article IX.D of the Plan, as additional consideration for the foregoing releases, the Senior Employees will waive their rights to certain deferred compensation owed to them by the Debtor. As of the date hereof, the total deferred compensation owed to the Senior Employees was approximately $3.9 million, which will be reduced by approximately $2.2 million to approximately $1.7 million. That reduction is composed of a reduction of (i) approximately $560,000 in the aggregate in order to qualify as Convenience Claims, (ii) approximately $510,000 in the aggregate to reflect the Convenience Claims treatment of 85% (and may be lower depending on the number of Convenience Claims), and (iii) of approximately $1.15 million in the aggregate to reflect an additional reduction of 40%.

As of the date of this Disclosure Statement, the Debtor has not identified any Causes of Action against any Released Parties. However, as set forth above, during the Chapter 11 Case, the Committee was granted sole standing to investigate and pursue the Estate Claims, which may include Causes of Action against certain of the Released Parties. As of the date of this Disclosure Statement, the Committee has not identified any Estate Claims against any Released Parties. The Debtor currently believes that there are no material Estate Claims or other Causes of Action against any Released Party.

5. Preservation of Rights of Action

Maintenance of Causes of Action

Except as otherwise provided in the 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.

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 the 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 the Plan based on the Disclosure Statement, the Plan or the Confirmation Order, except where such Causes of Action have been expressly released in the 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.

6. Injunction

Upon entry of the Confirmation Order, all holders of Claims and Equity Interests and other parties in interest, along with their respective Related Persons, shall be enjoined 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 Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor (whether proof of such Claims or Equity Interests has been filed or not 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) and other parties in interest, along with their respective Related Persons, are permanently enjoined, on and after the Effective Date, with respect to such Claims and Equity Interests, 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, (iii) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind 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, (iv) asserting any right of setoff, directly or indirectly, against any obligation due from the Debtor, the Independent Directors, the Reorganized Debtor, or the Claimant Trust or against property or interests in 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.

The injunctions set forth herein shall extend to any successors of the Debtor, the Reorganized Debtor, and the Claimant Trust and their respective property and interests in property.

Subject in all respects to Article XII. D of the Plan, no Entity may commence or pursue a claim or cause of action of any kind against any Protected Party that arose 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 transactions in furtherance of the foregoing without the Bankruptcy 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; *provided, however,* the foregoing will not apply to 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. As set forth in Article XI of the Plan, 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.

7. Term of Injunctions or Stays

Unless otherwise provided in the Plan, the Confirmation Order, or in a Final Order of the Bankruptcy Court, all injunctions or stays arising under or entered during the Chapter 11 Case under section 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect until the later of the Effective Date and the date indicated in the order providing for such injunction or stay.

8. Continuance of January 9 Order

Unless otherwise provided in the Plan, 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 until the dissolution of each of the Claimant Trust and the Litigation Trust.

F. Article XII.D of the Plan

Article XII.D of the Plan provides that, notwithstanding anything in the Plan to the contrary, nothing in the Plan 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.

G. 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 of the Plan, 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 the 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 nay taxes of the kind specified in Bankruptcy Code section 1146(a)

H. Statutory Requirements for Confirmation of the Plan

At the Confirmation Hearing, the Bankruptcy Court will determine whether the Plan satisfies the requirements of section 1129 of the Bankruptcy Code. The Debtor believes that: (i) the Plan satisfies or will satisfy all of the statutory requirements of chapter 11 of the Bankruptcy Code; (ii) the Debtor has complied or will have complied with all of the requirements of chapter 11 of the Bankruptcy Code; and (iii) the Plan has been proposed in good faith. Specifically, the Debtor believes that the Plan satisfies or will satisfy the applicable confirmation requirements of section 1129 of the Bankruptcy Code set forth below.

- The Plan complies with the applicable provisions of the Bankruptcy Code;
- The Debtor has complied and will comply with the applicable provisions of the Bankruptcy Code;
- The Plan has been proposed in good faith and not by any means forbidden by law;
- Any payment made or promised under the Plan for services or for costs and expenses in, or in connection with, the Debtor's bankruptcy case, or in connection with the Plan and incident to the case, has been or will be disclosed to the Bankruptcy Court, and any such payment: (i) made before the confirmation of the Plan is reasonable; or (ii) is subject to the

approval of the Bankruptcy Court as reasonable if it is to be fixed after confirmation of the Plan;

- Each Class of Claims or Equity Interests that is entitled to vote on the Plan will have accepted the Plan, or the Plan can be confirmed without the approval of such voting Class pursuant to section 1129(b) of the Bankruptcy Code;

- Except to the extent that the Holder of a particular Claim will agree to a different treatment of its Claim, the Plan provides that Administrative Expense Claims and Priority Claims will be paid in full in Cash on the Effective Date, or as soon thereafter as is reasonably practicable;

- Confirmation of the Plan will not likely be followed by the liquidation or the need for further financial reorganization of the Debtor or any successor thereto under the Plan;

- The Debtor has paid or will pay all fees payable under section 1930 of title 28, and the Plan provides for the payment of all such fees on the Effective Date; and

- The Plan provides for the continuation after the Effective Date of payment of all retiree benefits, if applicable.

1. Best Interests of Creditors Test

Often called the "best interests" test, section 1129(a)(7) of the Bankruptcy Code requires that the bankruptcy court find, as a condition to confirmation of a chapter 11 plan, that each holder of a claim or equity interest in each impaired class: (i) has accepted the plan; or (ii) among other things, will receive or retain under the plan property of a value, as of the effective date of the plan, that is not less than the amount that such Person would receive if the debtor were liquidated under chapter 7 of the Bankruptcy Code. To make these findings, the Bankruptcy Court must: (a) estimate the net Cash proceeds (the "Liquidation Proceeds") that a chapter 7 trustee would generate if the Debtor's Chapter 11 Case were converted to a chapter 7 case on the Effective Date and the assets of such Debtor's Estate were liquidated; (b) determine the distribution (the "Liquidation Distribution") that each non-accepting Holder of a Claim or Equity Interest would receive from the Liquidation Proceeds under the priority scheme dictated in chapter 7; and (c) compare each Holder's Liquidation Distribution to the distribution under the Plan that such Holder would receive if the Plan were confirmed and consummated.

2. Liquidation Analysis

Any liquidation analysis, including the estimation of Liquidation Proceeds and Liquidation Distributions, with respect to the Debtor (the "Liquidation Analysis") is subject to numerous assumptions and there can be no guarantee that the Liquidation Analysis will be accurate. No order or finding has been entered by the Bankruptcy Court estimating or otherwise fixing the amount of Claims and Equity Interests at the projected amounts of Allowed Claims

and Equity Interests set forth in the Liquidation Analysis. In preparing the Liquidation Analysis, the Debtor has projected an amount of Allowed Claims and Equity Interests that represents its best estimate of the chapter 7 liquidation dividend to Holders of Allowed Claims and Equity Interests. The estimate of the amount of Allowed Claims and Equity Interests set forth in the Liquidation Analysis should not be relied on for any other purpose, including, without limitation, any determination of the value of any Plan Distribution to be made on account of Allowed Claims and Equity Interests under the Plan and Disclosure Statement.

The full Liquidation Analysis is attached hereto as **Exhibit C**.

Furthermore, any chapter 7 trustee appointed in a chapter 7 liquidation would have to confront all of the issues described in this Disclosure Statement, including the prepetition litigation claims. This process would be significantly time-consuming and costly, and reduce any recoveries available to the Debtor's Estate. The Debtor believes that liquidation under chapter 7 would result in (i) smaller distributions being made to creditors than those provided for in the Plan because of the additional administrative expenses involved in the appointment of a trustee and attorneys and other professionals to assist such trustee, (ii) additional expenses and claims, some of which would be entitled to priority, which would be generated during the liquidation and from the rejection of executory contracts in connection with the cessation of the Debtor's operations, and (iii) the failure to realize greater value from all of the Debtor's assets.

Therefore, the Debtor believes that confirmation of the Plan will provide each Holder of a Claim with a greater recovery than such Holder would receive pursuant to the liquidation of the Debtor under chapter 7 of the Bankruptcy Code.

3. Feasibility

Section 1129(a)(11) of the Bankruptcy Code requires that the bankruptcy court find that confirmation is not likely to be followed by the liquidation, or the need for further financial reorganization of the Debtor, or any successor to the Debtor, unless the plan contemplates such liquidation or reorganization. For purposes of demonstrating that the Plan meets this "feasibility" standard, the Debtor has analyzed the ability of the Claimant Trust and the Reorganized Debtor to meet their obligations under the Plan and to retain sufficient liquidity and capital resources to conduct their business. A copy of the financial projections prepared by the Debtor is attached hereto as **Exhibit C**.

The Debtor believes that the Plan meets the feasibility requirement set forth in section 1129(a)(11) of the Bankruptcy Code. In connection with the development of the Plan and for the purposes of determining whether the Plan satisfies this feasibility standard, the Debtor analyzed their ability to satisfy their financial obligations while maintaining sufficient liquidity and capital resources. The Debtor believes that its available Cash and any additional proceeds from the Debtor's Assets will be sufficient to allow the Debtor, the Reorganized Debtor, and the Claimant Trust, as applicable, to make all payments required to be made under the Plan. Accordingly, the Debtor believes that the Plan is feasible.

4. Valuation

In order to provide information and full disclosure to parties in interest regarding the Debtor's assets, the Debtor estimates that its value and the total value of its Assets, as of September 30, 2020, was approximately $328.3 million.

5. Acceptance by Impaired Classes

The Bankruptcy Code requires, as a condition to confirmation, that, except as described in the following section, each class of claims or equity interests that is impaired under a plan, accepts the plan. A class that is not "impaired" under a plan is deemed to have accepted the plan and, therefore, solicitation of acceptances with respect to such class is not required. A class is "impaired" unless the plan: (i) leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest; or (ii) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default— (a) cures any such default that occurred before or after the commencement of the Chapter 11 Case, 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) expressly does not require to be cured; (b) reinstates the maturity of such claim or interest as such maturity existed before such default; (c) compensates the holder of such claim or interest for any damages incurred as a result of any reasonable reliance by such holder on such contractual provision or such applicable law; (d) if such claim or such interest arises from any failure to perform a nonmonetary obligation, other than a default arising from failure to operate a nonresidential real property lease subject to section 365(b)(1)(A), compensates the holder of such claim or such interest (other than the debtor or an insider) for any actual pecuniary loss incurred by such holder as a result of such failure; and (e) does not otherwise alter the legal, equitable, or contractual rights to which such claim or interest entitles the holder of such claim or interest.

Section 1126(c) of the Bankruptcy Code defines acceptance of a plan by a class of impaired claims as acceptance by holders of at least two-thirds in dollar amount and more than one-half in number of claims in that class, but for that purpose counts only those who actually vote to accept or to reject the plan and are not insiders. Section 1126(d) of the Bankruptcy Code defines acceptance of a plan by a class of equity interests as acceptance by holders of at least two-thirds in amount of the allowed interests of such class. Thus, a class of claims will have voted to accept the plan only if two-thirds in amount and a majority in number actually voting cast their ballots in favor of acceptance. Section 1126(d) of the Bankruptcy Code, except as otherwise provided in section 1126(e) of the Bankruptcy Code, defines acceptance of a plan by a class of impaired equity interests as acceptance by holders of at least two-thirds in amount of equity interests in that class actually voting to accept or to reject the plan.

Pursuant to section 1129 of the Bankruptcy Code, the Holders of Claims or Equity Interests in any voting class must accept the Plan for the Plan to be confirmed without application of the "fair and equitable test" to such Class, and without considering whether the Plan "discriminates unfairly" with respect to such Class, as both standards are described herein.

6. Confirmation Without Acceptance by Impaired Classes

Section 1129(b) of the Bankruptcy Code allows a bankruptcy court to confirm a plan even if less than all impaired classes entitled to vote on the plan have accepted it, *provided* that the plan has been accepted by at least one impaired class of claims. Pursuant to section 1129(b) of the Bankruptcy Code, notwithstanding an impaired Class's rejection or deemed rejection of the Plan, the Plan will be confirmed, at the Debtor's request, in a procedure commonly known as "cram down," so long as the Plan does not "discriminate unfairly" and is "fair and equitable" with respect to each Class of Claims or Equity Interests that is impaired under, and has not accepted, the Plan.

7. No Unfair Discrimination

This test applies to classes of claims or equity interests that are of equal priority and are receiving different treatment under the Plan. The test does not require that the treatment be the same or equivalent, but that such treatment be "fair." In general, bankruptcy courts consider whether a plan discriminates unfairly in its treatment of classes of claims of equal rank (e.g., classes of the same legal character). Bankruptcy courts will take into account a number of factors in determining whether a plan discriminates unfairly and, accordingly, a plan could treat two classes of unsecured creditors differently without unfairly discriminating against either class.

8. Fair and Equitable Test

This test applies to classes of different priority and status (e.g., secured versus unsecured) and includes the general requirement that no class of claims receive more than 100% of the amount of the allowed claims in such class. As to the dissenting class, the test sets different standards depending on the type of claims or equity interests in such class:

The condition that a plan be "fair and equitable" to a non-accepting Class of Secured Claims includes the requirements that: (a) the Holders of such Secured Claims retain the liens securing such Claims to the extent of the Allowed amount of the Claims, whether the property subject to the liens is retained by the debtor or transferred to another entity under the Plan; and (b) each Holder of a Secured Claim in the Class receives deferred Cash payments totaling at least the Allowed amount of such Claim with a present value, as of the Effective Date of the Plan, at least equivalent to the value of the secured claimant's interest in the debtor's property subject to the liens.

The condition that a plan be "fair and equitable" with respect to a non-accepting Class of unsecured Claims includes the requirement that either: (a) the plan provides that each Holder of a Claim of such Class receive or retain on account of such Claim property of a value, as of the Effective Date of the plan, equal to the allowed amount of such Claim; or (b) the Holder of any Claim or Equity Interest that is junior to the Claims of such Class will not receive or retain under the plan on account of such junior Claim or Equity Interest any property.

The condition that a plan be "fair and equitable" to a non accepting Class of Equity Interests includes the requirements that either: (a) the plan provides that each Holder of an Equity Interest in that Class receives or retains under the plan, on account of that Equity Interest, property of a value, as of the Effective Date of the plan, equal to the greater of (i) the allowed

amount of any fixed liquidation preference to which such Holder is entitled, (ii) any fixed redemption price to which such Holder is entitled, or (iii) the value of such interest; or (b) if the Class does not receive such an amount as required under (a), no Class of Equity Interests junior to the non-accepting Class may receive a distribution under the plan.

To the extent that any class of Claims or Class of Equity Interests rejects the Plan, the Debtor reserves the right to seek (a) confirmation of the Plan under section 1129(b) of the Bankruptcy Code and/or (b) modify the Plan in accordance with Article XIII.C of the Plan.

The Debtor believes that the Plan and the treatment of all Classes of Claims and Equity Interests under the Plan satisfy the foregoing requirements for non-consensual confirmation of the Plan.

ARTICLE IV.
RISK FACTORS

ALL HOLDERS OF CLAIMS AND EQUITY INTERESTS SHOULD READ AND CONSIDER CAREFULLY THE RISK FACTORS SET FORTH HEREIN, AS WELL AS ALL OTHER INFORMATION SET FORTH OR OTHERWISE REFERENCED IN THIS DISCLOSURE STATEMENT. THESE FACTORS SHOULD NOT BE REGARDED AS CONSTITUTING THE ONLY RISKS PRESENT IN CONNECTION WITH THE DEBTOR'S BUSINESS OR THE PLAN AND ITS IMPLEMENTATION.

A. Certain Bankruptcy Law and Other Considerations

1. Parties in Interest May Object to the Debtor's Classification of Claims and Equity Interests, or Designation as Unimpaired.

Section 1122 of the Bankruptcy Code provides that a plan may place a claim or an equity interest in a particular class only if such claim or equity interest is substantially similar to the other claims or equity interests in such class. The Debtor believes that the classification of Claims and Equity Interests under the Plan complies with the requirements set forth in the Bankruptcy Code because the Debtor created Classes of Claims and Equity Interests, each encompassing Claims or Equity Interests, as applicable, that are substantially similar to the other Claims and Equity Interests in each such Class. Nevertheless, there can be no assurance that the Holders of Claims or Equity Interests or the Bankruptcy Court will reach the same conclusion.

There is also a risk that the Holders of Claims or Equity Interests could object to the Debtor's designation of Claims or Equity Interests as Unimpaired, and the Bankruptcy Court could reach the same conclusion.

2. The Debtor May Not Be Able to Secure Confirmation of the Plan.

Section 1129 of the Bankruptcy Code sets forth the requirements for confirmation of a chapter 11 plan and requires, among other things, findings by the bankruptcy court that: (i) such plan "does not unfairly discriminate" and is "fair and equitable" with respect to any non-accepting classes; (ii) confirmation of such plan is not likely to be followed by a liquidation or a

need for further financial reorganization unless such liquidation or reorganization is contemplated by the plan; and (c) the value of distributions to Holders of Claims within a particular class under such plan will not be less than the value of distributions such holders would receive if the debtor was liquidated under chapter 7 of the Bankruptcy Code.

There can be no assurance that the Bankruptcy Court will confirm the Plan. The Bankruptcy Court could decline to confirm the Plan if it found that any of the statutory requirements for confirmation had not been met.

If the Plan is not confirmed by the Bankruptcy Court, there can be no assurance that any alternative plan of reorganization or liquidation would be on terms as favorable to Holders of Claims as the terms of the Plan. In addition, there can be no assurance that the Debtor will be able to successfully develop, prosecute, confirm and consummate an alternative plan that is acceptable to the Bankruptcy Court and the Debtor's creditors.

3. The Conditions Precedent to the Effective Date of the Plan May Not Occur.

As more fully set forth in Article IX of the Plan, the Effective Date of the Plan is subject to a number of conditions precedent. If such conditions precedent are not waived or not met, the Effective Date will not take place.

4. Continued Risk Following Effectiveness.

Even if the Effective Date of the Plan occurs, the Debtor, the Reorganized Debtor, and Claimant Trust will continue to face a number of risks, including certain risks that are beyond its control, such as changes in assets, asset values, and increasing expenses. Some of these concerns and effects typically become more acute when a case under the Bankruptcy Code continues for a protracted period without indication of how or when the case may be completed. As a result of these risks and others, there is no guarantee that a chapter 11 plan of liquidation reflecting the Plan will achieve the Debtor's stated goals.

In addition, at the outset of the Chapter 11 Case, the Bankruptcy Code provides the Debtor with the exclusive right to propose the Plan and prohibits creditors and others from proposing a plan. The Debtor will have retained the exclusive right to propose the Plan upon filing its petition. If the Bankruptcy Court terminates that right, however, or the exclusivity period expires, there could be a material adverse effect on the Debtor's ability to achieve confirmation of the Plan in order to achieve the Debtor's stated goals.

5. The Effective Date May Not Occur.

Although the Debtor believes that the Effective Date may occur quickly after the Confirmation Date, there can be no assurance as to such timing or as to whether the Effective Date will, in fact, occur.

6. The Chapter 11 Case May Be Converted to Cases Under Chapter 7 of the Bankruptcy Code

If the Bankruptcy Court finds that it would be in the best interest of creditors and/or the debtor in a chapter 11 case, the Bankruptcy Court may convert a chapter 11 bankruptcy case to a case under chapter 7 of the Bankruptcy Code. In such event, a chapter 7 trustee would be appointed or elected to liquidate the debtor's assets for distribution in accordance with the priorities established by the Bankruptcy Code. The Debtor believes that liquidation under chapter 7 would result in significantly smaller distributions being made to creditors than those provided for in the Plan because of (a) the likelihood that the assets would have to be sold or otherwise disposed of in a disorderly fashion over a short period of time, rather than selling the assets in an orderly and controlled manner, (b) additional administrative expenses involved in the appointment of a chapter 7 trustee, and (c) additional expenses and Claims, some of which would be entitled to priority, that would be generated during the liquidation.

7. Claims Estimation

There can be no assurance that the estimated Claim amounts set forth herein are correct, and the actual amount of Allowed Claims may differ from the estimates. The estimated amounts are subject to certain risks, uncertainties, and assumptions. Should one or more of these risks or uncertainties materialize, or should underlying assumptions prove incorrect, the actual amount of Allowed Claims may vary from those estimated herein.

8. The Financial Information Contained Herein is Based on the Debtor's Books and Records and, Unless Otherwise Stated, No Audit was Performed.

The financial information contained in this Disclosure Statement has not been audited. In preparing this Disclosure Statement, the Debtor relied on financial data derived from their books and records that was available at the time of such preparation. Although the Debtor has used its reasonable business judgment to ensure the accuracy of the financial information provided in this Disclosure Statement and, while the Debtor believes that such financial information fairly reflects its financial condition, the Debtor is unable to warrant or represent that the financial information contained herein and attached hereto is without inaccuracies.

B. Risks Related to Recoveries under the Plan

1. The Reorganized Debtor and/or Claimant Trust May Not Be Able to Achieve the Debtor's Projected Financial Results

The Reorganized Debtor or Claimant Trust, as applicable, may not be able to achieve their projected financial results. The Financial Projections represent the best estimate of the Debtor's future financial performance, which is necessarily based on certain assumptions regarding the anticipated future performance of the Reorganized Debtor or Claimant Trust, as well as the United States and world economies in general, and the investment industry in which the Debtor operates. The Debtor's Financial Projections include key assumptions on (i) target asset monetization values, (ii) timing of asset monetization, and (iii) costs to effectuate the Plan. In terms of achieving target asset monetization values, the Debtor faces issues including investment assets with cross-ownership across related entities and challenges associated with

collecting notes due from affiliates. The Debtor's Financial Projections anticipate that all investment assets will be sold by 2022, which may be at risk due to the semi-liquid or illiquid nature of the Debtor's assets, as well as general market conditions, including the sustained impact of COVID-19. Costs are based on estimates and may increase with delays or any other unforeseen factor. If the Reorganized Debtor or Claimant Trust do not achieve their projected financial results, the recovery for Claimant Trust Beneficiaries may be negatively affected and the Claimant Trust may lack sufficient liquidity after the Effective Date.

2. Claim Contingencies Could Affect Creditor Recoveries

The estimated Claims and projected creditor recoveries set forth in this Disclosure Statement are based on various assumptions the actual amount of Allowed Claims may differ from the estimates. Should one or more of the underlying assumptions ultimately prove incorrect, the actual Allowed amounts of Claims may vary materially from the estimated Claims contained in this Disclosure Statement. Moreover, the Debtor cannot determine with any certainty at this time, the number or amount of Claims that will ultimately be Allowed. Such differences may materially and adversely affect, among other things, the percentage recoveries to Holders of Allowed Claims under the Plan.

3. If Approved, the Debtor Release Could Release Claims Against Potential Defendants of Estate Causes of Action With Respect to Which the Claimant Trust Would Otherwise Have Recourse

The Claimant Trust Assets will include, among other things, Causes of Action, including Estate Claims that will be assigned to the Litigation Sub-Trust. The Committee's investigation of potential Estate Claims is still ongoing. Because the Committee has not concluded its investigation as of the date hereof, and such investigation will be transferred to the Litigation Trustee, there is no certainty of whether there are viable Estate Claims against any of the Released Parties. In the event there are viable Estate Claims against any of the Released Parties, such claims cannot be pursued for the ultimate benefit of Claimant Trust Beneficiaries if the Debtor Release is approved.

C. Investment Risk Disclaimer

1. Investment Risks in General.

The Reorganized Debtor is and will remain a registered investment adviser under the Investment Advisers Act of 1940, and the Reorganized Debtor will continue advising the Managed Funds. No guarantee or representation is made that the Reorganized Debtor's or the Managed Funds' investment strategy will be successful, and investment results may vary substantially over time.

2. General Economic and Market Conditions and Issuer Risk.

Any investment in securities carries certain market risks. Investments by the Reorganized Debtor, the Managed Funds, or the Claimant Trust may decline in value for any number of reasons over which none of the Managed Funds, the Reorganized Debtor, the Claimant Trust, or the Claimant Trustee may have control, including changes in the overall

market and other general economic and market conditions, such as interest rates, availability of credit, inflation rates, economic uncertainty, changes in laws, currency exchange rates and controls and national, international political circumstances (including wars and security operations), and acts of God (including pandemics like COVID-19). The value of the Managed Funds or the assets held by the Reorganized Debtor or Claimant Trust may also decline as a result of factors pertaining to particular securities held by the Managed Funds, Reorganized Debtor, or Claimant Trust, as applicable, such as perception or changes in the issuer's management, the market for the issuer's products or services, sources of supply, technological changes within the issuer's industry, the availability of additional capital and labor, general economic conditions, political conditions, acts of God, and other similar conditions. All of these factors may affect the level and volatility of security prices and the liquidity and the value of the securities held by the Managed Fund, Reorganized Debtor, or Claimant Trust. Unexpected volatility or illiquidity could impair the Managed Funds', Reorganized Debtor's, or Claimant Trust's profitability or result in it suffering losses.

D. Disclosure Statement Disclaimer

1. The Information Contained Herein is for Disclosure Purposes Only.

The information contained in this Disclosure Statement is for purposes of disclosure in connection with the Plan and may not be relied upon for any other purposes.

2. This Disclosure Statement was Not Approved by the SEC.

Neither the SEC nor any state regulatory authority has passed upon the accuracy or adequacy of this Disclosure Statement, or the exhibits or the statements contained herein, and any representation to the contrary is unlawful.

3. This Disclosure Statement Contains Forward-Looking Statements.

This Disclosure Statement contains "forward-looking statements" within the meaning of the Private Securities Litigation Reform Act of 1995. Such statements consist of any statement other than a recitation of historical fact and can be identified by the use of forward looking terminology such as "may," "expect," "anticipate," "estimate" or "continue" or the negative thereof or other variations thereon or comparable terminology. The reader is cautioned that all forward-looking statements are necessarily speculative and there are certain risks and uncertainties that could cause actual events or results to differ materially from those referred to in such forward-looking statements.

4. No Legal or Tax Advice is Provided to You by This Disclosure Statement.

This Disclosure Statement is not legal or tax advice to you. The contents of this Disclosure Statement should not be construed as legal, business or tax advice, and are not personal to any person or entity. Each Holder of a Claim or an Equity Interest should consult his or her own legal counsel and accountant with regard to any legal, tax and other matters concerning his or her Claim or Equity Interest. This Disclosure Statement may not be relied upon for any purpose other than as a disclosure of certain information to determine how to vote on the Plan or object to confirmation of the Plan.

5. No Admissions Are Made by This Disclosure Statement.

The information and statements contained in this Disclosure Statement will neither (i) constitute an admission of any fact or liability by any Entity (including, without limitation, the Debtor) nor (ii) be deemed evidence of the tax or other legal effects of the Plan on the Debtor, the Reorganized Debtor, the Claimant Trust, Holders of Allowed Claims or Equity Interests, or any other parties in interest.

6. No Reliance Should Be Placed on Any Failure to Identify Litigation Claims or Projected Objections.

No reliance should be placed on the fact that a particular litigation claim or projected objection to a particular Claim or Equity Interest is, or is not, identified in this Disclosure Statement. The Debtor or the Reorganized Debtor or Claimant Trustee, as applicable, may seek to investigate, file and prosecute litigation rights and claims against any third parties and may object to Claims after the Confirmation Date or Effective Date of the Plan irrespective of whether the Disclosure Statement identifies such litigation claims or objections to Claims or Equity Interests.

7. Nothing Herein Constitutes a Waiver of Any Right to Object to Claims or Equity Interests or Recover Transfers and Assets.

The Debtor, the Reorganized Debtor, the Claimant Trustee, or any party in interest, as the case may be, reserve any and all rights to object to that Holder's Allowed Claim regardless of whether any Claims or Causes of Action of the Debtor or its Estate are specifically or generally identified herein.

8. The Information Used Herein was Provided by the Debtor and was Relied Upon by the Debtor's Advisors.

Counsel to and other advisors retained by the Debtor have relied upon information provided by the Debtor in connection with the preparation of this Disclosure Statement. Although counsel to and other advisors retained by the Debtor have performed certain limited due diligence in connection with the preparation of this Disclosure Statement, they have not verified independently the information contained herein.

9. The Disclosure Statement May Contain Inaccuracies.

The statements contained in this Disclosure Statement are made by the Debtor as of the date hereof, unless otherwise specified herein, and the delivery of this Disclosure Statement after that date does not imply that there has not been a change in the information set forth herein since that date. While the Debtor has used its reasonable business judgment to ensure the accuracy of all of the information provided in this Disclosure Statement and in the Plan, the Debtor nonetheless cannot, and does not, confirm the current accuracy of all statements appearing in this Disclosure Statement. Further, the information contained in this Disclosure Statement is as of the date of the Disclosure Statement and does not address events that may occur after such date. The Debtor may update this Disclosure Statement but is not required to do so.

10. No Representations Made Outside the Disclosure Statement Are Authorized.

No representations concerning or relating to the Debtor, the Chapter 11 Case, or the Plan are authorized by the Bankruptcy Court or the Bankruptcy Code, other than as set forth in this Disclosure Statement. You should promptly report unauthorized representations or inducements to the counsel to the Debtor and the U.S. Trustee.

ARTICLE V.
ALTERNATIVES TO CONFIRMATION AND EFFECTIVENESS OF THE PLAN

If no chapter 11 plan can be confirmed, the Chapter 11 Case may be converted to a case under chapter 7 of the Bankruptcy Code in which case, a trustee would be elected or appointed to liquidate the Debtor's assets. If the Plan is not confirmed by the Bankruptcy Court, there can be no assurance that any alternative plan of reorganization or liquidation would be on terms as favorable to Holders of Claims as the terms of the Plan. In addition, there can be no assurance that the Debtor will be able to successfully develop, prosecute, confirm and consummate an alternative plan that is acceptable to the Bankruptcy Court and the Debtor's creditors.

ARTICLE VI.
U.S. FEDERAL INCOME TAX CONSEQUENCES OF THE PLAN

Implementation of the Plan will have federal, state, local or foreign tax consequences to the Debtor and Holders of Equity Interests as well as Holders of Claims. No tax opinion or ruling has been sought or will be obtained with respect to any tax consequences of the Plan, and the following discussion does not constitute and is not intended to constitute either a tax opinion or tax advice to any person.

The following discussion summarizes certain U.S. federal income tax consequences of the Plan to the Debtor and to Holders of Claims. This discussion assumes that each Holder of Claims is for United States federal income tax purposes:

- An individual who is a citizen or resident of the United States for federal income tax purposes;
- a corporation (or other entity treated as a corporation for United States federal income tax purposes) created or organized in or under the laws of the United States, any state thereof or the District of Columbia;
- any other person that is subject to U.S. federal income taxation on a net income basis.
- an estate the income of which is subject to United States federal income tax without regard to its source; or
- a trust (1) that is subject to the primary supervision of a United States court and the control of one or more United States persons or (2) that has a valid election in effect under applicable treasury regulations to be treated as a United States person.

This discussion also assumes that each Holder holds the Claims as capital assets under Section 1221 of the Internal Revenue Code.

The summary provides general information only and does not purport to address all of the federal income tax consequences that may be applicable to the Debtor or to any particular Holder of Claims in light of such Holder's own individual circumstances. In particular, the summary does not address the federal income tax consequences of the Plan to Holders of Claims that may be subject to special rules, such as non-U.S. persons, insurance companies, financial institutions, regulated investment companies, broker-dealers, persons who acquired Claims as part of a straddle, hedge, conversion transaction or other integrated transaction, or persons who acquired Claims in connection with the performance of services; persons who hold Claims through a partnership or other pass-through entity and tax-exempt organizations. The summary does not address foreign, state, local, estate or gift tax consequences of the Plan, nor does it address the federal income tax consequences to Holders of Equity Interests.

This summary is based on the Internal Revenue Code of 1986, as amended (the "Internal Revenue Code"), the final, temporary and proposed Treasury regulations promulgated thereunder, judicial decisions and administrative rulings and pronouncements of the Internal Revenue Service ("IRS"), all as in effect on the date hereof and all of which are subject to change (possibly with retroactive effect) by legislation, judicial decision or administrative action. Moreover, due to a lack of definitive authority, substantial uncertainties exist with respect to various tax consequences of the Plan.

THE TAX CONSEQUENCES TO THE HOLDERS OF CLAIMS OR EQUITY INTERESTS MAY VARY BASED UPON THE INDIVIDUAL CIRCUMSTANCES OF EACH HOLDER. MOREOVER, THE TAX CONSEQUENCES OF CERTAIN ASPECTS OF THE PLAN ARE UNCERTAIN DUE TO THE LACK OF APPLICABLE LEGAL PRECEDENT AND THE POSSIBILITY OF CHANGES IN THE APPLICABLE TAX LAW. THERE CAN BE NO ASSURANCE THAT THE IRS WILL NOT CHALLENGE ANY OF THE TAX CONSEQUENCES DESCRIBED HEREIN, OR THAT SUCH A CHALLENGE, IF ASSERTED, WOULD NOT BE SUSTAINED. ACCORDINGLY, EACH HOLDER OF A CLAIM OR EQUITY INTEREST SHOULD CONSULT WITH ITS OWN TAX ADVISOR REGARDING THE FOREIGN, FEDERAL, STATE AND LOCAL TAX CONSEQUENCES OF THE PLAN.

A. Consequences to the Debtor

It is anticipated that the consummation of the Plan will not result in any federal income tax liability to the Debtor. The Debtor is a partnership for federal income tax purposes. Therefore, the income and loss of the Debtor is passed-through to the Holders of its Equity Interests, and the Debtor does not pay federal income tax.

1. Cancellation of Debt

Generally, the discharge of a debt obligation of a debtor for an amount less than the adjusted issue price (in most cases, the amount the debtor received on incurring the obligation, with certain adjustments) creates cancellation of indebtedness ("COD") income that must be included in the debtor's income. Due to the nature of the Impaired Claims, it is anticipated that

the Debtor will not recognize any material amount of COD income. If any such COD income is recognized, it will be passed-through to the Holders of its Equity Interests, and the Holders of such Equity Interest generally will be required to include such amounts in income, unless a Holder is entitled to exclude such amounts from income under Section 108 of the Internal Revenue Code, based on the Holder's individual circumstances.

2. Transfer of Assets

Pursuant to the Plan, the Debtor's assets (including the Claimant Trust Assets and Reorganized Debtor Assets) will be transferred directly or indirectly to the Claimant Trust. For federal income tax purposes, any such assets transferred to the Claimant Trust will be deemed to have been transferred to the Claimant Trust Beneficiaries followed by the transfer by such Holders to the Claimant Trust of such assets in exchange for the respective Holders' beneficial interests in the Claimant Trust. The Claimant Trust thereafter will be treated as a grantor trust for federal income tax purposes. See U.S. Federal Income Tax Treatment of the Claimant Trust, below.

The Debtor's transfer of its assets pursuant to the Plan will constitute a taxable disposition of such assets. As discussed above, the Debtor is a partnership for federal income tax purposes. Any gain or loss recognized as a result of the taxable disposition of such assets will be passed through to the Holders of Equity Interests in the Debtor. The Debtor will not be required to pay any tax as a result of such disposition.

B. U.S. Federal Income Tax Treatment of the Claimant Trust

It is intended that the Claimant Trust will be treated as a "grantor trust" for U.S. federal income tax purposes. In general, a grantor trust is not a separate taxable entity. The IRS, in Revenue Procedure 94-45, 1994-2 C.B. 684, set forth the general criteria for obtaining an advanced ruling as to the grantor trust status of a liquidating trust under a chapter 11 plan. Consistent with the requirements of Revenue Procedure 94-45, the Claimant Trust Agreement requires all relevant parties to treat, for U.S. federal income tax purposes, the transfer of the Debtor's assets to the Claimant Trust as (i) a transfer of such assets to the Claimant Trust Beneficiaries (to the extent of the value of their respective interests in the applicable Claimant Trust Assets) followed by (ii) a transfer of such assets by such beneficiaries to the Claimant Trust (to the extent of the value of their respective interests in the applicable Claimant Trust Assets), with the beneficiaries being treated as the grantors and owners of the Claimant Trust.

The Plan and the Claimant Trust Agreement generally provide that the Claimant Trust Beneficiaries must value the assets of the Claimant Trust consistently with the values determined by the Claimant Trustee for all U.S. federal income tax purposes. As soon as possible after the Effective Date, the Claimant Trustee, based upon his good faith determination after consultation with his counsel and other advisors, shall inform the beneficiaries in writing as to his estimate of the value of the assets transferred to the Claimant Trust and the value of such assets allocable to each Class of beneficiaries.

Consistent with the treatment of the Claimant Trust as a grantor trust, the Claimant Trust Agreement will require each beneficiary to report on its U.S. federal income tax return its allocable share of the Claimant Trust's income, gain, loss or deduction that reflects the

beneficiary's interest in the interim and final distributions to be made by the Claimant Trust. Furthermore, certain of the assets of the Claimant Trust will be interests in the Reorganized Debtor, which will be a partnership for U.S. federal income tax purposes. The income, gain, loss or deduction of the Reorganized Debtor will also flow through the Claimant Trust to the beneficiaries of the Claimant Trust. Therefore, a beneficiary may incur a federal income tax liability with respect to its allocable share of the income of the Claimant Trust (including the income of the Reorganized Debtor) whether or not the Claimant Trust has made any distributions to such beneficiary. The character of items of income, gain, deduction, and credit to any beneficiary and the ability of such beneficiary to benefit from any deduction or losses will depend on the particular situation of such beneficiary. The interests of the beneficiaries may shift from time to time as the result of the allowance or disallowance of claims that have not been allowed at the Effective Date, which could give rise to tax consequences both to the Holders of claims that have, and have not been, allowed at the Effective Date. The Claimant Trustee will file with the IRS tax returns for the Claimant Trust as a grantor trust pursuant to Treasury Regulation Section 1.671-4(a) and will also send to each beneficiary a separate statement setting forth such beneficiary's share of items of Trust income, gain, loss, deduction, or credit. Each beneficiary will be required to report such items on its U.S. federal income tax return. Holders are urged to consult their tax advisors regarding the appropriate federal income tax treatment of distributions from the Claimant Trust.

The discussion above assumes that the Claimant Trust will be respected as a grantor trust for U.S. federal income tax purposes. If the IRS were to challenge successfully such classification, the U.S. federal income tax consequences to the Claimant Trust and the beneficiaries could differ materially from those discussed herein (including the potential for an entity level tax to be imposed on all income of the Claimant Trust).

C. Consequences to Holders of Allowed Claims

1. Recognized Gain or Loss

In general, each Holder of an Allowed Claim will recognize gain or loss in an amount equal to the difference between (i) the "amount realized" by such Holder in satisfaction of its Claim (other than any Claim for accrued but unpaid interest) and (ii) such holder's adjusted tax basis in such Claim (other than any Claim for accrued but unpaid interest). In general, the "amount realized" by a Holder will equal the sum of any cash and the aggregate fair market value of any property received by such Holder pursuant to the Plan (for example, such Holder's undivided beneficial interest in the assets of the Claimant Trust). A Holder that receives or is deemed to receive for U.S. federal income tax purposes a non-cash asset under the Plan in respect of its Claim should generally have a tax basis in such asset in an amount equal to the fair market value of such asset on the date of its receipt or deemed receipt. See U.S. Federal Income Tax Treatment of the Claimant Trust, above for more information regarding the tax treatment of the Claimant Trust Interests.

Where gain or loss is recognized by a Holder, the character of such gain or loss as long-term or short-term capital gain or loss or as ordinary income or loss will be determined by a number of factors, including the tax status of the Holder, whether the claim constitutes a capital asset in the hands of the Holder and how long it has been held, whether the claim was acquired at

a market discount, and whether and to what extent the Holder had previously claimed a bad debt deduction.

A Holder who, under the Plan, receives in respect of an Allowed Claim an amount less than the Holder's tax basis in the Allowed Claim may be entitled to a deduction for U.S. federal income tax purposes. The rules governing the character, timing and amount of such a deduction place considerable emphasis on the facts and circumstances of the Holder, the obligor and the instrument with respect to which a deduction is claimed. Holders of Allowed Claims, therefore, are urged to consult their tax advisors with respect to their ability to take such a deduction.

2. Distribution in Discharge of Accrued Unpaid Interest

Pursuant to the Plan, a distribution received in respect of Allowed Claims will be allocated first to the principal amount of such Claims, with any excess allocated to unpaid accrued interest. However, there is no assurance that the IRS would respect such allocation for federal income tax purposes. In general, to the extent that an amount received (whether cash or other property) by a Holder of a claim is received in satisfaction of interest that accrued during its holding period, such amount will be taxable to the Holder as interest income if not previously included in the Holder's gross income. Conversely, a Holder generally recognizes a deductible loss to the extent that it does not receive payment of interest that has previously been included in its income. Holders of Claims are urged to consult their tax advisors regarding the allocation of consideration and the deductibility of unpaid interest for tax purposes.

3. Information Reporting and Withholding

All distributions to Holders of Allowed Claims under the Plan are subject to any applicable withholding tax requirements. Under federal income tax law, interest, dividends, and other reportable payments, may, under certain circumstances, be subject to "backup withholding" (currently at a rate of up to 24%). Backup withholding generally applies if the Holder (a) fails to furnish its social security number or other taxpayer identification number ("TIN"), (b) furnishes an incorrect TIN, (c) fails properly to report interest or dividends, or (d) under certain circumstances, fails to provide a certified statement, signed under penalty of perjury, that the TIN provided is its correct number and that it is not subject to backup withholding. Backup withholding is not an additional tax but merely an advance payment, which may be refunded to the extent it results in an overpayment of tax. Certain persons are exempt from backup withholding, including, in certain circumstances, corporations and financial institutions.

D. Treatment of the Disputed Claims Reserve

Pursuant to the Plan, 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. Such taxes will be paid out of the Disputed Claims Reserve and therefore may reduce amounts paid to Holders of Allowed Claims from the Claimant Trust. If the Claimant Trustee does not make such an election to treat the Disputed Claims Reserve as a separate taxable entity, the net income, if any, earned in the Disputed Claims Reserve will be taxable to the Holders of Allowed Claims in accordance with

the principles discussed above under the heading "U.S. Federal Income Tax Treatment of the Claimant Trust", possibly in advance of any distributions to the Holders.

AS INDICATED ABOVE, THE FOREGOING IS INTENDED TO BE A SUMMARY ONLY AND NOT A SUBSTITUTE FOR CAREFUL TAX PLANNING WITH A TAX PROFESSIONAL. THE TAX CONSEQUENCES OF THE PLAN ARE COMPLEX AND, IN SOME CASES, UNCERTAIN. ACCORDINGLY, EACH HOLDER OF A CLAIM OR EQUITY INTEREST IS STRONGLY URGED TO CONSULT WITH HIS OWN TAX ADVISOR REGARDING THE TAX CONSEQUENCES OF THE PLAN.

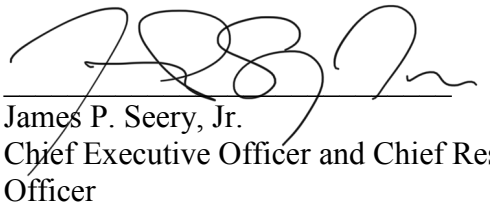
ARTICLE VII.
RECOMMENDATION

In the opinion of the Debtor, the Plan is preferable to the alternatives described in this Disclosure Statement because it provides for the highest distribution to the Debtor's creditors and interest holders. In addition, any alternative other than confirmation of the Plan could result in extensive delays and increased administrative expenses resulting in smaller distributions to Holders of Allowed Claims and Equity Interests than that which is proposed under the Plan. Accordingly, the Debtor recommends that all Holders of Claims and Equity Interests support confirmation of the Plan.

Dated: November 24, 2020

Respectfully submitted,

HIGHLAND CAPITAL MANAGEMENT, L.P.



James P. Seery, Jr.
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EXHIBIT A

PLAN OF REORGANIZATION

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.

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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*" means an "affiliate" as defined in section 101(2) of the Bankruptcy Code and also includes any other Entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such affiliate. For the purposes of this definition, the term "control" (including the terms "controlled by" and "under common control with") 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 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. "*Entity*" means any "entity" as defined in section 101(15) of the Bankruptcy Code and also includes any Person or any other entity.

57. "*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.

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

59. "*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.

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

61. "*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."

62. "*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.

63. "*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.

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

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

66. "*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.

67. "*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.

68. "*General Partner Interest*" means the Class A Limited Partnership Interest held by Strand, as the Debtor's general partner.

69. "*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.

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

71. "*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.

72. "*Holder*" means an Entity holding a Claim against, or Equity Interest in, the Debtor.

73. "*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.

74. "*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.

75. "*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.

76. "*Insurance Policies*" means all insurance policies maintained by the Debtor as of the Petition Date.

77. "*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.

78. "*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.

79. "*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.

80. "*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.

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

82. "*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.

83. "*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.

84. "*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.

85. "*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.

86. "*New GP LLC Documents*" means the charter, operating agreement, and other formational documents of New GP LLC.

87. "*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].

88. "*Other Unsecured Claim*" means any Secured Claim other than the Jefferies Secured Claim and the Frontier Secured Claim.

89. *"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.

90. "*Petition Date*" means October 16, 2019.

91. "*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.

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

93. "*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.

94. "*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.

95. "*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.

96. "*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.

97. "*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.

98. "*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.

99. "*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.

100. "*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.

101. "*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.

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

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

104. "*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."

105. "*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.

106. "*Reduced Employee Claims*" has the meaning set forth in ARTICLE IX.D.

107. "*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.

108. "*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.

109. "*Related Entity*" means, without duplication, (a) James Dondero, (b) Mark Okada, (c) Grant Scott, (d) Hunter Covitz, (e) any entity or person that was an insider of the

Debtor on the Petition Date under Section 101(31) of the Bankruptcy Code, including any non-statutory insider, (f) any entity that, after the Effective Date, is controlled directly or indirectly by James Dondero, including, without limitation, The Dugaboy Investment Trust, (g) the Hunter Mountain Investment Trust and any of its direct or indirect parents, and (h) the Charitable Donor Advised Fund, L.P., and any of its direct or indirect subsidiaries.

110. "*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 and former officers, directors, employees, managers, managing members, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, employees, subsidiaries, divisions, management companies, and other representatives, in each case solely in their capacity as such.

111. "*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.

112. "*Reorganized Debtor*" means the Debtor, as reorganized pursuant to this Plan on and after the Effective Date.

113. "*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.

114. "*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.

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

116. "*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.

117. "*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].

118. "*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.

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

120. "*Senior Employees*" means the senior employees of the Debtor Filed in the Plan Supplement.

121. "*Senior Employee Stipulation*" means the agreements filed in the Plan Supplement between each Senior Employee and the Debtor.

122. "*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.

123. "*Statutory Fees*" means fees payable pursuant to 28 U.S.C. § 1930.

124. "*Strand*" means Strand Advisors, Inc., the Debtor's general partner.

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

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

127. "*Subordinated Claim*" means any Claim that (i) is or may be subordinated to the Convenience Claims and General Unsecured Claims pursuant to 11 U.S.C. § 510 or Final Order of the Bankruptcy Court or (ii) arises from a Class A Limited Partnership Interest or a Class B/C Limited Partnership Interest.

128. "*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.

129. "*Trust Distribution*" means the transfer of Cash or other property by the Claimant Trustee to the Claimant Trust Beneficiaries.

130. "*Trustees*" means, collectively, the Claimant Trustee and Litigation Trustee.

131. "*UBS*" means, collectively, UBS Securities LLC and UBS AG London Branch.

132. "*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.

133. "*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.

134. "*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.

135. "*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, or (b) 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 or as soon as reasonably practicable after the Effective Date, each Holder of an Allowed Class 9 Claim, in full satisfaction, settlement, discharge and release of, and in exchange for, such Claim shall receive either (i) the treatment provided to Allowed Class 8 Claims or (ii) if such Allowed Class 9 Claim is subordinated to the Convenience Claims and General Unsecured Claims pursuant to 11 U.S.C. § 510 or Final Order of the Bankruptcy Court, its 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 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 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, 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.

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 Trust[2]

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

[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.

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 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 Expenses 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. 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 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 Clamant 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.

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 a Final Order of the Bankruptcy Court entered prior to the Effective 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 Supplement, on the Effective 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 Effective 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 Effective 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 Effective 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 or any other appropriate motion or adversary proceeding with respect thereto, which shall be litigated to Final Order 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 been entered, not subject to stay pending appeal, 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 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. Effect of Non-Occurrence of Conditions to Effectiveness

Unless waived as set forth in ARTICLE VIII.B, if the Effective Date of this Plan does not occur within twenty calendar days of entry of the Confirmation Order, the Debtor may withdraw this Plan and, if withdrawn, the Plan shall be of no further force or effect.

D. 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)-(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. 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 holders of Claims and Equity Interests and other parties in interest, along with their respective Related Persons, shall be enjoined 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 Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor (whether proof of such Claims or Equity Interests has been filed or not 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) and other parties in interest,

along with their respective Related Persons, are permanently enjoined, on and after the Effective Date, with respect to such Claims and Equity Interests, 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, (iii) creating, perfecting, or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind 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, (iv) asserting any right of setoff, directly or indirectly, against any obligation due from the Debtor, the Independent Directors, the Reorganized Debtor, or the Claimant Trust or against property or interests in 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.

The injunctions set forth herein shall extend to any successors of the Debtor, the Reorganized Debtor, and the Claimant Trust and their respective property and interests in property.

Subject in all respects to ARTICLE XII.D, no Entity may commence or pursue a claim or cause of action of any kind against any Protected Party that arose from or is 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, the administration of the Claimant Trust, or the transactions in furtherance of the foregoing without the Bankruptcy 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; *provided, however,* the foregoing will not apply to 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. As set forth in ARTICLE XI, 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.

G. Term of Injunctions or Stays

Unless otherwise provided in this Plan, the Confirmation Order, or in a Final Order of the Bankruptcy Court, all injunctions or stays arising under or entered during the Chapter 11 Case under section 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect until the later of the Effective Date and the date indicated in the order providing for such injunction or stay.

H. Continuance of January 9 Order

Unless otherwise provided in this Plan, 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 until the dissolution of each of the Claimant Trust and the Litigation Trust.

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 nay 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 as 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: November 24, 2020

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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Email: MHayward@HaywardFirm.com
ZAnnable@HaywardFirm.com

Counsel for the Debtor and Debtor-in-Possession

EXHIBIT B

ORGANIZATIONAL CHART OF THE DEBTOR

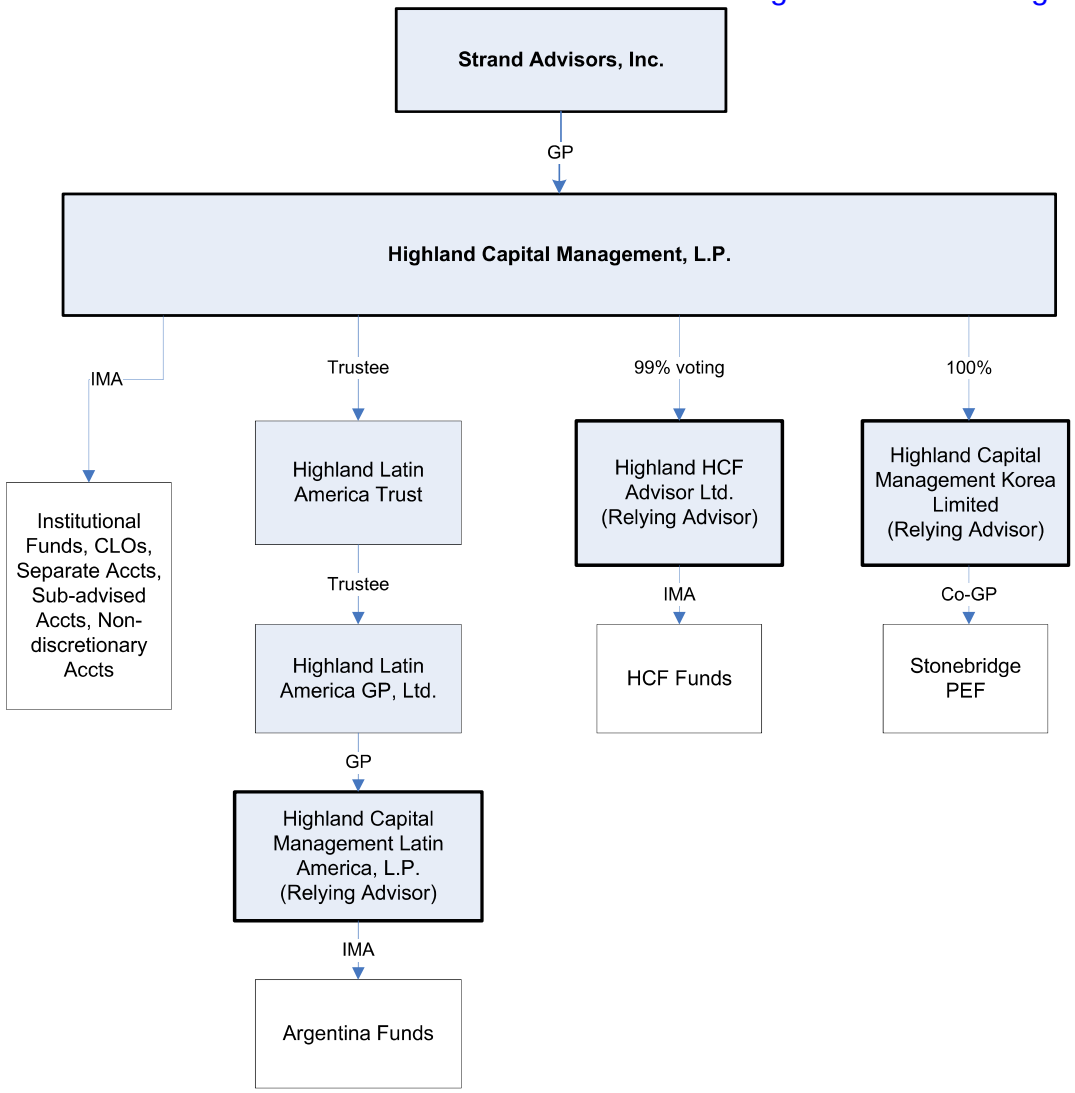
Strand Advisors, Inc.
GP
Highland Capital Management, L.P.
IMA
Trustee
99% voting
100%
Institutional Funds, CLOs, Separate Accts, Sub-advised Accts, Non-discretionary Accts
Highland Latin America Trust
Highland HCF Advisor Ltd. (Relying Advisor)
Highland Capital Management Korea Limited (Relying Advisor)
Trustee
IMA
Co-GP
Highland Latin America GP, Ltd.
HCF Funds
Stonebridge PEF
GP
Highland Capital Management Latin America, L.P. (Relying Advisor)
IMA
Argentina Funds

EXHIBIT C

LIQUIDATION ANALYSIS/FINANCIAL PROJECTIONS

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 Memorandum 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 January 31 ,2021.
B. All investment assets are sold by December 31, 2022.
C. All demand notes are collected in the year 2021.
D. All notes receivable with maturity dates beyond 12/31/2022 are sold in Q4 2022; in the interim interest income and principal payments are collected as they become due.
E. Fixed assets used in daily business operations are sold in February 2021.
F. 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 three HCMLP employees as contractors 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 UBS, IFA, the HarbourVest entities (collectively "HV") 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 UBS, IFA, HM and 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 $9.96 million.
P. See below for Class 8 estimated payout schedule; payout is subject to certain assets being monetized by payout date:
    - By September 30, 2021 - $50,000,000
    - By March 31, 2022 – additional $50,000,000
    - By June 30, 2022 – additional $25,000,000
    - All remaining proceeds are assumed to be paid out on or soon after all remaining assets are monetized.

Highland Capital Management, L.P.
Plan Analysis Vs. Liquidation Analysis
(US $000's)

	Plan Analysis	Liquidation Analysis
Estimated cash on hand at 1/31/2020	$ 25,076	$ 25,076
Estimated proceeds from monetization of assets [1][2]	190,445	149,197
Estimated expenses through final distribution[1][3]	(33,642)	(36,232)
Total estimated $ available for distribution	181,879	138,042
Less: Claims paid in full		
Unclassified [4]	(1,078)	(1,078)
Administrative claims [5]	(10,574)	(10,574)
Class 1 - Jefferies Secured Claim	-	-
Class 2 - Frontier Secured Claim [6]	(5,463)	(5,463)
Class 3 - Other Secured Claims	(551)	(551)
Class 4 – Priority Non-Tax Claims	(16)	(16)
Class 5 - Retained Employee Claims	-	-
Class 6 - PTO Claims	-	-
Class 7 – Convenience Claims [7][8][9]	(10,255)	-
Subtotal	(27,937)	(17,682)
Estimated amount remaining for distribution to general unsecured claims	153,942	120,359
Class 8 – General Unsecured Claims [8][10]	176,049	192,258
Subtotal	176,049	192,258
% Distribution to general unsecured claims	87.44%	62.60%
Estimated amount remaining for distribution	-	-
Class 9 – Subordinated Claims	*no distribution*	*no distribution*
Class 10 – Class B/C Limited Partnership Interests	*no distribution*	*no distribution*
Class 11 – Class A Limited Partnership Interest	*no distribution*	*no distribution*

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
[2] Sale of investment assets, sale of fixed assets, collection of accounts receivable and interest receivable
[3] Estimated expenses through final distribution exclude non-cash expenses:
Depreciation of $462 thousand 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 and $4.5 million in timing of payments to vendors
[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] Class 7 includes $1.1 million estimate for aggregate contract rejections damage and Class 8 includes $1.4 million for contract rejection damages
[9] Assumes 3 claimants with allowed claims less than $2.5 million opt into Class 7 along with claims of Senior Employees
[10] Class estimates $0 allowed claim for the following creditors: IFA, HV, HM and UBS; assumes RCP claims offset against HCMLP interest in RCP fund

Notes:
All claim amounts are estimated as of November 20, 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	$ 28,342	$ 4,934	$ 96,913	$ 90,428	$ 106,803	$ 52,322	$ 23,641	$ 21,344	$ -
Other Current Assets	13,182	13,651	10,559	9,629	7,746	7,329	5,396	6,054	6,723	7,406	-
Investment Assets	320,912	305,961	261,333	258,042	133,026	81,793	54,159	54,159	54,159	54,159	-
Net Fixed Assets	3,055	2,823	2,592	1,348	-	-	-	-	-	-	-
TOTAL ASSETS	**$ 352,142**	**$ 328,323**	**$ 302,826**	**$ 273,952**	**$ 237,684**	**$ 179,550**	**$ 166,358**	**$ 112,535**	**$ 84,523**	**$ 82,910**	**$ -**
Liabilities											
Post-petition Liabilities	$ 26,226	$ 19,138	$ 19,280	$ 2,891	$ -	$ -	$ -	$ -	$ -	$ -	$ -
Pre-petition Liabilities	126,365	126,343	121,950	-	-	-	-	-	-	-	-
Claims											
Unclassified	-	-	-	-	-	-	-	-	-	-	-
Class 1 – Jefferies Secured Claim	-	-	-	-	-	-	-	-	-	-	-
Class 2 - Frontier Secured Claim	-	-	-	5,210	-	-	-	-	-	-	-
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	-	-	-	176,049	176,049	126,049	126,049	76,049	51,049	51,049	22,107
Class 9 – Subordinated Claims	-	-	-	-	-	-	-	-	-	-	-
Class 10 – Class B/C Limited Partnership Interests	-	-	-	-	-	-	-	-	-	-	-
Class 11 – Class A Limited Partnership Interests	-	-	-	-	-	-	-	-	-	-	-
Claim Payable	126,365	126,343	121,950	181,259	176,049	126,049	126,049	76,049	51,049	51,049	22,107
TOTAL LIABILITIES	**$ 152,591**	**145,481**	**141,230**	**184,150**	**176,049**	**126,049**	**126,049**	**76,049**	**51,049**	**51,049**	**22,107**
Partners' Capital	199,551	182,842	161,596	89,802	61,635	53,501	40,309	36,486	33,473	31,860	(22,107)
TOTAL LIABILITIES AND PARTNERS' CAPITAL	**$ 352,142**	**$ 328,323**	**$ 302,826**	**$ 273,952**	**$ 237,684**	**$ 179,550**	**$ 166,358**	**$ 112,535**	**$ 84,523**	**$ 82,910**	**$ -**

Highland Capital Management, L.P.
Profit/Loss
(US $000's)

	Actual	Actual	Forecast --->						
	Jan 2020 to June 2020 Total	**3 month ended Sept 2020**	**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	$ 2,651	$ 11,173	$ 779	$ -	$ -	$ -	$ 779
Shared Service Fees	7,672	3,765	3,788	15,225	1,263	-	-	-	1,263
Other Income	3,126	538	340	4,004	113	-	-	-	113
Total revenue	$ 17,370	$ 6,252	$ 6,779	$ 30,401	$ 2,154	$ -	$ -	$ -	$ 2,154
Operating Expenses [1]	13,328	9,171	9,079	31,579	8,428	1,646	1,807	2,655	14,536
Income/(loss) From Operations	$ 4,042	$ (2,918)	$ (2,301)	$ (1,177)	$ (6,274)	$ (1,646)	$ (1,807)	$ (2,655)	$ (12,381)
Professional Fees	17,522	7,707	7,741	32,971	5,450	5,058	2,048	1,605	14,160
Other Income/(Expenses) [2]	2,302	1,518	1,057	4,878	(59,016)	573	423	423	(57,598)
Operating Gain/(Loss)	$ (11,178)	$ (9,107)	$ (8,985)	$ (29,270)	$ (70,741)	$ (6,130)	$ (3,432)	$ (3,837)	$ (84,139)
Realized and Unrealized Gain/(Loss)									
Other Realized Gains/(Loss)	-	-	-	-	(763)	522	-	-	(241)
Net Realized Gain/(Loss) on Sale of Investment	(28,418)	1,549	(12,167)	(39,036)	(290)	19	(4,702)	(8,006)	(12,979)
Net Change in Unrealized Gain/(Loss) of Investments	(29,929)	(7,450)	-	(37,380)	-	-	-	-	-
Net Realized Gain /(Loss) from Equity Method Investees	-	-	(94)	(94)	-	(22,578)	-	(1,349)	(23,927)
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)	$ (12,262)	$ (158,992)	$ (1,053)	$ (22,037)	$ (4,702)	$ (9,355)	$ (37,147)
Net Income	$ (150,307)	$ (16,708)	$ (21,247)	$ (188,262)	$ (71,794)	$ (28,167)	$ (8,134)	$ (13,192)	$ (121,287)

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 $61.2 million in January 2021 includes:
[a] $77.7 million was expensed to record for the increase of allowed claims.
[b] Income of $15.8 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	$ -	$ -	$ -	$ -	$ -	$ 779
Shared Service Fees	-	-	-	-	-	1,263
Other Income	-	-	-	-	-	113
Total revenue	$ -	$ -	$ -	$ -	$ -	$ 2,154
Operating Expenses	1,443	643	758	1,088	3,932	18,468
Income/(loss) From Operations	$ (1,443)	$ (643)	$ (758)	$ (1,088)	$ (3,932)	$ (16,314)
Professional Fees	2,788	2,788	1,288	1,288	8,153	22,313
Other Income/(Expenses)	408	419	434	184	1,444	(56,154)
Operating Gain/(Loss)	$ (3,823)	$ (3,013)	$ (1,613)	$ (2,193)	$ (10,641)	$ (94,780)
Realized and Unrealized Gain/(Loss)						
Other Realized Gains/(Loss)	-	-	-	(51,775)	(51,775)	(52,016)
Net Realized Gain/(Loss) on Sale of Investment	-	-	-	-	-	(12,979)
Net Change in Unrealized Gain/(Loss) of Investments	-	-	-	-	-	-
Net Realized Gain /(Loss) from Equity Method Investees	-	-	-	-	-	(23,927)
Net Change in Unrealized Gain /(Loss) from Equity Method Investees	-	-	-	-	-	-
Total Realized and Unrealized Gain/(Loss)	$ -	$ -	$ -	$ (51,775)	$ (51,775)	$ (88,922)
Net Income	$ (3,823)	$ (3,013)	$ (1,613)	$ (53,967)	$ (62,415)	$ (183,702)

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)	$ (21,247)	$ (71,794)	$ (28,167)	$ (8,134)	$ (13,192)	$ (3,823)	$ (3,013)	$ (1,613)	$ (53,967)
Cash Flow from Operating Activity										
(Increase) / Decrease in Cash										
Depreciation and amortization	231	231	231	231	-	-	-	-	-	-
Other realized (gain)/ loss	-	-	763	(522)	-	-	-	-	-	51,775
Investment realized (gain)/ loss	(1,549)	12,262	290	22,559	4,702	9,355	-	-	-	-
Unrealized (gain) / loss	(9,150)	-	-	-	-	-	-	-	-	-
(Increase) Decrease in Current Assets	(470)	3,092	930	1,884	417	1,933	(658)	(669)	(684)	2,010
Increase (Decrease) in Current Liabilities	(7,110)	(4,251)	(54,172)	(2,891)	-	-	-	-	-	-
Net Cash Increase / (Decrease) - Operating Activities	(34,757)	(9,913)	(123,752)	(6,907)	(3,015)	(1,904)	(4,481)	(3,681)	(2,297)	(182)
Cash Flow From Investing Activities										
Proceeds from Sale of Fixed Assets	-	-	250	1,639	-	-	-	-	-	-
Proceeds from Investment Assets	25,650	32,366	3,002	102,457	46,531	18,278	-	-	-	7,780
Net Cash Increase / (Decrease) - Investing Activities	25,650	32,366	3,252	104,096	46,531	18,278	-	-	-	7,780
Cash Flow from Financing Activities										
Claims payable	-	-	(73,997)	-	-	-	-	-	-	-
Claim reclasses/(paid)	-	-	181,259	(5,210)	(50,000)	-	(50,000)	(25,000)	-	(28,942)
Maple Avenue Holdings	-	-	(4,975)	-	-	-	-	-	-	-
Frontier Note	-	-	(5,195)	-	-	-	-	-	-	-
Net Cash Increase / (Decrease) - Financing Activities	-	-	97,092	(5,210)	(50,000)	-	(50,000)	(25,000)	-	(28,942)
Net Change in Cash	$ (9,107)	$ 22,454	$ (23,408)	$ 91,979	$ (6,484)	$ 16,374	$ (54,481)	$ (28,681)	$ (2,297)	$ (21,344)
Beginning Cash	14,994	5,888	28,342	4,934	96,913	90,428	106,803	52,322	23,641	21,344
Ending Cash	$ 5,887	$ 28,342	$ 4,934	$ 96,913	$ 90,428	$ 106,803	$ 52,322	$ 23,641	$ 21,344	$ -

Appendix Exhibit 66

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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.	§	

PATRICK DAUGHERTY'S MOTION TO LIFT THE AUTOMATIC STAY

PURSUANT TO LOCAL BANKRUPTCY RULE 4001-1(b), A RESPONSE IS REQUIRED TO THIS MOTION, OR THE ALLEGATIONS IN THE MOTION MAY BE DEEMED ADMITTED, AND AN ORDER GRANTING THE RELIEF SOUGH MAY BE ENTERED BY DEFAULT.

ANY RESPONSE SHALL BE IN WRITING AND FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT 1100 COMMERCE STREET, RM. 1254, DALLAS, TEXAS 75242-1496 BEFORE CLOSE OF BUSINESS ON DECEMBER 14, 2020, WHICH IS AT LEAST 14 DAYS FROM THE DATE OF SERVICE HEREOF. A COPY SHALL BE SERVED UPON COUNSEL FOR THE MOVING PARTY AND ANY TRUSTEE OR EXAMINER APPOINTED IN THE CASE. ANY RESPONSE SHALL INCLUDE A DETAILED AND COMPREHENSIVE STATEMENT AS TO HOW THE MOVANT CAN BE "ADEQUATELY PROTECTED" IF THE STAY IS TO BE CONTINUED.

TO THE HONORABLE STACEY G. C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

Patrick Daugherty ("**Daugherty**"), a creditor and party in interest in the above-referenced bankruptcy case, hereby files this *Motion to Confirm Status of Automatic Stay, or Alternatively to Modify Automatic Stay* (the "**Motion**") pursuant to 11 U.S.C. § 362(d) and would respectfully show the Court as follows:

INTRODUCTION

1. As this Court is aware, Daugherty sued the Debtor and multiple non-Debtor defendants prepetition in the Court of Chancery of the State of Delaware (the "**Delaware Court**"). The initial Delaware trial was in the third day of a three-day trial when the Debtor filed the instant bankruptcy case. As this Court is also aware, the cases in Delaware involve multiple non-debtors (Highland Employee Retention Assets LLC, Highland ERA Management LLC, James Dondero, Hunton Andrews Kurth LLP, Marc Katz, Michael Hurst, Scott Ellington, Thomas Surgent, and Isaac Leventon)(collectively, the "**non-Debtor Defendants**"). The most efficient and economical means for liquidating Daugherty's claims is to lift the stay and allow for the litigation in Delaware to go forward.

2. Lifting the stay and allowing for the litigation to proceed in Delaware not only avoids duplicative litigation (i.e., having to start the trial over), but also avoids costly litigation regarding Constitutional authority and *Stern* issues. The Delaware Court is already very familiar with the facts underlying Daugherty's claims as the first lawsuit has been pending in Delaware for two and a half years. The Delaware Court has had numerous hearings, including multiple discovery disputes related to the very evidence being utilized to support Daugherty's claims, among them, a finding that the crime-fraud exception applied after an *in camera* review. Moreover, as noted above, the Delaware Court has already presided over two days of trial. Finally, as this Court noted

at an earlier hearing, if the Debtor wanted these issues to be litigated in this Court, it could have removed the cases and asked them to be transferred. The Debtor did not. Cause exists to lift the stay because doing so avoids unnecessary additional litigation time and expenses and avoids unnecessary Constitutional and *Stern*-related issues.

JURISDICTION AND VENUE

3. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334(b).

4. Venue is proper in this district pursuant to 28 U.S.C. § 1408 and 1409.

5. The statutory basis for relief is 11 U.S.C. § 362(d)(1).

I. BACKGROUND

A. The Delaware Cases.

6. Prior to the Petition Date, Daugherty sued the Debtor, Highland Employee Retention Assets LLC, Highland ERA Management LLC, and Dondero in the Court of Chancery of the State of Delaware (the "**Delaware Court**") in a case styled: *Daugherty v. Highland Capital Management, L.P.*, C.A. No. 2017-0488-MTZ (the "**Delaware I Case**").[1] In Daugherty's Second Amended Complaint filed in the Delaware I Case, Daugherty explains a scheme contrived by the Debtor, Highland Employee Retention Assets LLC, Highland ERA Management LLC, and Dondero to rob and divert assets that were escrowed for Daugherty.

7. During the two-and-a-half years the Delaware I Case was pending before the Delaware Court, the Delaware Court held multiple hearings, including multiple hearings related to discovery disputes.[2]

8. During the many hearings, the Delaware Court reviewed much of the evidence that is the basis of Daugherty's claims, including reviewing significant amounts of evidence that

[1] *See* Declaration of Patrick Daugherty in Support of Motion to lift the Stay ("**Daugherty Declaration**") at ¶ 3.
[2] *See* Daugherty Declaration at ¶ 4.

formed the basis of the Delaware I Court's finding that the crime-fraud exception to attorney client privilege applied. Subsequently, on reargument, Vice Chancellor Zurn again outlined some of the documents she reviewed and the extensive factual basis for her findings.

9. The three-day trial in the Delaware I Case began on October 14, 2019. The Debtor filed its voluntary petition on the third day of that trial, after the Delaware Court had already heard the majority of the evidence. Additionally, at the time of the Debtor's bankruptcy filing, both parties had submitted summary judgment motions and briefs to the Delaware Court and those issues were ripe for determination.[3]

10. During trial of the Delaware I Case (and after the Delaware court found that the crime-fraud exception to attorney-client privilege applied to communications with the Debtor's internal and external attorneys), Dondero and his accomplices' scheme became more clear as did their tardy reliance on an advice of counsel defense. As a result, Daugherty filed a separate lawsuit against Dondero, Highland ERA Management LLC, Highland Employee Retention Assets LLC, Hunton Andrews Kurth LLP, Marc Katz, Michael Hurst, Scott Ellington, Thomas Surgent, and Isaac Leventon in the Delaware Court in a case styled: *Daugherty v. Dondero et al.*, C.A. No. 2019-0956-MTZ (the "**Delaware II Case**") alleging fraudulent transfer and conspiracy.[4]

11. As a result of the litigation, Daugherty has had to spend considerable amounts of money, and has had to cash-in parts of his retirement accounts and borrow money from his own mother.[5]

[3] *See* Daugherty Declaration at ¶ 6.
[4] *See* Daugherty Declaration at ¶ 7.
[5] *See* Daugherty Declaration at ¶ 8.

B. The Bankruptcy Case and Adversary Proceeding.

12. Three days into the trial in the Highland Delaware Case, 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 Bankruptcy Court**").

13. On October 29, 2019, the United States Trustee appointed an Official Committee of Unsecured Creditors.

14. On December 4, 2019, the Delaware Bankruptcy Court entered an order transferring this case to this Court.

15. On August 31, 2020, the Debtor sued Daugherty in this case, initiating the Daugherty Adversary Proceeding, in which the Debtor objects to Daugherty's claim and seeks subordination of part of the claim.

16. Daugherty filed his proof of claim in the amount of $40,710,819.42, and the Court recently entered an order temporarily allowing Daugherty's claim in the amount of $9,134,019.00

17. The Debtor recently filed its Fifth Amended Plan of Reorganization (the "**Plan**")[Docket No. 1472] and the Court approved the Debtor's Disclosure Statement for the Fifth Amended Plan (the "**Disclosure Statement**")[Docket No. 1473]. The Plan provides *inter alia* that "Disputed Claims" (i.e., those claims that have not yet been allowed) will be merely reserved pending their allowance. However, the amount reserved can be something substantially less than the full amount of an alleged claim.[6]

18. Confirmation is currently set for January 13, 2021.

[6] *See* Plan at 7.

RELIEF REQUESTED

19. By this Motion, Daugherty seeks an order from the Court lifting the say to allow him to finalize and finish his trial pending in the Delaware Court, thereby allowing him to liquidate his claims in the most efficient and expedient manner possible.

BASIS FOR RELIEF REQUESTED

20. Section 362 of the Bankruptcy Code provides that the court *shall* grant relief from the automatic stay, for cause, including lack of adequate protection. *See* 11 U.S.C. § 362(d)(1). Cause exists to lift the stay for at least four reasons: (1) unnecessary duplication of effort is avoided, (2) Constitutional *Stern* issues are avoided, (3) Debtor's counsel has admitted that Delaware is a capable and suitable forum, and (4) other factors specific to this case. As explained more fully herein, the Court should lift the stay and allow Daugherty to liquidate the claims raised in the Delaware cases.

A. Cause Exists Because Unnecessary Duplication of Effort is Avoided.

21. In determining whether "cause" exists to lift the stay, courts should consider "the interests of judicial economy, expeditious and economic resolution of the litigation, comity, jurisdiction, and the balancing of the harms between the parties." *See In re S.H. Leggitt Co.*, 2011 WL 1376772, at *4 (Bankr. W.D. Tex. 2011).

22. The interests of judicial economy are best served by lifting the stay and allowing Daugherty to continue liquidating his claims in the Delaware Court because the Delaware I Case was in its third day of trial, the majority of the witnesses had testified, and the trial was substantially complete. In addition to two days of trial, in the two and a half years prior to the trial, the Delaware Court held multiple hearings, including several hearings related to discovery in which Judge Zurn reviewed the very evidence that was the basis of her crime-fraud exception ruling, and which

supports multiple claims of Daugherty. The Delaware Court is already intimately familiar with the claims and the evidence supporting them. Why then, should this Court devote its resources to retrying issues that have already been litigated to the point of trial in another forum perfectly capable of adjudicating those issues? There is not a stronger argument that the interests of judicial economy absolutely favors lifting the stay.

23. Likewise, the expeditious and economic resolution of the litigation is best served by lifting the stay. The fastest and most economic means for liquidating Daugherty's claims is to the lift the say and allow the litigation to proceed in Delaware. The trial was nearly finished, and thus the parties could finish their trial and Daugherty could begin participating in distributions from the proposed liquidation trust. The Debtor and Committee have consistently noted the high administrative costs of this case. There is no doubt that starting the entire trial over to litigate and liquidate the claims already tried in Delaware would cost the Debtor's estate significantly more (and ultimately the Claimant Trust proposed in the Plan) than simply lifting the stay. Thus, it cannot rationally be argued that it would be more expeditious and economic to re-litigate the issues and claims in this Court.

24. As comity generally deals with one nation recognizing within its territory the "legislative, executive or judicial acts of another nation"[7] concerns for comity are not applicable here.

25. In the current procedural posture, this Court does not presently have jurisdiction over any of the non-Debtor Defendants. In the present adversary proceedings pending before this Court, the only parties to those cases are the Debtor and Daugherty. Accordingly, if this Court denies Daugherty's motion, and Daugherty is required to start his lawsuit over again in this Court,

[7] *See Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de CV)*, 701 F.3 1031, 1043-44 (5th Cir. 2012).

he would be required to third-party sue and bring the other non-Debtor Defendants into the pending adversary proceedings. Those third-party non-Debtor Defendants will likely bring dismissal motions (as they are in the process of briefing already in Delaware) and additional significant costs and expenses will be incurred, not to mention the additional judicial resources of this Court devoted to those issues. Although the Court likely has "related to" jurisdiction, those procedural motions add expense and time. At a minimum, those motions will delay an adjudication of Daugherty's claims, and the fact that time and efforts would be devoted to those motions further underscores the arguments that lifting the stay to allow liquidation in Delaware is most efficient and expedient.

26. The balancing of the harms also weighs in favor of lifting the stay. The Debtor's Plan provides that the Claimant Trust[8] may make Trust Distributions to the Claimant Trust Beneficiaries "at any time and/or use 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."[9] Further, the Plan and Claimant Trust Agreement provide that there will be no distributions on account of "Disputed Claims" while it is pending allowance.[10] A "Disputed Claim" is one that is not yet allowed.[11] For "Disputed Claims," the Debtor proposes to create a "Disputed Claim Reserve."[12] However, the amount placed in the "Disputed Claim Reserve" 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*.[13]

[8] Capitalize terms not expressly defined herein, shall have the meanings ascribed to them in the Plan.
[9] *See* Plan at 31.
[10] *See* Plan at 44; Claimant Trust Agreement at § 6.4.
[11] *See* Plan at 7.
[12] *See* Plan at 40.
[13] *See* Definition of "Disputed Claims Reserve Amount" Plan at 7 (emphasis added).

Upon a claim being allowed, the Plan provides:

> 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.[14]

A serious problem with this construct arises if the Debtor under-estimates the amount of the Disputed Claim Reserve, which is a major risk considering (1) the significant amount of "Disputed Claims" and the ability of the Debtor to utilize an order estimating a claim to determine how much to reserve. If any one of the "Disputed Claims" is adjudicated in an amount great than what was reserved (or estimated), then holders of "Disputed Claims" will receive disparate treatment from other creditors in the same case. By way of an example, in Daugherty's case, if his claim is ultimately allowed in an amount in excess of $9,134,019.00, then any amounts paid over and above the amount reserved and estimated will come at the expense of other holders of "Disputed Claims." Likewise, if other creditors settle or resolve their Claims in an allowed amount in excess of what was estimated or what was reserved, their additional recoveries (those above the estimated or reserved amount) would come at the expense of Daugherty and other holders of Disputed Claims. Consequently, any delay in the liquidation of Daugherty's claim severely prejudices him. Each day his claim remains not allowed, his recovery is subject to dilution by the holders of other Disputed Claims and by the holders of Allowed Claims. The conclusion that cause exists to lift the stay is inescapable when the prejudice is added to the harm already caused to Daugherty (including having to utilize retirement funds and borrow money from his mother to fend off the Debtor's

[14] *See* Plan at 40.

overly aggressive litigation efforts), and would represent an entirely unnecessary duplication of effort if the Court were to deny the relief requested.

B. Cause Exists Because Constitutional Authority Issues Are Avoided.

27. This Court is well-versed and is keenly aware of *Stern* and *Stern*-related issues. In *Stern v. Marshall*, the Supreme Court held that a bankruptcy court's constitutional authority to enter final findings of fact and conclusions of law are limited. *See* 564 U.S. 462, 132 S. Ct. 56 (2011). Even before *Stern*, it was universally accepted that, absent consent, a bankruptcy court may only enter final findings of fact and conclusions of law on "core proceedings arising under title 11, or arising in a case under title 11." *See* 28 U.S.C. § 157(b)(1). A proceeding "arises under" Title 11 "if it invokes a substantive right provided by title 11." *Southmark v. Coopers & Lybrand (In re Southmark)*, 163 F.3d 925, 930 (5th Cir. 1999); *In re Wood,* 825 F.2d 90, 93 (5th Cir. 1987). A proceeding "arises in" a case under Title 11 where it is not based on any right expressly created by Title 11, but nevertheless "would have no existence outside of bankruptcy." *In re Wood*, 825 F.2d at 97; *Frelin v. Oakwood Homes Corp.*, 292 B.R. 369, 376 (Bankr. E.D. Ark. 2003). A proceeding is "related to" a bankruptcy if "the outcome of the proceeding could *conceivably* have any effect on the estate being administered in bankruptcy." *See In re U.S. Brass Corp.*, 301 F.3d 296, 303-04 (5th Cir. 2002); *see also In re Wood*, 825 F.2d at 92. Because the claims against the non-Debtor Defendants are neither "arising in" or "arising under" title 11, they are likely merely "related to" claims. Therefore, without consent from the non-Debtor Defendants, this Court would be prohibited from entering final findings of fact and conclusion of law with regard to the claims against those defendants. All of these issues are avoided if the stay is lifted to allow for liquidation of the claims in Delaware because the Delaware Court has jurisdiction and authority to resolve all of the claims against all of the defendants before it.

CONCLUSION

28. The Delaware Court presided over the Delaware I case for two and a half years. In that time the Court personally reviewed much of the evidence *in camera* that forms the basis of Daugherty's claims. The Delaware Court held multiple hearings and is extremely familiar with the facts, evidence, and arguments related to the claims alleged. But not only is the Delaware Court familiar with all of the evidence, the Delaware Court has actually presided over a substantial amount of the trial. Judicial economy, duplication of efforts, and the extreme burden and prejudice that would befall Daugherty if the Court requires him to start over anew in this Court strongly militate in favor of finding that cause exists to the lift the stay.

WAIVER OF STAY

29. Daugherty respectfully requests that the 14-day stay in Rule 4001(a)(c) be waived. Federal Rule of Bankruptcy Procedure 4001(a)(3) provides that "[a]n order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 14 days after the entry of the order, *unless the court orders otherwise*." *See* Fed. Bankr. P. 4001(a)(3)(emphasis added). As outlined above, every day that Daugherty's claims remain not allowed, he is prejudiced and his recovery is threatened. Accordingly, the Court should waive a stay of entry of its order.

WHEREFORE PREMISES CONSIDERED, Daugherty respectfully requests that this Court enter an order granting the relief requested herein and granting such further relief, whether in law or equity, for which Daugherty may show himself justly entitled.

Dated: November 30, 2020

Respectfully submitted,

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COUNSEL FOR
PATRICK DAUGHERTY

CERTIFICATE OF CONFERENCE

I hereby certify that on November 25, 2020, I conferred with John Morris, counsel for the Debtor, regarding the relief sought herein and he communicated that the Debtor was opposed.

/s/ Jason P. Kathman
Jason P. Kathman

CERTIFICATE OF SERVICE

I hereby certify that, on November 30, 2020, a true and correct copy of the foregoing was filed electronically and served upon the Debtor, and upon each of the parties receiving notice via the Court's electronic notification system.

/s/ Jason P. Kathman
Jason P. Kathman

Appendix Exhibit 67

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Counsel for Plaintiff 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.	§	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. JAMES D. DONDERO, Defendant.	§	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.

PLAINTIFF HIGHLAND CAPITAL MANAGEMENT, L.P.'S VERIFIED ORIGINAL COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff, Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession ("Plaintiff" or the "Debtor"), by its undersigned counsel, files this *Original Complaint* (the "Complaint") against defendant Mr. James D. Dondero ("Defendant" or "Mr. Dondero") seeking preliminary and permanent injunctive relief pursuant to sections 105(a) and 362 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 7001(7) and 7065 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of its Complaint, the Debtor alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. Mr. Dondero is the Debtor's former President and Chief Executive Officer, having surrendered those positions in January 2020 as part of a "corporate governance" settlement approved by the Court. The settlement also resulted in, among other things, the imposition of an independent board of directors at Strand Advisors, Inc., the Debtor's general partner, with sole authority to oversee the Debtor's operations, management of its assets, and bankruptcy proceedings.

2. While Mr. Dondero resigned as an officer, he continued to serve as a portfolio manager and employee of the Debtor until October 2020, when the Board[2] asked for his resignation due to certain actions taken by Mr. Dondero that were adverse to the Debtor's estate. Regrettably, since his resignation, Mr. Dondero interfered with the Debtor's operations by intervening to halt certain trades that were authorized by the Debtor's CEO—while issuing warnings to certain of the Debtor's employees. In addition, promptly after the Debtor exercised its right to demand payment

[2] Capitalized terms not defined in this Preliminary Statement shall have the meanings ascribed to them below.

from Mr. Dondero and certain of his affiliates on almost $30 million of Demand Notes, Mr. Dondero sent a threatening text message to Mr. James R. Seery, Jr. ("Mr. Seery"), the Debtor's CEO and CRO that said simply: "Be careful what you do – last warning."

3. Mr. Dondero cannot be permitted to directly (or indirectly through his corporate entities or anyone else acting on his behalf) control, interfere with, or even influence the Debtor's business and operations or threaten or intimidate the Debtor or any of its directors, officers, employees, professionals, or agents.

4. The Debtor has therefore commenced this adversary proceeding to enjoin Mr. Dondero from: (a) communicating (whether orally, in writing, or otherwise), directly or indirectly, with any Board member unless Defendant'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; (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 Defendant; (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 or controlled by the Debtor, and 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").[3]

JURISDICTION AND VENUE

5. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and § 1334(b). This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

[3] The Debtor intends to separately move for a temporary restraining order seeking the same relief.

6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.

7. This adversary proceeding is commenced pursuant to Bankruptcy Rules 7001 and 7065, Bankruptcy Code sections 105(a) and 362, 28 U.S.C. §§ 2201 and 2202, and applicable Delaware law.

THE PARTIES

8. Plaintiff is a limited liability partnership formed under the laws of Delaware with a business address at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

9. Upon information and belief, Defendant is an individual residing in Dallas, Texas. Mr. Dondero 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

10. On October 16, 2019 (the "Petition Date"), 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").

11. 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 (collectively, "UBS"), and (d) Acis Capital Management, L.P. and Acis Capital Management GP LLC (collectively, "Acis").

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

[4] All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

13. The Debtor has continued to operate and manage its business as a debtor-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee or examiner has been appointed in this chapter 11 case.

STATEMENT OF FACTS

A. An Independent Board Is Appointed to Oversee the Debtor's Affairs; Mr. Dondero's Role Becomes Limited and Subject to the Board's Oversight; and Mr. Dondero Is Later Asked to Resign

14. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). On January 9, 2019, this Court entered an Order granting the Settlement Motion [Docket No. 339] (the "Settlement Order").

15. As part of the Settlement Order, this Court also approved a term sheet [Docket No. 354-1] (the "Term Sheet") between the Debtor and the Committee pursuant to which Mr. Seery, Mr. John S. Dubel, and Mr. Russell Nelms (collectively, the "Independent Directors"), were appointed to the board (the "Board") of Strand Advisors, Inc. ("Strand"), the Debtor's general partner.

16. As required by the Term Sheet, on January 9, 2020, Mr. Dondero resigned from his roles as an officer and director of Strand and as the Debtor's President and Chief Executive Officer.

17. While resigning from those roles, Mr. Dondero remained an unpaid employee of the Debtor and retained his title as portfolio manager for each of the investment vehicles and funds managed by the Debtor. However, pursuant to the Term Sheet, Mr. Dondero's authority was subject to oversight and ultimately termination by the Independent Board:

> Mr. Dondero's responsibilities in such capacities shall in all cases be as determined by the Independent Directors . . . [and] 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 agrees to resign immediately upon such determination.

18. Although ultimate decision-making authority remained with the Board, by resolution passed on January 9, 2020, the Board authorized Mr. Seery to work with the Debtor's traders and Mr. Dondero with respect to certain of the Debtor's assets where Mr. Dondero remained portfolio manager.

19. During the pendency of the Debtor's bankruptcy case, it became apparent that it would be more efficient and lead to better financial results to have a traditional corporate-management structure oversee the Debtor's operations and assets. Consequently, after due deliberation, the Board determined that it was in the best interests of the Debtor's estate to appoint Mr. Seery as the Debtor's Chief Executive Officer ("CEO") and Chief Restructuring Officer ("CRO"). This Court approved Mr. Seery's appointment as CEO and CRO on July 16, 2020. [Docket No. 854].

20. Mr. Seery's appointment as CEO and CRO formalized his role and authority to oversee the day-to-day management of the Debtor, including the purchase and sale of assets held by the Debtor and its managed investment vehicles, funds, and subsidiaries. Mr. Seery routinely carried out such responsibilities, particularly after the seizure by Jefferies of the Select fund equity account managed by Mr. Dondero as a result of Select's failure to post margin.

21. On August 12, 2020, the Debtor filed its *Plan of Reorganization* [Docket No. 944] (as subsequently amended, the "Plan"). The Plan provides for, among other things, the monetization of the Debtor's assets for the benefit of the Debtor's creditors. Also in August 2020, the Debtor entered into a mediation with certain of its creditors which resulted in, among other things, a settlement with Josh and Jennifer Terry and Acis.

22. After the Acis settlement was publicly announced, Mr. Dondero voiced his displeasure with not just the terms of the Acis settlement, but that a settlement had been reached at all. On October 5, 2020, Mr. Dondero objected [Docket No. 1121] to the Debtor's motion seeking approval of the Acis settlement, thereby creating an actual conflict with the Board and the Debtor.

23. In addition, the Dugaboy Investment Trust—Mr. Dondero's family trust—continued to press its proof of claim alleging that the Debtor, and by extension the Board and Mr. Seery, had mismanaged Highland Multi Strategy Credit Fund, L.P. ("MSCF") with respect to the sale of MSCF's assets in May of 2020. *See, e.g.*, Proof of Claim No. 177; Docket No. 1154.

24. The Debtor concluded that it was untenable for Mr. Dondero to continue to be employed by the Debtor in any capacity while taking positions adverse to the interests of the Debtor's estate. Thus, on October 2, 2020, Mr. Dondero was asked to resign as a portfolio manager at the Debtor and from any roles that he had at MSCF.

25. Mr. Dondero resigned from his positions with the Debtor on October 9, 2020.

B. Mr. Dondero Interferes with the Debtor's Business and Instructs and Threatens Certain of the Debtor's Employees

26. Since tendering his resignation, Mr. Dondero has interfered with the Debtor's operations and the management of the assets under its control, and he has otherwise acted directly and through entities he controls to improperly exert pressure on certain of the Debtor's employees.

27. The Debtor serves as the servicer, portfolio manager, or equivalent of certain pooled collateralized loan obligation vehicles (collectively, the "CLOs"). The Debtor's sole client in these matters is the CLO issuer and not any individual shareholder or noteholder of the CLO.

28. NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P. ("HCMFA," and together with NexPoint, the "Advisors") are investment advisors

directly or indirectly controlled by Mr. Dondero. Upon information and belief, the Advisors and certain investment funds advised by the Advisors and/or their affiliates own interests in the CLOs for which the Debtor serves as portfolio manager or servicer.

29. On October 16, 2020, the Advisors wrote to Mr. Seery and, among other things, questioned the Debtor's business judgment and "request[ed] that no CLO assets be sold without prior notice to and prior consent from the Advisors." Mr. Seery did not accede to the Advisors' "request" nor did he otherwise respond to their letter.

30. On November 24, 2020, the Advisors sent another letter where they again questioned the Debtor's business judgment and "re-urge[d] [their] request that no CLO assets be sold without prior notice to and prior consent from the Advisors."

31. The Debtor has no contractual, legal, or other obligation to provide notice to, or obtain the consent of, the Advisors (or any other holder of interests in the CLOs) before exercising its business judgment to manage and service the CLOs, including in connection with the sale of the CLOs' assets.

32. On November 24, 2020, Mr. Dondero personally intervened to prevent sales of certain CLO assets that he knew Mr. Seery had authorized. Upon learning that the trades that Mr. Seery had authorized were being executed, Mr. Dondero sent an e-mail to Mr. Matthew Pearson (with copies to Mr. Hunter Covitz and Mr. Joseph Sowin) in which he said "No…… do not." About an hour later, Mr. Pearson (an HCMFA employee, not an employee of the Debtor) cancelled the trades, but Mr. Dondero warned Mr. Pearson that "HCMFA and DAF has [sic] instructed Highland in writing not to sell any CLO underlying assets . . . there is potential liability, don't do it again please."

33. Mr. Dondero's threat had the intended effect as Mr. Sowin (an HCMFA employee, not an employee of the Debtor) responded by saying that "Compliance should never have approved this order then – will coordinate with them Jim [Dondero]. Post: Please block all orders from Hitting the trading desk for the fun[ds] Jim [Dondero] mentioned."

34. On November 27, 2020, after learning that Mr. Seery had attempted to effectuate the trades, Mr. Dondero continued to interfere with the Debtor's business and engage in threating conduct, this time writing to Thomas Surgent (the Debtor's Chief Compliance Officer) that "I understand Seery is working on a work around to trade these securities anyway. Trades that contradict investor desires and have no business purpose or investment rational. You might want to remind him (and yourself) that the chief compliance officer has personal liability."

35. On December 3, 2020, the Debtor demanded that the Advisors "cease and desist from making or initiating, directly or indirectly, any instructions, requests, or demands to HCMLP regarding the terms, timing, or other aspects of any portfolio transactions of any of the CLOs."

36. The Debtor made the same demand of Mr. Dondero the following day.

C. The Debtor Demands that Mr. Dondero and His Affiliates Satisfy Certain Demand Notes, and Mr. Dondero Issues an Explicit Threat

37. HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC), Highland Capital Management Funds Advisors, LP, and Highland Capital Management Services, Inc. (collectively, the "Corporate Obligors") are the makers under a series of promissory notes in favor of the Debtor (collectively, the "Corporate Obligors' Notes").

38. In addition, Mr. Dondero, in his personal capacity, is the maker under a series of promissory notes in favor of the Debtor (collectively, the "Dondero Notes" and together with the Corporate Obligors' Notes, the "Demand Notes").

39. Each of the Demand Notes provides, among other things, that (a) all accrued interest and principal "shall be due and payable upon demand," and that (b) the maker shall pay the holder (*i.e.*, the Debtor) all court costs and costs of collection, including reasonable attorneys' fees and expenses, if, among other things, the Note is "collected through a bankruptcy court."

40. On December 3, 2020, Debtor's counsel sent letters to representatives of Mr. Dondero and each of the Corporate Obligors demanding payment of all unpaid principal and accrued interest due under the Demand Notes by December 11, 2020 (collectively, the "Demand Letters"). These demands were made to collect funds that will be required to fund the reorganized Debtor and the trust under the plan of reorganization that is subject to confirmation before this Court in January 2021.

41. Shortly after the Debtor sent the Demand Letters, Mr. Dondero sent a text message to Mr. Seery that stated only: "Be careful what you do – last warning."

CLAIM FOR RELIEF

(For Injunctive Relief -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7065)

42. The Debtor repeats and realleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

43. The Debtor seeks, pursuant to Bankruptcy Code section 105(a) and Bankruptcy Rule 7065, a preliminary and permanent injunction enjoining Mr. Dondero from engaging in the Prohibited Conduct.

44. Bankruptcy Code section 105(a) authorizes the Court to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a).

45. Bankruptcy Rule 7065 incorporates by reference rule 65 of the Federal Rules of Civil Procedure and authorizes the Court to issue injunctive relief in adversary proceedings.

46. The interference and threats described herein are embodied in written communications and are without any justification; the Debtor is therefore likely to prevail on its claim for injunctive relief.

47. In the absence of injunctive relief, the Debtor will be irreparably harmed because Mr. Dondero is likely to engage in some or all of the Prohibited Conduct, thereby interfering with the Debtor's operations, management of assets, and pursuit of a plan of reorganization, all to the detriment of the Debtor, its estate, and its creditors.

48. In light of, among other things, (a) the Debtor's status as a debtor in bankruptcy subject to the jurisdiction of this Court, (b) the Settlement Order, (c) the Term Sheet, (d) Mr. Dondero's resignations as the Debtor's President and CEO and later as portfolio manager and an employee, and (e) the authority vested in the Board and Mr. Seery, as CEO and CRO, there is no legal or equitable basis for Mr. Dondero to engage in any of the Prohibited Conduct, and the balance of the equities strongly favors the Debtor in its request to engage in business without Mr. Dondero engaging in any Prohibited Conduct.

49. Injunctive relief would serve the public interest by re-enforcing the implicit mandate in the Bankruptcy Code that debtors are to be managed and controlled only by court-authorized representatives, free from threats and coercion.

50. Based on the foregoing, the Debtor requests that the Court preliminarily and permanently enjoin Mr. Dondero from engaging in any prohibited Conduct.

PRAYER

WHEREFORE, the Debtor prays for judgment as follows:

(a) For a preliminary injunction enjoining Mr. Dondero from engaging in the Prohibited Conduct;

(b) For a permanent injunction enjoining Mr. Dondero from engaging in the Prohibited Conduct; and

(c) For such other and further relief as this Court deems just and proper.

Dated: December 7, 2020.

PACHULSKI STANG ZIEHL & JONES LLP

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Counsel for Plaintiff Highland Capital Management, L.P.

VERIFICATION

I have read the foregoing VERIFIED ORIGINAL COMPLAINT FOR INJUNCTIVE RELIEF and know its contents.

☐ I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☒ I am the Chief Executive Officer and Chief Restructuring Officer of Highland Capital Management, L.P., the Plaintiff in this action, and am authorized to make this verification for and on behalf of the Plaintiff, and I make this verification for that reason. I have read the foregoing document(s). I am informed and believe and on that ground allege that the matters stated in it are true.

☐ I am one of the attorneys of record for _____, a party to this action. Such party is absent from the county in which I have my office, and I make this verification for and on behalf of that party for that reason. I have read the foregoing document(s). I am informed and believe and on that ground allege that the matters stated in it are true.

I certify and declare under penalty of perjury under the laws of the United States that the foregoing is true and correct as of this 7th day of December 2020.

/s/ James P. Seery, Jr.
James P. Seery, Jr.

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	**ADVERSARY PROCEEDING NUMBER** (Court Use Only)

PLAINTIFFS	**DEFENDANTS**
Highland Capital Management, L.P.	James D. Dondero
ATTORNEYS (Firm Name, Address, and Telephone No.) Hayward & Associates, PLLC 10501 N. Central Expressway, Suite 106, Dallas, TX 75231 Tel: (972) 755-7110	**ATTORNEYS** (If Known) Bonds Ellis Eppich Schafer Jones LLP 420 Throckmorton St., Suite 1000, Fort Worth, TX 76102 Tel: (817) 405-6900
PARTY (Check One Box Only) ☑ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☑ Creditor ☐ Other ☐ Trustee

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

Request for injunctive relief pursuant to 11 U.S.C. 105(a) and Rule 7065 of the Federal Rules of Bankruptcy Procedure

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
- ☐ 11-Recovery of money/property - §542 turnover of property
- ☐ 12-Recovery of money/property - §547 preference
- ☐ 13-Recovery of money/property - §548 fraudulent transfer
- ☐ 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- ☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- ☐ 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- ☐ 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- ☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- ☐ 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- ☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- ☐ 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- ☐ 61-Dischargeability - §523(a)(5), domestic support
- ☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
- ☐ 63-Dischargeability - §523(a)(8), student loan
- ☐ 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- ☐ 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- ☐ 71-Injunctive relief – imposition of stay
- ☑ 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- ☐ 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- ☐ 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action
- ☐ 01-Determination of removed claim or cause

Other
- ☐ SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- ☐ 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

☐ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ Check if a jury trial is demanded in complaint	Demand $0.00

Other Relief Sought

Preliminary and permanent injunction against Mr. James D. Dondero

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 December 7, 2020	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.

Appendix Exhibit 68

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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)
Debtors.	)	(Jointly Administered)

MOTION FOR ORDER IMPOSING TEMPORARY RESTRICTIONS ON DEBTOR'S ABILITY, AS PORTFOLIO MANAGER, TO INITIATE SALES BY NON-DEBTOR CLO VEHICLES

Highland Capital Management Fund Advisors, L.P. ("**HCMFA**") and NexPoint Advisors, L.P. ("**NexPoint**", and together with HCMFA, the "**Advisors**"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the

"**Funds**"), by and through their undersigned counsel, hereby submit this motion for an order of the Court under Bankruptcy Code §§ 105(a), 363, and 1107 imposing temporary restrictions on Highland Capital Management, L.P.'s (the "**Debtor**") ability to initiate sales as portfolio manager (or other similar capacity) for certain non-debtor investment vehicles (the "**CLOs**"). In support of the Motion, the Funds and Advisors submit the Declaration of Dustin Norris (the "**Declaration**") attached hereto and state as follows:

BACKGROUND

A. General Background on the Advisors and their Advised Funds

1. Each Advisor is registered with the U.S. Securities and Exchange Commission ("**SEC**") as an investment advisor under the Investment Advisers Act of 1940, as amended (the "**Advisers Act**").

2. Each of the Advisors advises several funds, including the Funds. Each of the Funds is a registered investment company or business development company under the Investment Company Act of 1940 (as amended, the "**1940 Act**").

3. As an investment company or business development company, each Fund is overseen by a majority independent board of trustees subject to 1940 Act requirements. That board reviews and approves contracts with one of the Advisors for the respective Fund. The Funds do not have employees. Instead, each Fund relies on its respective Advisor, acting pursuant to advisory agreements, to provide the services necessary to the Fund's operations.

B. The CLOs

4. 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., Liberty CLO, Ltd., Red River CLO, Ltd., Rockwall CDO, Ltd., Rockwall CDO II Ltd.,

Southfork CLO, Ltd., Stratford CLO Ltd., Loan Funding VII, LLC, and Westchester CLO, Ltd.

5. The CLOs are securitization vehicles formed to acquire and hold pools of debt obligations. They also issued various tranches of notes and preference 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 waterfall, with the value remaining in the CLO after the notes are fully paid flowing to the holders of the preference shares.

6. The CLOs were created many years ago. Most of the CLOs are, at this point, past their reinvestment period and have paid off all the tranches of notes or, in a few instances, all but the last and most junior tranche. Accordingly, most of the economic value remaining in the CLOs, and all of the upside, belongs to the holders of the preference shares. The repayment status of the notes in the CLOs as of November 2020 is shown on Exhibit A to the Declaration, and the Funds' collective ownership of the preference shares is shown on Exhibit B to the Declaration. As shown on Exhibit B, the Funds hold a majority of the preference shares in three of the CLOs, Grayson CLO, Ltd., Greenbriar CLO, Ltd., and Stratford CLO Ltd., and material interests in most of the other CLOs.

7. The CLOs have each separately contracted for the Debtor to serve as the CLO's portfolio manager.[1] In this capacity, the Debtor is responsible, among other things, for making decisions to sell the CLOs' assets. Although the portfolio management agreements vary, the agreements generally impose a duty on the Debtor when acting as portfolio manager to maximize the value of the CLO's assets for the benefit of the CLO's noteholders and preference

[1] 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 Motion, 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.

shareholders.

C. The Operating Protocols

8. As part of the resolution of certain disputes between the Debtor and the Official Committee of Unsecured Creditors (the "**Committee**"), the Debtor is operating under the restrictions and provisions of certain operating protocols (the "**Operating Protocols**") approved by the Court. See Notice of Debtor's Amended Operating Protocols (Docket No. 466). Among other things, the Operating Protocols include provisions regulating the Debtor's actions on behalf of other entities. With respect to the CLOs, however, the Operating Protocols generally exempt the Debtor from the regular approval process involving the Committee where the Debtor acts as portfolio manager for the CLOs. See, e.g., Operating Protocols at § IV(B)(3)(a).

C. Recent Asset Sales and the Advisors' Requests for a Temporary Pause in Sales

9. The Court recently approved the Debtor's Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (Docket No. 1473) (the "Disclosure Statement").

10. The Disclosure Statement 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.

11. The Financial Projections attached as Exhibit C to the Disclosure Statement make clear that, assuming confirmation of the Debtor's chapter 11 plan in its current form, the Debtor intends to liquidate its remaining assets over the next two years, concluding in December 2022.

12. The Funds and Advisors do not agree with recent sales executed by the Debtor in certain CLOs, including sales during the historically light Thanksgiving trading week, because the Funds and Advisors view those assets as having greater value if held as long-term investments. When the Advisors became aware the Debtor was considering these transactions, NexPoint requested that the Debtor not consummate the sales.

13. NexPoint has requested in two letters that the Debtor refrain from causing the CLOs to sell further assets without prior notice and consent of NexPoint. Counsel to the Funds and Advisors has also requested by email that the Debtor agree consensually to temporarily suspend further sales of the CLOs' assets and/or confirm that the Debtor is not presently planning further sales in the immediate future. The Debtor has refused these requests.

D. HCMLP Decisions Illustrating Its Short-Term Approach

14. Consistent with its proposal to liquidate all of its assets by the end of 2022 per the Disclosure Statement, HCMLP has engaged in transactions taking a short-term approach to value.

15. In addition to the sales noted above during Thanksgiving week, during the chapter 11 case, the Debtor has directed the disposition of other assets in a manner that suggests a focus on quick monetization at the expense of maximizing returns for investors and/or the

estate. For example, Debtor-controlled entities sold a collective majority interest in an unsecured term loan to OmniMax International, Inc. Other non-Debtor controlled entities, advised by the Advisors, were able to secure a substantially better price for their stake in the same asset by being willing to hold it and transacting at a later date. Given the Debtor-controlled entities large ownership in the unsecured loan, the Advisors believe the Debtor was well-positioned to realize a higher price.

16. Also, upon information and belief, the Debtor, through its wholly owned subsidiary Trussway Holdings, LLC ("**Trussway**"), consummated a sale transaction where Trussway sold a division, SSP Holdings, LLC, in which Trussway had a majority interest. Upon information and belief, the sale was conducted without a formal competitive bidding process and resulted in a loss of $10 million, despite certain metrics of SSP Holdings, LLC having improved materially since it was acquired in 2014.

REQUEST FOR RELIEF

17. The Funds and Advisors request that the Court, under Bankruptcy Code sections 105(a), 363, and 1107(a) impose a temporary restriction on the Debtor's ability, as portfolio manager, to cause the CLOs to sell assets. The Funds and Advisors request that the Court prohibit the Debtor from authorizing any such sales for a period of 30 days, absent further order of the Court.

18. Bankruptcy Code section 363 governs the Debtor's use of estate property. 11 U.S.C. § 363. Section 363 authorizes the Debtor to use that property outside of the ordinary course of business "after notice and a hearing," and in the ordinary course of business without notice and a hearing "unless the court orders otherwise . . . ." 11 U.S.C. § 363(b-c). Bankruptcy Code section 1107(a) grants the Debtor, as debtor-in-possession, the powers of a chapter 11 trustee, subject to "such limitations or conditions as the court prescribes . . . ." 11 U.S.C.

§ 1107(a). And Bankruptcy Code section 105(a) empowers the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a).

19. Consistent with these powers, the Court implemented the Operating Protocols earlier in this case regarding the Debtor's actions on behalf of other non-debtor entities. Unlike where the Debtor directs sales of assets for other entities, however, the Operating Protocols generally do not restrict the Debtor's actions as portfolio manager for the CLOs. See Operating Protocols at IV(B)(3)(a).[2] The Funds and Advisors submit that the relief requested does not conflict with the Operating Protocols, but to the extent necessary, the Funds and Advisors request that the Court modify the Operating Protocols in the limited and temporary way requested in this Motion.

20. The Funds and Advisors seek this relief to preserve the status quo at the CLOs while the Funds and Advisors explore replacing the Debtor as portfolio manager either

[2] Section IV(B)(3)(a) (Transactions involving entities that the Debtor manages but in which the Debtor does not hold a direct or indirect interest)(Operating Requirements)(Third Party Transactions: All Stages) provides in full:

> **Except** (x) as set forth in (b) and (c) below and **(y) for any Transaction involving a Specified Entity and the sale or purchase by such Specified Entity of an asset that is not an obligation or security issued or guaranteed by any of the Debtor, a Related Entity or a fund, account, portfolio company owned, controlled or managed by the Debtor or a Related Entity, where such Transaction is effected in compliance with the collateral management agreement to which such Specified Entity is party,** any Transaction that decreases the NAV of an entity managed by the Debtor in excess of the greater of (i) 10% of NAV or (ii) $3,000,000 requires five business days advance notice to Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

(emphasis added). "Specified Entity" is defined in section I(K) of the Operating Protocols to include the CLOs referenced in this Motion.

consensually or through the contractual processes laid out in the relevant underlying agreements.

21. In the Disclosure Statement, the Debtor states that it has not determined if it wants to continue to serve as portfolio manager for the CLOs. The Debtor also has not sought input from the Funds and Advisers, even though the Funds are among the largest stakeholders indirectly and significantly affected by the Debtor's actions with respect to the CLOs.

22. The Advisers Act places a fiduciary duty on investment advisers comprising a duty of care and duty of loyalty. See, e.g., SEC Release No. IA-3248, "Commission Interpretation Regarding Standard of Conduct for Investment Advisers," (July 12, 2019). This means an adviser, like the Debtor, must, at all times, serve the best interest of its client and not subordinate its client's interest to its own. See id. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the "best interest" of its client at all times. See SEC v. Tambone, 550 F.3d 106, 146 (1st Cir. 2008) ("Section 206 imposes a fiduciary duty on investment advisers to act at all times in the best interest of the fund . . . ."); SEC v. Moran, 944 F. Supp. 286, 297 (S.D.N.Y. 1996) ("Investment advisers are entrusted with the responsibility and duty to act in the best interest of their clients.").

23. Although the Debtor's nominal "clients" are the CLOs themselves, the true parties in interest are the holders of beneficial interests in the CLOs, such as the Funds. Most or all of the other layers of CLO interests have been paid out, and the Funds hold either the majority or a substantial portion of most of the remaining CLO interests. In these circumstances, the Funds and the other preference shareholders are the parties who are economically affected by the Debtor's actions as portfolio manager.

24. The Funds and Advisors believe replacing the Debtor as portfolio manager is appropriate in light of the reduced staffing the Debtor anticipates having once the Debtor's chapter 11 plan goes effective. The Funds and Advisors also believe it is appropriate in light of the Debtor's reduced investment time horizon under the chapter 11 plan. As noted above, the Debtor intends to liquidate its investments in the next two years. The Funds, on the other hand, have a much longer investment time horizon and, as a result, have very different financial incentives with respect to their investments. The Funds and Advisors accordingly believe that the Funds and the other preference shareholders would be best served by a portfolio manager with a similar long-term perspective.

25. Upon information and belief, none of the CLOs needs liquidity at the current time, as the next quarterly waterfall payments are not due until February 2021. The Funds and Advisors accordingly submit that none of the CLOs, the other holders of preference shares and notes issued by the CLOs, or the Debtor will be harmed by the temporary restriction proposed by this Motion. Notably, the Funds and Advisors are not seeking to restrict the Debtor from performing any of its other functions for the CLOs or to modify the Debtor's compensation from the CLOs in any way.

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CONCLUSION

26. For the reasons set forth above, the Funds and Advisors respectfully request that the Court grant the relief requested in the Motion and such other and further relief as the Court deems just and proper.

Dated: December 8, 2020

K&L GATES LLP

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2020, I caused the foregoing document to be served via first class United States mail, postage prepaid and/or electronic email through the Court's CM/ECF system to the parties that consented to such service, as each are listed in the debtor's service list filed at docket entry 1442, Exhibits A and B.

This the 8th day of December, 2020

/s/ Artoush Varshosaz
Artoush Varshosaz

CERTIFICATE OF CONFERENCE

I hereby certify that on December 7, 2020, I conferred with Mr. Greg Demo, counsel for the Debtors, regarding the relief requested in the motion. Mr. Demo informed me that the Debtors do not consent to the relief sought in the motion.

This the 8th day of December, 2020

/s/ James A. Wright III
James A. Wright III

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)
Debtors.	)	(Jointly Administered)

DECLARATION OF DUSTIN NORRIS

I, Dustin Norris, hereby declare pursuant to 28 U.S.C. § 1746, that the following is true and correct.

1. I am the Executive Vice President of NexPoint Advisors, L.P. ("**NexPoint**").

2. I submit this Declaration based on my personal knowledge and information supplied to me by other members of NexPoint's management. I submit this Declaration in support of the Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles (the "Motion") by NexPoint, Highland Capital Management Fund Advisors, L.P. ("**HCMFA**", and together with NexPoint, the "**Advisors**"), Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the "**Funds**").

3. The Motion concerns the following non-debtor investment vehicles: Aberdeen Loan Funding, Ltd., Brentwood CLO, Ltd., Eastland CLO, Ltd., Gleneagles CLO, Ltd., Grayson CLO, Ltd., Greenbriar CLO, Ltd., Jasper CLO, Ltd., Liberty CLO, Ltd., Red River CLO, Ltd., Rockwall CDO, Ltd., Rockwall CDO II Ltd., Southfork CLO, Ltd., Stratford CLO Ltd., Loan Funding VII, LLC, and Westchester CLO, Ltd. (collectively, the "**CLOs**").

4. The Funds each hold interests in the CLOs.

5. The CLOs are securitization vehicles formed to acquire and hold pools of debt obligations. They also issued various tranches of notes and preference 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 waterfall, with the value remaining in the CLO after the notes are fully paid flowing to the holders of the preference shares.

6. The CLOs were created many years ago. Most of the CLOs are, at this point, past their reinvestment period and have paid off all the tranches of notes or, in a few instances, all but the last and most junior tranche. Accordingly, most of the economic value remaining in the CLOs, and all of the upside, belongs to the holders of the preference shares. The repayment status of the notes in the CLOs as of November 2020 is shown on Exhibit A hereto, and the Funds' collective ownership of the preference shares is shown on Exhibit B hereto.

7. The CLOs have each separately contracted for Highland Capital Management, L.P. (the "**Debtor**") to serve as the CLO's portfolio manager. 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 capacity, the Debtor is responsible, among other things, for making decisions to sell the CLOs assets. Although the portfolio management agreements vary, the agreements generally impose a duty on the Debtor when acting as portfolio manager to maximize the value of the CLO's assets for the benefit of the CLO's noteholders and preference shareholders.

8. During the chapter 11 case, the Debtor has directed the disposition of other assets in a manner that suggests a focus on quick monetization at the expense of maximizing returns for investors and/or the estate. For example, Debtor-controlled entities sold a collective majority

interest in an unsecured term loan to OmniMax International, Inc. Other non-Debtor controlled entities, advised by the Advisors, were able to secure a substantially better price for their stake in the same asset by being willing to hold it and transacting at a later date. Given the Debtor-controlled entities large ownership in the unsecured loan, the Advisors believe the Debtor was well-positioned to realize a higher price.

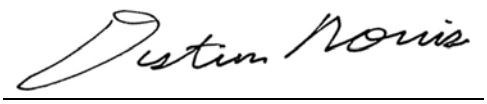
9. Also, upon information and belief, the Debtor, through its wholly owned subsidiary Trussway Holdings, LLC ("**Trussway**"), consummated a sale transaction where Trussway sold a division, SSP Holdings, LLC, in which Trussway had a majority interest. Upon information and belief, the sale was conducted without a formal competitive bidding process and resulted in a loss of $10 million, despite certain metrics of SSP Holdings, LLC having improved materially since it was acquired in 2014.

10. The Advisors did not agree with the Debtor's decision to execute recent sales for certain of the CLOs, because the Advisors viewed those assets as having greater value if held as long-term investments. When the Advisors became aware the Debtor was considering these transactions, NexPoint requested that the Debtor not consummate the sales.

11. Upon information and belief, none of the CLOs need liquidity at the current time, as the next quarterly waterfall payments are not due until February 2021.

I declare under the penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 8th day of December, 2020, in Allen, Texas,

By: 

Dustin Norris

EXHIBIT A

CLO Note Repayment Status[1]

Aberdeen Loan Funding, Ltd.

Security	CUSIP	Remaining Balance
Class A Notes	00306LAA2	$0
Class B Notes	00306LAB0	$0
Class C Notes	00306LAC8	$0
Class D Notes	00306LAD6	$0
Class E Notes	00306MAA0	$0
Class I Preference Shares	00306M201	$12,000,000.00
Class II Preference Shares	00306M300	$36,000,000.00

Brentwood CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1A Notes	107265AA8	$0
Class A-1B Notes	107265AM2	$0
Class A-2 Notes	107265AC4	$0
Class B Notes	107265AE0	$0
Class C Notes	107265AG5	$0
Class D Notes	107265AK5	$10,279,258.35
Class I Preference Shares	107264202	$34,400,000.00
Class II Preference Shares	107264400	$37,000,000.00

Eastland CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1 Notes	277345AA2	$0
Class A-2a Notes	277345AC8	$0
Class A-2b Notes	277345AE4	$0
Class A-3 Notes	277345AG9	$0
Class B Notes	277345AJ3	$0
Class C Notes	277345AL8	$0
Class D Notes	27734AAA1	$3,251,287.27
Class I Preference Shares	27734A202	$85,000,000.00
Class II Preference Shares	27734A400	$38,500,000.00

[1] As of December 1, 2020.

Gleneagles CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1 Notes		$0
Class A-2 Notes		$0
Class B Notes		$0
Class C Notes		$0
Class D Notes		$0
Class 1 Combination Notes		$0
Class 2 Combination Notes		$0
Preference Shares	37866PAB5 & G39165AA6	$91,000,000.00

Grayson CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1a Notes	389669AA0	$0
Class A-1b Notes	389669AB8	$0
Class A-2 Notes	389669AC6	$0
Class B Notes	389669AD4	$0
Class C	389669AE2	$0
Class D	389668AA2	$9,011,534.74
Class I Preference Shares	389669203	$52,500,000.00
Class II Preference Shares	389669302	$75,000,000.00

Greenbriar CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A Notes	393647AA0	$0
Class B Notes	393647AB8	$0
Class C Notes	393647AC6	$0
Class D Notes	393647AD4	$0
Class E Notes	39364PAA0	$0
Class I Preference Shares	39364P201	$20,000,000.00
Class II Preference Shares	39364P300	$60,000,000.00

Jasper CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A Notes		$0
Class B Notes		$0
Class C Notes		$0
Class D-1 Notes		$0
Class D-2 Notes		$0
Preference Shares	471315200	$70,000,000.00

Liberty CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1a Notes		$0
Class A-1b Notes		$0
Class A-1c Notes		$0
Class A-2 Notes		$0
Class A-3 Notes		$0
Class A-4 Notes		$0
Class B Notes		$0
Class C Notes		$0
Class Q-1 Notes		$0
Class P-1 Notes		$0
Class E Certificates	EP0175232 & 530360205	$94,000,000.00

Red River CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A Notes	75686VAA2	$0
Class B Notes	75686VAB0	$0
Class C Notes	75686VAC8	$0
Class D Notes	75686VAD2	$0
Class E Notes	75686XAA8	$0
Class I Preference Shares	75686X209	$36,000,000.00
Class II Preference Shares	75686X308	$45,000,000.00

Rockwall CDO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1LA Notes	774262AA7	$0
Class A-1LB Notes	774262AB5	$0
Class A-2L Notes	774262AC3	$0
Class A-3L Notes	774262AD1	$0
Class A-4L Notes	774262AE9	$0
Class B-1L Notes	774262AF6	$0
Class X Notes	774262AG4	$0
Class I Preference Shares	774272207	$33,200,000.00
Class II Preference Shares	774261127	$45,000,000.00

Rockwall CDO II Ltd.

Security	CUSIP	Remaining Balance
Class A-1LA Notes	77426NAA1	$0
Class A-1LB Notes	77426NAB9	$0
Class A-2L Notes	77426NAC7	$0
Class A-3L Notes	77426NAD5	$0
Class B-1L Notes	77426NAE3	$0
Class B-2L Notes	77426RAA2	$9,838,508.11
Class I Preference Shares	77426R203	$42,200,000.00
Class II Preference Shares	77426R401	$44,000,000.00

Southfork CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1a Notes		$0
Class A-1b Notes		$0
Class A-1g Notes		$0
Class A-2 Notes		$0
Class A-3a Notes		$0
Class B Notes		$0
Class C Notes		$0
Preference Shares	84427P202	$80,200,000.00
Class I Composite Note		$2,000,000.00

Stratford CLO Ltd.

Security	CUSIP	Remaining Balance
Class A-1 Notes	86280AAA5	$0
Class A-2 Notes	86280AAC1	$0
Class B Notes	86280AAD9	$0
Class C Notes	86280AAE7	$0
Class D Notes	86280AAF4	$0
Class E Notes	86280AAG2	$0
Class I Preference Shares	86280A202	$17,500,000.00
Class II Preference Shares	86280A301	$45,500,000.00

Loan Funding VII, LLC (aka Valhalla)

Security	CUSIP	Remaining Balance
Class A-1-A Notes		
Class A-2 Notes		
Class B Notes		
Class C-1 Notes		
Class C-2 Notes		
Class I Preference Shares	91914QAA4	$82,000,000.00

Westchester CLO, Ltd.

Security	CUSIP	Remaining Balance
Class A-1-A Notes	95736XAA6	$0
Class A-1-B Notes	95736XAB4	$0
Class B Notes	95736XAD0	$0
Class C Notes	95736XAE8	$0
Class D Notes	95736XAF5	$0
Class E Notes	95736XAG3	$9,141,575.05
Class I Preference Shares	95736T206	$80,000,000.00

EXHIBIT B

Holdings of Preference Shares[1] in CLOs

CLO	HIF	NSOF	NC	Total
Aberdeen	0%	30.21%	0%	**30.21%**
Brentwood	0%	40.06%	0%	**40.06%**
Eastland	31.16%	10.53%	0%	**41.69%**
Gleneagles	9.74%	8.52%	0%	**18.26%**
Grayson	49.10%	10.75%	0.63%	**60.48%**
Greenbriar	0%	53.44%	0%	**53.44%**
Jasper	0%	17.86%	0%	**17.86%**
Liberty	0%	10.64%	0%	**10.64%**
Red River	0%	10.49%	0%	**10.49%**
Rockwall	6.14%	19.57%	0%	**25.71%**
Rockwall II	14.56%	5.65%	0%	**20.21%**
Southfork	0%	7.30%	0%	**7.30%**
Stratford	0%	69.05%	0%	**69.05%**
Loan Funding VII (aka Valhalla)	0%	1.83%	0%	**1.83%**
Westchester	0%	44.38%	0%	**44.38%**

[1] Class E Certificates for Liberty CLO, Ltd.

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)
Debtors.	)	(Jointly Administered)

ORDER GRANTING MOTION FOR ORDER IMPOSING TEMPORARY RESTRICTIONS ON DEBTOR'S ABILITY, AS PORTFOLIO MANAGER, TO INITIATE SALES BY NON-DEBTOR CLO VEHICLES

Upon the Motion (the "**Motion**"),[1] filed by Highland Capital Management Fund Advisors, L.P. ("**HCMFA**") and NexPoint Advisors, L.P. ("**NexPoint**," and together with HCMFA, the "**Advisors**"), and Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (together, the "**Funds**"), seeking an order, pursuant to sections 105(a), 363, and 1107 of the Bankruptcy Code, imposing temporary restrictions on the Debtor's

[1] Capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Motion.

ability to initiate sales as portfolio manager (or other similar capacity) for certain non-debtor investment

vehicles (the "**CLOs**"); and upon the Declaration of Dustin Norris (the "**Declaration**"); and the Court, having reviewed the Motion and the Declaration; and due and sufficient notice of the Motion having been given; and it appearing that no other or further notice need be provided; and upon the record before the Court; and a hearing having been held on the Motion; and it appearing to the Court that good cause exists to grant the relief requested by the Motion;

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.

2. For a period of thirty days, commencing on the date hereof, the Debtor, in its capacity as portfolio manager or such other similar role with respect to the CLOs, is hereby prohibited from causing the CLOs to engage in any asset sales until January ___, 2021.

3. The Court shall retain jurisdiction over all matters involving the enforcement, implementation and interpretation of this Order.

END OF ORDER # #

Submitted by:

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Appendix Exhibit 69

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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.	)	**Re: Docket No. 1439**

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

[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.

The above-captioned debtor and debtor in possession (the "Debtor") hereby submits this response (the "Response") to *James Dondero's Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside the Ordinary Course of Business* [Docket No. 1439] (the "Motion").[2] In support of the Response, the Debtor respectfully states as follows:

PRELIMINARY STATEMENT

1. Through the Motion, Mr. James Dondero seeks entry of an order requiring the Debtor to obtain court approval before engaging in transactions outside the ordinary course of its business. Essentially, the Motion argues that the Protocols, which were approved by the Court approximately eleven months ago with Mr. Dondero's consent, permit the Debtor to engage in transactions that violate 11 U.S.C. § 363. The Motion reflects a profound misunderstanding of the Protocols and the types of transactions the Bankruptcy Code requires be brought to the Court for approval.

2. Given the Debtor's business as an investment manager, the Debtor proactively sought Court approval at the beginning of the case to define which of the Debtor's day-to-day activities were ordinary course and could be completed without Court oversight. After weeks of negotiations, the Debtor and the Committee agreed on the Protocols, which govern those ordinary course transactions. The Protocols provided the Committee with enhanced notice rights with respect to what would otherwise be ordinary course transactions and which would not require Court approval. The Debtor never intended the Protocols to apply to out of the ordinary course transactions for which separate approval would be required under section 363(b). In fact, the Debtor emphasized this point to the Court at the January 9, 2020, hearing at which the Court

[2] All capitalized terms used but not defined herein have the meanings given to them in the Motion.

approved the Protocols.

3. Regardless, the Motion's real argument is that certain transactions superficially identified in the Motion were outside of the ordinary course of business and required Court approval. The Motion, however, conflates the Debtor's obligation to seek Court approval for out of the ordinary course transactions involving the sale of the *Debtor's assets* with restrictions on the Debtor's ability to exercise its role as an investment manager and to sell assets of the Debtor's managed investment vehicles. There is no restriction on the Debtor fulfilling its role as an investment manager in the Bankruptcy Code.

4. On December 10, 2020, the Court entered the *Order Granting Debtor's Motion for a Temporary Restraining Order against James Dondero*, Adv. Proc. No. 20-03190-sgj [Adv. Docket No. 10] (the "TRO"). The TRO was necessitated by Mr. Dondero's unlawful interference in the Debtor's business operations and threats made by Mr. Dondero to Mr. Seery and the Debtor's employees. Faced with the impending confirmation of the Debtor's Plan and the rejection of Mr. Dondero's alternative plan, Mr. Dondero is again attempting to impede the Debtor's operations and the Debtor's efforts to maximize value. The Court should see through Mr. Dondero's pre-textual arguments for transparency and deny the Motion.[3]

REPLY

I. The Protocols Do Not Authorize Sales Outside of the Ordinary Course

5. In the Motion, Mr. Dondero contends that the Protocols allow the Debtor to sell assets outside of the ordinary course of business without having to satisfy the requirements of the Bankruptcy Code. That contention is false. The Protocols were instituted as part of a global

[3] Mr. Dondero's Motion also seeks relief similar to that sought by Mr. Dondero's two other registered investment advisors (NexPoint Advisors, L.P., and Highland Capital Management Fund Advisors, L.P. (collectively, the "Advisors")) in the *Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles* [Docket No. 1522] (the "CLO Motion"). In the CLO Motion, the Advisors seek a stay on the Debtor's ability to cause its managed CLOs to sell assets without the Advisors' consent.

settlement with the Committee and were intended to limit the Debtor's ability to transfer assets away from the estate and the reach of the Debtor's creditors. The Protocols were adopted because of the myriad and substantial allegations that the Debtor – then under the control of Mr. Dondero – had engaged in repeated fraudulent and impermissible transfers intended to frustrate creditor recoveries and hide assets. In negotiating the Protocols, the Debtor and the Committee intended the Protocols to apply only to (i) transactions within the "ordinary course of business" (*i.e.*, transactions that the Debtor could have completed without the need to come to this Court) or (ii) transactions occurring at non-Debtor entities that were otherwise arguably outside of this Court's jurisdiction and oversight. The Debtor was clear about this at the hearing approving the Protocols.[4]

6. The Protocols do not apply to transactions "outside of the ordinary course of business" because those transactions would *always* be subject to this Court's jurisdiction and require notice and a hearing. In other words, the Debtor and the Committee did not need to negotiate safeguards with respect to transactions outside the ordinary course. Those safeguards were already imposed by the Bankruptcy Code and have been honored by the Debtor (and the Committee) throughout this case. Further, the Protocols were approved by Mr. Dondero and have not been challenged by any party until now.

7. Again, the Protocols do not allow transactions outside the ordinary course of

[4] *See* Transcript, January 9, 2020 (14:16-25; 15: 1-10):

> The third major aspect of the term sheet, Your Honor, was the agreement on operating protocols, and it really relates to the ground rules for the Debtor's operations going forward and when notice to the Committee is required of certain transactions that would otherwise be in the ordinary course of business.
>
> Importantly, Your Honor, we are not trying to modify the Bankruptcy Code in any way. Any transactions out of the ordinary course of business would still be subject to Your Honor's approval.
>
> However, in this case. . . whether or not something is ordinary is not straightforward in a case such as the Debtor's, given the nature of the Debtor's operations. So we thought it was important to establish ground rules up front, and establishing those ground rules was one of the things we did initially in the case. We had opposition from the Committee, and we've worked through the opposition and ultimately arrived at the operating protocols that are attached to the term sheet.

business in violation of 11 U.S.C. § 363(b), and, for the avoidance of doubt, the Debtor will seek this Court's approval prior to conducting any transaction that would be outside the ordinary course of the Debtor's business.

II. The Debtor Has *Not* Conducted Sales Outside of the Ordinary Course of Business

8. Mr. Dondero also argues, without factual support or specificity, that the Debtor has conducted a number of substantial asset sales outside of the ordinary course of business and that the Debtor's non-debtor subsidiaries have also conducted significant asset sales without complying with the Bankruptcy Code. Both of these arguments fail.

The Asset Sales Mentioned in the Motion Did Not Involve Property of the Estate

9. Mr. Dondero alleges that three sales violated 11 U.S.C. § 363: sales conducted by the Highland Multi Strategy Credit Fund, L.P. ("MSCF"), Highland Restoration Capital Partners, L.P. ("RCP"), and the sale of SSPI Holdings, Inc. ("SSPI").[5] These sales were subject to the Protocols (and consistent with the Protocols, each sale was approved by the Committee); however, they were not subject to 11 U.S.C. § 363(b).

10. Section 363(b) applies to "property of the estate." 11 U.S.C. § 363(b)(1) ("The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, ***property of the estate***. . . .") (emphasis added). In the Motion, Mr. Dondero asserts – without support – that sales of assets owned by subsidiaries of the Debtor must comply with 11 U.S.C. § 363. However, the assets of a debtor's non-debtor subsidiaries are *not* property of a debtor's estate. *See, e.g., In re Guyana Dev. Corp.*, 168 B.R. 892, 905 (Bankr. S.D. Tex. 1994) ("As a general rule, property of the estate includes the debtor's stock in a subsidiary but not the assets of the subsidiary."); *see also Parkview-Gem, Inc.*, 516 F.2d 807, 809 (8th Cir. 1975)

[5] In the Motion, Mr. Dondero refers to SSP Holdings generically as a subsidiary of "Trussway." (Motion ¶13). The actual entity that was sold was SSPI.

("Ownership of all of the outstanding stock of a corporation, however, is not the equivalent of ownership of the subsidiary's property or assets. . . Even though the value of the subsidiary's outstanding shares owned by the debtor may be directly affected by the subsidiary's disputes with third parties,' Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate.'") (*citing In re Beck Indus., Inc.*, 479 F.2d 410 (2d Cir. 1973)).

11. Further, while the Debtor has certain control rights over RCP, MSCF, and SSPI, those rights do not make the assets of RCP, MSCF, and SSPI property of the Debtor's estate. *See In re Thomas*, 2020 Bankr. LEXIS 1364 at *31 (Bankr. W.D. Tenn. 2020) (a debtor's membership interest in an LLC, including both its economic rights and governance rights, became property of the estate on the petition date, but the assets of the LLC remain separate and the debtor must manage them consistent with the terms of the operating agreement and applicable law); *In re Cardinal Indus.*, 105 B.R. 834, 849 (Bankr. S.D. Ohio 1989) (a debtor's ownership interests and control rights in non-debtor partnerships were property of the estate; but those rights did not make the assets of the partnership property of the estate or implicate the automatic stay so as to prevent secured creditors of the non-debtor partnerships from foreclosing on properties of the partnerships).

12. None of RCP, MSCF, or SSPI is a wholly-owned subsidiary of the Debtor and each has meaningful third party investors. The assets of those entities – and by extension the interests of the third party investors – are not property of the estate and, therefore, are not subject to 11 U.S.C. § 363(b). The assets of these entities are only subject to this Court's oversight because of the agreement the Debtor reached with the Committee to enter into and be bound by the Protocols.

The Debtor Is Authorized to Sell Assets Pursuant to 11 U.S.C. § 363(c)(1)

13. Further, in the Motion, Mr. Dondero focuses on 11 U.S.C. § 363(b), but ignores 11 U.S.C. § 363(c)(1), which grants the Debtor the authority to operate its business in the ordinary course without notice or hearing. Specifically, section 363(c)(1) provides:

> [i]f the business of the debtor is authorized to be operated under section. . . 1108. . . of this title... the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1). As such, a debtor may enter into post-petition transactions, including the sale or lease of its property, if the debtor is authorized to operate its business under section 1108 and such transactions are "in the ordinary course of business."

14. An activity is "ordinary course" if it satisfies both the "horizontal test" and the "vertical test." S*ee, e.g.*, *Denton Cty. Elec. Coop. v. Eldorado Ranch, Ltd. (In re Denton Cty. Elec. Coop.)*, 281 B.R. 876, 882 n.12 (Bankr. N.D. Tex. 2002); *see also In re Roth American, Inc.*, 975 F.2d 949, 952 (3d Cir. 1992). The vertical test looks to "whether the transaction subjects a hypothetical creditor to a different economic risk than existed when the creditor originally extended credit." *In re Patriot Place, Ltd.*, 486 B.R. 773, 793 (Bankr. W.D. Tex. 2013). The horizontal test considers "whether the transaction was of the sort commonly undertaken by companies in the industry." *Id.* As such, even if the MSCF, RCP, and SSPI asset sales mentioned in the Motion were subject to this Court's jurisdiction (and they were not), they are allowed by the Bankruptcy Code because they are within the ordinary course of the Debtor's business.

15. First, the vertical test is satisfied with respect to such sales. As Mr. Dondero knows, the Debtor is an investment manager and its business *is* buying and selling assets on behalf of its managed investment vehicles. As such, any creditor of the Debtor (with the

potential exception of Mr. Dondero) would expect the Debtor to continue buying and selling assets; that is what the Debtor does. The MSCF, RCP, and SSPI sales are thus consistent with the expectations of the Debtor's creditors and the Debtor's obligations to MSCF, RCP, and SSPI.[6] *See Thomas*, 2020 Bankr. LEXIS 1364 at *31. The MSCF, RCP, and SSPI sales are examples of the Debtor selling assets on behalf of a managed investment vehicles and include no different economic risk than existed prepetition. Because the Debtor is engaging in the same conduct post-petition as it did prepetition (which is what debtors-in-possession are intended and expected to do under 11 U.S.C. § 1107 of the Bankruptcy Code), the Debtor's creditors will incur no additional risk. This risk is further mitigated because any such sales will be authorized by the Debtor's new management, not Mr. Dondero.

16. Second, the horizontal test is satisfied. The Debtor, again, is an investment manager. Investment managers manage investment vehicles and by definition, buy and sell assets and distribute the proceeds of those assets to investors. The sales referenced in the Motion are consistent with that business as they are the sales of assets held by managed investment vehicles – some of which are currently in orderly liquidation. Selling assets *is* the Debtor's industry, and the sales referenced in the Motion are the sorts of sales commonly conducted in the industry. The Debtor is thus simply operating post-petition in the same manner it did prepetition, albeit under Court-mandated new management. Consequently, the horizontal test is also satisfied.

17. Regardless, if the Court believes the Debtor should be required to justify its conduct, the Debtor is ready to do so as it has acted, in all instances, in a commercially reasonable manner and in the best interests of the Debtor's estate and the stakeholders of MSCF,

[6] In fact, creditors should support the asset sales and such sales were supported by the Committee. The sales liquidated assets at non-Debtor entities to which the Debtor's creditors had no recourse and the net proceeds of those sales were distributed, in part, to the Debtor, to which the Debtor's creditors have recourse.

RCP, and SSPI.[7]

III. Mr. Dondero Has a *De Minimis* Interest in the Debtor

18. In the Motion, Mr. Dondero asserts he is a "creditor, indirect equity security holder, and party in interest" in the Debtor's bankruptcy. While that claim is ostensibly true, it is tenuous. Mr. Dondero filed five proofs of claim in the Debtor's bankruptcy case. Two of those proofs of claim were withdrawn with prejudice on November 23, 2020 [Docket No. 1460]. The other three are unliquidated, contingent claims, each of which said that Mr. Dondero would "update his claim in the next ninety days." Ninety days has passed since those proofs of claim were filed and yet Mr. Dondero has not updated those claims to assert an actual claim against the Debtor's estate.[8]

19. Mr. Dondero's claim as an "indirect equity security holder" is also a stretch. Mr. Dondero holds no direct equity interest in the Debtor. Mr. Dondero instead owns 100% of Strand Advisors, Inc. ("Strand"), the Debtor's general partner. Strand, however, holds only 0.25% of the total limited partnership interests in the Debtor through its ownership of Class A limited partnership interests. The Class A limited partnership interests are junior in priority of distribution to the Debtor's Class B and Class C limited partnership interests. The Class A interests are also junior to all other claims filed against the Debtor. Finally, Mr. Dondero's recovery on his indirect equity interest is junior to any claims against Strand itself. Consequently, before Mr. Dondero can recover on his "indirect" equity interest, the Debtor's

[7] The Dugaboy Investment Trust ("Dugaboy") – Mr. Dondero's family trust and a limited partner in MSCF – filed a proof of claim [Claim No. 177] asserting that the Debtor mismanaged MSCF during the pendency of the bankruptcy by causing MSCF to sell certain of its assets [Docket No. 1154] (the "Dugaboy Claim"). The Debtor believes that the sales discussed in the Dugaboy Claim are the same MSCF sales alluded to in the Motion. The Debtor is currently negotiating a briefing and discovery schedule with respect to the Dugaboy Claim with Mr. Dondero's counsel – which also represents Dugaboy. Consequently, even if the Motion is denied, the Debtor will still be required to account for its conduct with respect to the MSCF sales.

[8] Without knowing the what nature of the "updates" would have been, the Debtor does not concede that any "updates" would have been procedurally proper and reserves the right to object to any proposed amendment to Mr. Dondero's claims.

estate must be solvent, priority distributions to Class B and Class C creditors must be satisfied, and all claims against Strand must be paid.

20. Consequently, although in a purely technical sense Mr. Dondero may have standing as a "creditor" to object to asset sales, his standing is attenuated and his chances of recovery in this case are speculative. *See In re Kutner*, 3 B.R. 422, 425 (Bankr. N.D. Tex. 1980) (finding that a party had standing only when it had "pecuniary interest. . . directly affected by the bankruptcy proceeding"); *see also In re Flintkote Co.* 486 B.R. 99, 114-15 (Bankr. D. Del. 2012), *aff'd.* 526 B.R. 515 (D. Del. 2014) (a claim that is speculative cannot confer party in interest standing).

21. Mr. Dondero's minimal interest in the estate should not allow him to control the disposition of assets in the ordinary course of the Debtor's business, especially when those asset sales have the blessing of the Debtor's *actual* creditors and constituents. As the court said in *In re Lionel* (a case cited by Mr. Dondero), "a bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, [the judge] should consider all salient factors. . . and . . . act to further the diverse interests of the debtor, creditors and equity holders, alike." 722 F.2d 1063, 1071 (2d Cir. 1983). Mr. Dondero's attempt to re-assert his lost control over the Debtor should be rejected and the Motion should be denied.

[Remainder of Page Intentionally Blank]

WHEREFORE, for the reasons set forth above, the Debtor respectfully requests that the Court deny the Motion.

Dated: December 11, 2020.

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Appendix Exhibit 70

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ATTORNEYS FOR 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.	§	

NOTICE OF WITHDRAWAL

PLEASE TAKE NOTICE THAT James Dondero hereby **WITHDRAWS** the following documents:

1. *James Dondero's Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Outside the Ordinary Course of Business* [Docket No. 1439];
2. Notice of Subpoena of Jean Paul Sevilla [Docket No. 1559];
3. Notice of Subpoena of Russell Nelms [Docket No. 1560]; and
4. Notice of Subpoena of Fred Caruso [Docket No. 1561].

Dated: December 23, 2020

Respectfully submitted,

/s/ Bryan C. Assink

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ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on December 23, 2020, a true and correct copy of the foregoing document was served via the Court's CM/ECF system upon all parties requesting or consenting to such service.

/s/ Bryan C. Assink
Bryan C. Assink

Appendix Exhibit 71

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County

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

In re:	**§**	**Chapter 11**
	§	
HIGHLAND CAPITAL MANAGEMENT, LP,	**§**	**Case No. 19-34054-SGJ**
	§	
Debtor.	**§**	

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.

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Come now Dallas County, City of Allen, Allen ISD, City of Richardson and Kaufman County (collectively, the "Tax Authorities"), creditors and parties-in-interest, and file this, their objection to confirmation of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the "Plan") and would respectfully show the Court as follows:

Background

1. Dallas County, City of Allen, Allen ISD and the City of Richardson, duly organized governmental units of the State of Texas, are the holders of secured claims against the Debtor for unpaid ad valorem business personal property taxes for tax year 2019 in the aggregate amount of $65,181.49.

2. The Tax Authorities are the holders of administrative expense claims against the

Debtor for year 2020 and estimated 2021 ad valorem real and business personal property taxes.

3. The prepetition claims and the administrative expense claims are secured by unavoidable, first priority, perfected liens on all property of the Debtor's estate pursuant to sections 32.01 and 32.05 of the Texas Property Tax Code and 11 U.S.C. Section 362(b)(18). *In re Winn's Stores, Inc.*, 177 B.R. 253 (Bankr. W.D. Tex. 1995); *Central Appraisal District of Taylor County v. Dixie-Rose Jewels, Inc.*, 894 S.W.2d 841 (Tex. App.-Eastland 1995). These liens are *in solido* and attach on January 1 of each year to all business personal property of the property owner and to property subsequently acquired. *In re Universal Seismic Associates, Inc.*, 288 F.3d 205 (5th Cir. 2002); *City of Dallas v. Cornerstone Bank, N.A.*, 879 S.W.2d 264 (Tex. App.-Dallas 1994).

4. Texas Tax Code Section 32.01 provides:

> (a) On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on the property, whether or not the taxes are imposed in the year the lien attaches. The lien exists in favor of each taxing unit having power to tax the property.
>
> (b) A tax lien on inventory, furniture, equipment, or other personal property is a lien in solido and attaches to all inventory, furniture, equipment, and other personal property that the property owner owns on January 1 of the year the lien attaches or that the property owner subsequently acquires.
>
> …
>
> (d) The lien under this section is perfected on attachment and … perfection requires no further action by the taxing unit.

Tex. Tax Code § 32.01. Texas Tax Code Section 32.05(b) provides:

> (b) . . . a tax lien provided by this chapter takes priority over the claim of any creditor of a person whose property is encumbered by the lien and over the claim of any holder of a lien on property encumbered by the tax lien, whether or not the debt or lien existed before attachment of the tax lien.

Tex. Tax Code § 32.05(b).

Objection to Confirmation

The Tax Authorities object to confirmation of the plan for numerous reasons.

5. The Tax Authorities object to confirmation of the Plan because it defines the "Disputed Claims Reserve Amount" as the Cash that would have otherwise been distributed to a Holder of a Disputed Claim at the time any distributions . . . are made to the Holders of Allowed Claims." (Plan, Art. I. Sec. B. 50 at 7). The Tax Authorities object to the failure to pay all postpetition and posteffective date interest that they are entitled to receive on their prepetition claims pursuant to 11 U.S.C. Sections 506(b), 511 and 1129 as well as all penalties and interest that may accrue on their administrative expense claims, which are fully collectible, if the administrative claims are not paid before the state law delinquency date.

6. The Tax Authorities object to confirmation of the Plan because it fails to provide for payment of postpetition ad valorem property taxes in the ordinary course of business prior to the state law delinquency date.

7. The Tax Authorities object to confirmation of the Plan because it fails to provide that they shall receive all penalties and interest that accrue on postpetition ad valorem property taxes if the taxes are not paid prior to the state law delinquency date.

8. The Tax Authorities object to confirmation of the Plan because it violates the provisions of 11 U.S.C. Section 503(b)(1)(D) which very specifically states that a governmental unit is not required to file a request for payment of an administrative expense as a condition of allowance.

9. The Tax Authorities object to confirmation of the Plan because it fails to specifically provide for the retention of the liens that secure postpetition ad valorem property taxes plus all penalties and interest that may accrue.

10. The Tax Authorities object to confirmation of the plan because it fails to provide for the retention of the liens that secure the prepetition claims until they receive payment in full of their claims in violation of 11 U.S.C. Section 1129.

11. The Tax Authorities object to confirmation of the Plan because it provides that all Reorganized Debtor Assets[1] will vest in the Reorganized Debtor free and clear of all liens except those that are specifically preserved in the plan. (Plan, Art. IV. Sec. C.5 at 33.)

12. The Tax Authorities object to confirmation of the Plan because it fails to specifically provide for the payment of postpetition preeffective date interest at the state statutory rate of 1% per month, which the Tax Authorities are entitled to pursuant to 11 U.S.C. Sections 506(b) and 511.

13. The Tax Authorities object to confirmation of the Plan because it fails to specifically provide for the payment of posteffective date interest at the state statutory rate of 12% per annum, which the Tax Authorities are entitled to pursuant to 11 U.S.C. Sections 511 and 1129.

14. The Tax Authorities object to confirmation of the Plan because it provides that except as otherwise provided in the Plan the Holders of Claims shall not be entitled to interest in violation of 11 U.S.C. Sections 506(b), 511 and 1129. (Plan, Art. VI, Sec. A. at 39.) The Tax Authorities also object to this provision because it could result in the nonpayment of penalties and interest that accrues on postpetition taxes, which are fully secured and collectible. *See U.S. v. Noland*, 571 U.S. 535 (1996).

15. The Tax Authorities object to confirmation because the Plan provides that distributions to disputed claims that become allowed claims shall be made in the amount that the

[1] All capitalized terms that are not defined herein shall have the same meaning as provided in the Plan.

holder would have received if it been an allowed claim on the Effective Date. (Plan, Art. VI. Sec. E. at 40.) This provision violates 11 U.S.C. Sections 506(b), 511 and 1129. The Tax Authorities also object to this provision because it could result in the nonpayment of penalties and interest that accrues on postpetition taxes, which are fully secured and collectible. *See U.S. v. Noland*, 571 U.S. 535 (1996).

16. The Tax Authorities object to confirmation of the Plan because it does not provide that failure to timely pay postpetition taxes is an event of default under the Plan and because the Plan does not provide a remedy in the event of such a default. The Plan should be amended to provide that in the event of default the Tax Authorities shall send written notice of the default to counsel for the Debtor/Reorganized Debtor via electronic mail, the Debtor/Reorganized Debtor will have 10 days from the date of the notice to cure its default and if the default is not cured, the Tax Authorities shall be entitled to pursue all state law remedies available to them without the need for recourse to the Bankruptcy Court. The Plan should further provide that the Tax Authorities are only required to give the Debtor/Reorganized Debtor two notices of default and if the Debtor defaults a third time, the Tax Authorities will be entitled to pursue collection of all amounts owed pursuant to state law outside the Bankruptcy Court without further notice to the Debtor. An event of default shall include the Debtor's failure to make a payment to one or both of the Tax Authorities under the plan and the Debtor's failure to pay post-petition ad valorem taxes prior to the state law delinquency date.ih38SW!615.00

17. The Tax Authorities object to the definition of "Other Unsecured Claim," which the Plan defines as "any Secured Claim other than the Jeffries Secured Claim and the Frontier Secured Claim." (Plan Art. I, Sec. B. 88 at 17.) Defining a secured claim as an "Other

Unsecured Claim" is not sufficient to reclassify a secured claim or to avoid a creditor's lien or security interest.

Based on the foregoing, the Tax Authorities request that the Court enter an order denying confirmation of the Debtor's plan.

WHEREFORE, PREMISES CONSIDERED, the Tax Authorities request that the Court enter an order denying confirmation of the Debtor's Fifth Amended Plan of Reorganization.

Dated: January 5, 2021.

Respectfully submitted,

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ATTORNEYS FOR DALLAS COUNTY, CITY OF ALLEN, ALLEN ISD, CITY OF RICHARDSON AND KAUFMAN COUNTY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 5, 2021, a true and correct copy of the foregoing was served electronically through the Court's electronic case filing system or *via* electronic mail upon: Jeffrey N. Pomerantz, email: jpomerantz@pszjlaw.com ; Ira D. Kharasch, email: jkharasch@pszjlaw.com; Gregory V. Demo, email: gdemopszjlaw.com; Melissa S. Hayward, email: mhayward@haywardfirm.com; Zachery Z. Annable, email: zannable@haywardfirm.com; Matthew A. Clemente, email: mclemente@sidley.com; Alyssa Russell, email: alyssa.russell@sidley.com and Lisa L . Lambert, email: Lisa.L.Lambert@usdoj.gov.

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Appendix Exhibit 72

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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 Claims[1] 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 defined[2] 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 office 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 "Entity[5]" 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

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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 pursing 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

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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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Appendix Exhibit 73

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

UNITED STATES' (IRS) LIMITED OBJECTION TO
DEBTOR'S FIFTH AMENDED PLAN OF REORGANIZATION

The United States of America, on behalf of its agency the Internal Revenue Service, a creditor and governmental unit, files this limited objection to Highland Capital Management, L.P.'s Fifth Amended Plan of Reorganization as the Debtor has failed to comply with its prepetition tax obligations under the Internal Revenue Code, and the Plan contains provisions that violate the Bankruptcy Code and other applicable law. In support of this limited objection, the United States states as follows:

Objections

1. The United States objects to the Debtor's Plan because the Plan at Article II, Paragraph C. fails to state that the IRS' priority tax claim will be paid in accordance with Bankruptcy Code section 1129(a)(9)(C), which requires that the total value of the priority taxes, as of the effective date, must be paid over a period ending not later than five years after the petition date. 11 U.S.C. § 1120(a)(9)(C). In addition, the Debtor's Plan fails to specifically state

that the Debtor will pay the value of the IRS' priority tax claim as of the Effective Date, as the Debtor's Plan contemplates payments on the IRS' priority tax claim on a date other than, *i.e.*, subsequent to, the Plan's Effective Date, thus allowing the Debtor to avoid its obligation to pay the total value of the IRS' priority tax claim as of the Effective Date. The Debtor's Plan at Article VI, Paragraph A. *Dates of Distributions* provides that "Except as otherwise provided in this Plan, Holders of Claims … 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." In order to comply with the provisions of 1129(a)(9)C), the Debtor must pay an applicable interest rate on the IRS' priority claim as outlined in Section 511 of the Bankruptcy Code.

2. The United States objects to the Debtor's Plan on the grounds that the Debtor has outstanding prepetition tax obligations, including the filing of certain tax returns with the IRS, and thus the Debtor is not in compliance with its federal tax reporting requirements under the Internal Revenue Code. In particular, under 26 U.S.C. § 4376, the Debtor is obligated to file Quarterly Federal Excise Tax Returns (Form 720) with respect to its self-insured health plan. However, as shown on the IRS' latest filed proof of claim (filed April 14, 2020), the IRS does not have a record of the Debtor filing its Form 720 for the June 30, 2014, June 30, 2016 or the June 30, 2017 tax periods.

As a result of the Debtor's non-compliance with its required tax return filings and tax payments, the United States requests that the Debtor's Plan be amended to include the following default language as to the Internal Revenue Service:

> Default Provision - IRS. Notwithstanding any other provision or term of this 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):

(1) 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 said notice and demand, then the following shall apply to the IRS:

(A) 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;

(B) The automatic stay of 11 U.S.C. § 362 and any injunction of this Plan or in the Confirmation Order shall, with regard to the IRS only, lift or terminate without further notice or hearing by the Court, and the entire imposed liability owed to the IRS, together with any unpaid current liabilities, may become due and payable immediately; and

(C) 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.

(2) 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 the entire imposed liability, together with any unpaid current 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.

(3) If full payment is not made within fourteen (14) days of such demand, then the Internal Revenue Service may collect any unpaid liabilities through the administrative collection provisions of the Internal Revenue Code. 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 (A), (B), and/or (C) herein above without further notice to the Debtor, the Reorganized Debtor, or any successor in interest, or its counsel. The collection statute expiration date will be extended from the Petition Date until substantial default under the Plan.

(4) 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.

(5) 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.

3. The United States objects to the Debtor's Plan and specifically Article VI, Paragraph A, which states that "Upon the Effective Date, all Claims … against the Debtor shall be deemed fixed and adjusted pursuant to the Plan and none of the Debtor, the Reorganized Debtor, or the Claimant Trust will have liability on account of any Claims … except as set forth in this Plan and in the Confirmation Order." Because the Debtor has failed to comply with its tax return filing requirements under the Internal Revenue Code as shown on the IRS' proof of claim listing unfiled tax returns and estimates of taxes for the unfiled tax periods, the IRS is unable to fully ascertain the Debtor's tax liability until all the Debtor's tax returns are filed, processed and the tax liabilities assessed by the IRS against the Debtor. The Debtor should be required to amend or modify its Plan – as to the Internal Revenue Service – to provide that until all required tax returns are filed with the Internal Revenue Service, the IRS' 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 after the Debtor has filed all unfiled tax returns.

4. All checks are to be made payable to: Department of the Treasury, and mailed to Internal Revenue Service, 1100 Commerce Street, M/S MC 5027DAL, Dallas, Texas 75242. Reference the Debtor's bankruptcy case number on the memo line on the check.

The United States respectfully request that the Court sustain the United States' objections to the Debtor's Fifth Amended Chapter 11 Plan as set forth above. The United States request such further relief to which it is entitled.

Date: January 5, 2021.

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/s/ David G. Adams

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2020, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to counsel requesting notice, including:

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

In re: Highland Capital Management, L.P.,	§	**Case No. 19-34054-sgj-11**
	§	
	§	**Chapter 11**
Debtor.	§	
	§	

SENIOR EMPLOYEES' LIMITED OBJECTION TO DEBTOR'S FIFTH AMENDED PLAN OF REORGANIZATION

Scott Ellington, Frank Waterhouse, Isaac Leventon, and Thomas Surgent (collectively, the "**Senior Employees**") file this limited objection to the Debtor's Fifth Amended Plan of Reorganization (Dkt. No. 1472) (the "**Plan**") and in support thereof respectfully state as follows:

I. THE SENIOR EMPLOYEES' CLAIMS FOR COMPENSATION ARE ENTITLED TO ADMINISTRATIVE PRIORITY.

As a threshold matter, the Senior Employees' compensation-related claims against the Debtor's estate are entitled to administrative priority, as the Debtor has previously argued to the Court and the Debtor's independent directors repeatedly have represented to the Senior Employees. The Senior Employees will be filing a motion seeking payment of claims as administrative expenses and are not seeking to argue the merits of such claims in the context of the confirmation hearing except as the Debtor's disparate treatment of the Senior Employees is reflected in the terms of the Plan. To the extent, however, that any portion of the Senior Employees' claims are found to be pre-petition claims, the deficiencies in the Plan identified in this objection would apply to such claims. The Senior Employees do not waive any of their rights by filing this limited objection, casting (or not casting) ballots, or making elections for treatment under the Plan. The Senior Employees reserve all their rights with respect to their claims, including without limitation their rights to insurance coverage and indemnification.

II. THE PLAN AS CURRENTLY DRAFTED IS NOT CONFIRMABLE.

The Debtor's Plan is not confirmable because (A) it violates Bankruptcy Code § 1123(a)(4)'s requirement that claims in the same class be treated the same by (1) unfairly imposing conditions on the Senior Employees that are not imposed on all other employees, (2) arbitrarily providing some members of Class 8 but not others the option to elect treatment under Class 7, and (3) not allowing the Senior Employees to make the Convenience Class Election, resulting in disparate treatment of holders of Class 8 Claims; (B) the Plan appears to impermissibly grant the Debtor, the Reorganized Debtor, and the

Claimant Trustee the unfettered power to "re-classify" any claim as a Subordinated Claim; and (C) the Plan violates Bankruptcy Code § 1127 by failing to provide creditors with all material information required to make an informed decision in voting on the Plan.

A. The Plan Violates Bankruptcy Code § 1123(a)(4).

The Plan violates the Bankruptcy Code's requirement that the contents of a confirmable plan of reorganization must "provide the same treatment for each claim or interest of a particular class" unless an affected claimant agrees to the less favorable treatment proposed by the Debtor. 11 U.S.C. § 1123(a)(4).

1. The Plan Provides Senior Employees with Less Favorable Treatment than Other Employees in the Same Class by Requiring them to Sign a "Stipulation" to Obtain Releases and Exculpations.

Under the Plan, the Debtor proposes to treat the great majority of its employees the same while singling out the similarly situated Senior Employees (whose claims are classified in the same class as the other employees) for disparate—and less favorable—treatment without their consent. Specifically, the Plan grants broad releases to "Employees," but impermissibly conditions the release of four "Senior Employees"—and only these four Employees—on the Senior Employees agreeing to take less favorable treatment on their claims than what other creditors (including Employees) are receiving. *See* Plan Art. IX.D. No other Employees are required to sign a stipulation to be included as a Released or Exculpated Party. And no other Employees in the same class are provided different and lesser treatment with respect to the Plan's treatment of their claims. This violates § 1123(a)(4) because the Plan is providing less favorable treatment to creditors (Employees vs Senior Employees) whose claims are classified in the same class.

2. The Stipulation Suffers from Numerous Defects.

The form of the stipulation the Debtor drafted has not been approved or accepted by any "Senior Employee," for good reason. The form itself suffers from a number of substantial defects. The following are just some of the examples of defects in the Debtor's proposed stipulation.

- The draft stipulation wrongly states that "the Committee objected to the Senior Employee receiving the Earned Amounts during the Chapter 11 Case and the Earned Amounts, although earned, was [sic] not paid" (with no reference to the record of any such alleged objection).

- It fails to explain why the supposed Committee objection is relevant, given that the Debtor obtained Court authority to pay ***all*** Employees (other than James Dondero and Mark Okada) their bonus amounts. That authority to pay all Employees their bonus payments in the ordinary course of business was not conditioned on Committee approval (or made subject to a Committee veto);

- The draft stipulation contains a vague standard for what constitutes "Confidential Information" that the Senior Employee is required to keep confidential, including "discussions, information, and observations" and undefined "business sensitive information."

- It vests sole authority in the Claimant Trustee and the "Independent Member" of the Claimant Trust Oversight Committee ("CTOC") (who is only "independent" because they do not hold a claim, but otherwise is selected exclusively by the CTOC) to determine whether the Senior Employee has complied with the conditions for a release, with no right of the Senior Employee to dispute such determination and seek a court decision on whether that determination was justified.

- With respect to the "Earned Amount" of a Senior Employee's compensation, the stipulation requires the Senior Employee to reduce his claims to Convenience Claims and then further reduce such claims by 40% in exchange for the possibility that the Senior Employee will be released on the date at some point in the distant future when the Claimant Trust is dissolved. The stipulation provides no mechanism, however, for the Senior Employee to recover claims and distributions that he forfeited, or even to preserve such rights as defenses or offsets against any claims that might be asserted.

In addition to the defects listed above, the stipulation also is rife with vague standards with which the Senior Employee has to comply if the Senior Employee ultimately wants to be released from claims. Moreover, the stipulation provides no requirement that the Claimant Trustee provide notice to the Senior Employee of any purported violation of the Stipulation and ability to cure. The vague requirements include the following: (1) The Senior Employee "works with or assists any person to sue, attempt to sue, or threaten" a number of parties, including any "Released Party" "in connection with any claim or cause of action arising prior to the Effective Date." (What does it mean to "work with or assist"? What if the Senior Employee is compelled to provide information by means of a subpoena or other requirement under applicable law? Read literally, the "causes of action" (which are not defined) do not even have to relate to the Debtor); (2) The Senior Employee "has taken any action that, [sic] impairs or harms the value of the Claimant Trust Assets or the Reorganized Debtor Assets" (This language, read literally, could apply even to actions taken prepetition. The draft stipulation provides no specifics about what kinds of action could "impair" the value and does not even require a material impairment as a basis for taking away the Senior Employee's release.); (3) The Senior Employee "has violated the confidentiality provision" (Again, this is not defined by any time frame, could include any discussions that occurred prior to execution of the stipulation, and fails to carve out any disclosure required by a subpoena or otherwise in accordance with applicable law); (4) The Senior Employee, "upon the request of the Claimant Trustee, has failed to provide reasonable assistance in good faith … or has taken any action that impedes or frustrates the Claimant Trustee or the Reorganized Debtor." (The stipulation should set forth what

actions will be required of the Senior Employee to comply with this standard and should provide for reimbursement to the Senior Employee if compliance with the provision would require the Senior Employee to incur any expenses; otherwise, the Senior Employee should be relieved from any obligation to comply with such provision.).

3. The Debtor Improperly Has Attempted to Prevent the Senior Employees from Making the Convenience Class Election.

Each of the Senior Employees has filed a proof of claim in these cases. That proof of claim asserts PTO Claims under the Plan, claims for compensation amounts that have been earned and not paid (the "***Liquidated Awards***"), and other claims that might arise in the future, including contingent indemnification claims and claims for future compensation amounts (the "***Other Claims***"). As reflected in a chart prepared by the Debtor summarizing the Liquidated Awards, attached hereto as **Exhibit A** (the "***Liquidated Awards Spreadsheet***"), the Debtor does not dispute the amount of the Liquidated Awards. The Debtor also does not dispute that the Senior Employees' PTO Claims, which were part of the Senior Employees' proofs of claim, will be paid under Class 6 of the Plan. As of the date hereof, no objection has been filed to any of the claims asserted by the Senior Employees. As such, the PTO Claims, the Liquidated Awards, and the Other Claims all constitute allowed claims within the meaning of § 502(a) of the Bankruptcy Code.[1]

What is in dispute is the priority of the Liquidated Awards and the Other Claims—the Senior Employees assert that the Liquidated Awards and Other Claims are entitled to administrative expense priority, while the Debtor disagrees. The Senior Employees will file

[1] Section 502(a) provides, in relevant part, that a "claim ..., proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest ... objects."

a motion requesting payment of such claims as administrative expenses, and the Senior Employees are not asking the Court to address that issue in connection with confirmation. Without prejudice to such such issue, however, the Senior Employees seek to protect their rights under the Plan to elect to have the Liquidated Awards, which otherwise would be General Unsecured Claims within the scope of Class 8 of the Plan, be treated as Convenience Claims under Class 7 the Plan if it is determined that the Liquidated Awards are prepetition claims.

a) The Plan Gives Class 8 Creditors the Right to Make the Convenience Class Election.

Article I.B.43 of the Plan defines a "Convenience Claim" as "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" (emphasis added). With respect to holders of General Unsecured Claims in Class 8, Article III.H.8 of the Plan allows any holder of an "Allowed Class 8 Claim" to "make[] a valid Convenience Class Election." The "Convenience Class Election" is "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." Plan Art. I.A.43 (emphasis added). Nowhere does the Plan define what is meant by requiring that a claim be "liquidated," as opposed to "Allowed." In addition, nowhere does the Plan purport to require that a creditor aggregate all their claims within a Class for the purposes of making the Convenience Class Election.

Moreover, nowhere does the Plan condition the right of the Senior Employees to make the Convenience Class Election on their execution of the Senior Employee Stipulation. Although the definition of "Convenience Claim" makes it clear that execution of the Senior Employee Stipulation gives rise to a "Reduced Employee Claim" that will be treated as a Convenience Claim, nowhere does the Plan provide for the converse -- that the failure to sign the Senior Employee Stipulation would deprive the Senior Employees of their right to make the Convenience Class Election. Indeed, the only consequence of failing to sign the Senior Employee Stipulation is set forth in Article IX.D. of the Plan, which conditions the release of Senior Employees under Article IX.D. upon execution of the Senior Employee Stipulation. This is consistent with the representations made by the Debtor and its counsel (as reflected in the Liquidated Awards Spreadsheet) -- the Senior Employees could elect not to be released but to have their Liquidated Awards treated as Convenience Claims in the same manner as other holders in Class 7, or the Senior Employees could sign the Senior Employee Stipulation, receive a release, and limit their recovery to the Reduced Employee Claim amount.

b) The Debtor Has Contradicted the Plan in Answering Questions Raised by the Senior Employees Concerning the Convenience Class Election.

Although the Senior Employees had not signed the Senior Employee Stipulation as of the distribution of the solicitation packages, each of the Senior Employees received two ballots -- a Class 7 (Convenience Class) ballot in the Reduced Employee Claim amount and a Class 8 (General Unsecured Claims) ballot in the amount of $1.00 (for voting purposes only).

Because of the confusion created by the ballots and given the Debtor's failure to define "liquidated" in the Plan, the Senior Employees, through their counsel, sought to clarify that their understanding of the Convenience Class Election was consistent with how the Plan had been described to them by the Debtor's advisers—the Liquidated Awards would be "dropped down" to Class 7, but the Other Claims would remain as Class 8. The text of the ensuing email exchange with the Debtor's counsel is attached hereto as **Exhibit B**. In short, the Debtor, for the first time has taken the position that (1) a Class 8 Creditor may only make the Convenience Class Election for all of its Class 8 Claims, and (2) a Class 8 Creditor may only make the Convenience Class Election if all of its Class 8 Claims are liquidated as of the Confirmation Date. As a result, the Debtor's counsel has stated that the Senior Employees have no right to make the Convenient Class Election. This is inconsistent with numerous other representations of the Debtor and its counsel to the Senior Employees.

c) The Debtor's Interpretation of the Convenience Class Election Is Inaccurate and Inconsistent with its Prior Positions.

The Senior Employees object to this interpretation because (1) it is not supported by the text of the provisions relating to the Convenience Class Election, (2) is inconsistent with the other terms in the Plan, (3) is inconsistent with the Debtor's statements about the Plan in its discussions with the Senior Employees, (4) seemingly ignores that that a creditor may hold multiple claims within a class, and (5), if applied to exclude Class 8 creditors having Claims that also are unliquidated, violates § 1123(a)(4) of the Bankruptcy Code.

As set forth above, the plain language of the Plan regarding the Convenience Class Election provides that the Convenience Class Election may be exercised with respect to ***any*** General Unsecured Claim that is liquidated. It does not require that ***all*** of a holder's General Unsecured Claims be liquidated. Nor does it require that a holder of a General Unsecured Claim make the election with respect to all its claims. The text clearly states that the election is available to ***a*** General Unsecured Claim that is ***a*** "liquidated claim."

Moreover, the "all or nothing" approach to the Convenience Class Election ignores that the Plan otherwise generally recognizes that a proof of claim may comprise multiple claims. That is why, for example, the Senior Employees' PTO Claims (which are asserted in the same proofs of claim that cover the Liquidated Awards and the Other Claims) are being classified and treated in Class 6. The approach also ignores that the Plan specifically recognizes in the form of Senior Employee Stipulation that ***only*** the Liquidated Awards (defined in the Senior Employee Stipulation as the "Earned Amounts") would be subject to the Convenience Class Election. Nothing in the form of the Senior Employee Stipulation even purports to characterize allowing only the Senior Employees to opt into the Convenience Class only for the Liquidated Awards as a modification of an "all or nothing" requirement in the Plan.

The Debtor's last-minute interpretation also flies in the face of statements that the Debtor and its counsel made to the Senior Employees about the Convenience Class Election. The Liquidated Awards Spreadsheet, ***which was prepared by the Debtor's counsel***, makes this clear -- it shows the recovery to the Senior Employees if they do not sign the Senior Employee Stipulation but make the Convenience Class Election, and it

separately shows the reduced recovery for the Senior Employees if they elect to be released and sign the Senior Employee Stipulation.

In the absence of specific aggregation language in the Plan, a holder of a Class 8 General Unsecured Claim should be allowed to make the Convenience Class Election with respect to all, some, or none of its claims within Class 8. The Debtor seemingly ignores the well-supported principle that a single creditor may hold multiple claims, even within the same class.[2]

Finally, the Plan may not impose a condition to eligibility for the Convenience Class Election that provides some General Unsecured Claims in Class 8 with more favorable treatment than other General Unsecured Claims in Class 8. Putting aside whether the requirement that a particular claim be "liquidated" is itself a valid condition to making the Convenience Class Election, arbitrarily excluding the claims of creditors such as the Senior Employees from making the election with respect to their admittedly liquidated General Unsecured Claims because such creditors also have other claims that have not been liquidated violates § 1123(a)(4)'s proscription against unequal treatment of claims within the same class under a plan.

[2] *See, e.g.*, *Figter Ltd. v. Teachers Ins. Annuity Ass'n* (*In re Figter Ltd.*), 118 F.3d 635, 640-641 (9th Cir. 1997) (allowing claims purchaser to vote separately each purchased claim within the same class); *In re Vicor Techs., Inc.*, No. 12-39329-EPK, 2013 WL 1397460, at *9 (Bankr. S.D. Fla. Apr. 5, 2013) ("a single creditor may hold multiple claims against an alleged debtor."); *In re Cohn-Phillips, Ltd.*, 193 B.R. 757, 763 n.8 (Bankr. E.D. Va. 1996) (In applying section 303(b) of the Bankruptcy Code,"The claims of a holder of multiple claims are not dismissed merely because one of them is subject to a bona fide dispute.")*Concord Square Apartments of Wood Cty, Ltd. v. Ottawa Properties, Inc.* (*In re Concord Square Apartments of Wood Cty., Ltd.*), 174 B.R. 71, 74 (Bankr. S.D. Ohio 1994) (creditor with "multiple claims has a voting right for each claim it holds"); *In re Gilbert*, 104 B.R. 206, 211 (Bankr. W.D. Mo. 1989) ("[Creditor with two unsecured claims] is entitled to one vote for each of his unsecured Class X claims").

4. The Plan Identifies No Basis for its Disparate and Unfair Treatment of Senior Employees.

With respect to the draft stipulation, the Debtor has not provided any justification for why it is singling out certain "Senior Employees" for disparate treatment, or explained how the Debtor even selected which employees were placed into the "Senior Employees" category. The Debtor has not disclosed why the four apparently arbitrarily selected Senior Employees are not entitled to be released and protected from third party claims under the Plan in the same manner as other similarly situated and classified employees. The Plan identifies no claims or causes of action against any of the Senior Employees. Nor does the Plan identify any reason why the Senior Employees have not been paid their promised bonus payments, which were approved by the Court over a year ago and for which the Debtor has reserved and reported cash being held to pay. Nothing in the Plan or the Debtor's prior representations to the Court and to the Senior Employees throughout the pendency of the bankruptcy case provides any justification for providing disparate and less favorable treatment of the Senior Employees than what all other Employees are receiving.

What the Debtor is offering the Senior Employees is essentially a Hobson's choice: either accept the lesser treatment imposed on them by the terms of the non-negotiable stipulation the Debtor seeks to force on them as a condition for being included as a Released or Exculpated Party (along with treatment of their Class 8 claims that is less favorable treatment than what their fellow employees receive or have received) or receive the same treatment but without the benefit of the Plan's releases and exculpations that are made available to all other Employees who are not required to sign the "stipulation." This is the illusion of choice, and is impermissible under Bankruptcy Code § 1123(a)(4).

Likewise, concerning the Convenience Class Election, the Debtor has provided no justification for arbitrarily permitting Class 8 holders of fully liquidated claims the choice to have their claims treated as Class 7 Convenience Claims while not permitting holders of claims that have not been liquidated or holders of multiple claims (some of which have been liquidated and others not) to do the same. Again, the Debtor has singled out the Senior Employees for disparate and less favorable treatment without explanation and without legal basis, in violation of § 1123(a)(4) of the Bankruptcy Code.

B. Under the Plan any Claim Can Be Re-Classified and Subordinated.

The Debtor's Plan provides that claims classified as Subordinated Claims are placed in Class 9, which is subordinate in treatment to Convenience and General Unsecured Claims. This is typical for plans of reorganization. But the Plan also provides the Debtor—and after confirmation, the Claimant Trustee—with apparently unfettered discretion and power to "re-classify" as a Subordinated Claim any claim that had previously been classified differently. This is neither typical nor legally permissible.

Plan Article 3.J provides that "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." (Emphasis added).

Under the Plan as drafted, then, the Debtor is classifying claims and soliciting votes from claim holders based on those classifications, but at any time and, apparently, for any reason (or no reason at all), the Debtor, the Reorganized Debtor, or Claimant Trustee

"reserve the right" to change the classification of and re-classify it as a Subordinated Claim. There is no basis in law to support such a sweeping power.

C. The Plan Violates Bankruptcy Code §§ 1125 and 1127.

Section 1127(a) of the Bankruptcy Code allows the Debtor to modify the Plan at any time before confirmation, and § 1127(b) allows the Debtor to modify the Plan after confirmation but before the Plan is substantially consummated. Such modifications, however, are subject to a number of conditions, including the requirement under §1127(c) that the Debtor comply with § 1125 with respect to the Plan, as modified. By reserving the right to make changes without Court approval, failing to provide final versions of the Plan Documents (which are expressly part of the Plan), and asking the Court to approve the Plan in what is essentially draft form, the Debtor is asking the Court to ignore the express requirements of §§ 1125 and 1127.

The Plan provides that, to the extent that the Committee and the Debtor cannot agree upon the terms of any particular document, the issue will be submitted to non-binding mediation. The Plan also provides that finalizing the Plan Documents is a condition to the Effective Date, but the Committee and the Debtor have the right to waive that condition in their sole discretion. And the Plan does not require the Debtor to demonstrate that, upon a document that is part of the Plan being finalized, the Plan as modified complies with the applicable provisions of the Bankruptcy Code. The Debtor and the Committee simply can agree upon terms, and those terms apparently are binding on all creditors without any further Court approval.

Essentially, the Debtors are asking creditors and the Court to consider and approve the Plan before the Plan is even finalized, and the Plan impermissibly grants the Debtor and the Committee carte blanche to make amendments to the Plan post-confirmation without complying with § 1127 of the Bankruptcy Code.

III. CONCLUSION

The Plan should not be confirmed unless the defects identified in this limited objection are corrected, and the Court should allow the Senior Employees to make the Class 7 Convenience Class Election if they so choose.

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Respectfully submitted January 5, 2021

By: */s/ Frances A. Smith*
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(*Pro hac vice motion pending*)

COUNSEL FOR SCOTT ELLINGTON, THOMAS SURGENT, FRANK WATERHOUSE, AND ISAAC LEVENTON

Exhibit A

Employee	Earned Bonus	Convenience Class Reduction	Total Convenience Class Claim	Convenience Class Treatment (85%)	Add'l Reduction (40%)	Total Payment	% of Earned Bonus
Scott Ellington	$ 1,367,197.00	$ 367,197.00	$ 1,000,000.00	$ 850,000.00	$ 340,000.00	**$ 510,000.00**	37%
Frank Waterhouse	$ 791,579.00	$ -	$ 791,579.00	$ 672,842.15	$ 269,136.86	**$ 403,705.29**	51%
Thomas Surgent	$ 1,191,748.00	$ 191,748.00	$ 1,000,000.00	$ 850,000.00	$ 340,000.00	**$ 510,000.00**	43%
Isaac Leventon	$ 589,198.00	$ -	$ 589,198.00	$ 500,818.30	$ 200,327.32	**$ 300,490.98**	51%

Exhibit B

Dandeneau, Debra A.

From: Jeff Pomerantz <jpomerantz@pszjlaw.com>
Sent: Monday, January 4, 2021 9:19 PM
To: Dandeneau, Debra A.
Cc: Gregory V. Demo; Ira Kharasch; Frances A. Smith; Eric Soderlund; Hartmann, Michelle; Jeff Pomerantz
Subject: Re: [EXTERNAL] RE: HIGHLAND: Question re Convenience Class Election under the Plan -- SENDING AGAIN WITH GREG'S CORRECT EMAIL

Raise your concerns with the Judge Debra.

Jeff

From: "Dandeneau, Debra A." <Debra.Dandeneau@bakermckenzie.com>
Date: Monday, January 4, 2021 at 9:17 PM
To: Jeffrey Pomerantz <jpomerantz@pszjlaw.com>
Cc: Greg Demo <GDemo@pszjlaw.com>, Ira Kharasch <ikharasch@pszjlaw.com>, "Frances A. Smith" <Frances.Smith@judithwross.com>, Eric Soderlund <Eric.Soderlund@judithwross.com>, "Hartmann, Michelle" <Michelle.Hartmann@bakermckenzie.com>
Subject: Re: [EXTERNAL] RE: HIGHLAND: Question re Convenience Class Election under the Plan -- SENDING AGAIN WITH GREG'S CORRECT EMAIL

Dear Jeff,

A claim is a right to payment, and a claimant may hold multiple claims. Nowhere in the plan does it state that a claimant must make the Convenience Class Election with respect to all of its claims. To the contrary, the definition of "Convenience Class Election" refers to a "claim" in the singular: "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." (Emphasis added)

There are ways for a plan to provide that a creditor's claims must be aggregated for the purposes of the convenience claim election (and I am sure that Pachulski has come across numerous examples in its practice). Your plan, however, is not one of these examples.

Best,

Deb

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http://restructuring.bakermckenzie.com<http://restructuring.bakermckenzie.com>

On Jan 4, 2021, at 8:39 PM, Jeff Pomerantz <jpomerantz@pszjlaw.com> wrote:
Debra –

Greg responded below that the term liquidated, as that term is used in the plan, means a claim in a sum certain. Your clients do not have a liquidated claim as their claims include amounts which are not in a sum certain. Accordingly, the convenience class treatment is not available to them

Best,
Jeff

From: "Dandeneau, Debra A." <Debra.Dandeneau@bakermckenzie.com>
Date: Monday, January 4, 2021 at 7:53 PM
To: Greg Demo <GDemo@pszjlaw.com>
Cc: Jeffrey Pomerantz <jpomerantz@pszjlaw.com>, Ira Kharasch <ikharasch@pszjlaw.com>, "Frances A. Smith" <Frances.Smith@judithwross.com>, Eric Soderlund <Eric.Soderlund@judithwross.com>, "Hartmann, Michelle" <Michelle.Hartmann@bakermckenzie.com>
Subject: Re: [EXTERNAL] RE: HIGHLAND: Question re Convenience Class Election under the Plan -- SENDING AGAIN WITH GREG'S CORRECT EMAIL

Dear Greg,

Thank you for your response. I think you are conflating the term “Allowed” (which actually is defined in the plan) with the term “liquidated” (which nowhere is defined in the plan). It would be helpful to understand how a claim becomes “liquidated” in your view if it means something other than allowance. Moreover, I would note that, pursuant to section 502(a) of the Bankruptcy Code, a claim, proof of which is properly filed, is deemed allowed unless and until a party in interest objects. I am not aware of any pending objections to our clients’ claims, proofs of which were properly filed. If you interpret “liquidated” to mean something more stringent than “allowed,” please let me know what that definition is.

In any event, it is helpful to understand that your position is that claimants who do not have allowed claims as of the confirmation date cannot receive the same treatment under the plan as claimants who have “liquidated” claims.

If your view changes, please let me know.

Best,

Deb

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On Jan 4, 2021, at 7:42 PM, Gregory V. Demo <GDemo@pszjlaw.com> wrote:
Your clients’ claims are not entitled to make the convenience class election because they are not fully liquidated, which for purposes of the plan provisions means a claim in a sum certain. The component parts of your clients’ claims do not matter for purposes of this analysis. They are not entitled to make the convenience class election because their claims are not liquidated.

Your clients had the opportunity to sign the Senior Employee Stipulation, which would have given them a reduced convenience claim amount with respect to three parts of their claim with the balance of their claims being treated as GUCs. That stipulation and the resulting convenience claim provided the consideration for the release. As your clients’

have rejected the Senior Employee Stipulation, there is no pathway to any portion of their claims receiving convenience class treatment.

Gregory V. Demo
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vCard<https://urldefense.com/v3/__http://www.pszjlaw.com/vcard-130.vcf__;!!Hj9Y_P0nvg!A1iO3LDyMTdKzb_4zPQEZYLRBvvdL1zjinidbq3c8d1Q14y7xeCHFwYFqNBPJIpkbcZFyOyEpA$<https://urldefense.com/v3/__http://www.pszjlaw.com/vcard-130.vcf__;!!Hj9Y_P0nvg!A1iO3LDyMTdKzb_4zPQEZYLRBvvdL1zjinidbq3c8d1Q14y7xeCHFwYFqNBPJIpkbcZFyOyEpA$>> | Bio<https://urldefense.com/v3/__http://www.pszjlaw.com/attorneys-130.html__;!!Hj9Y_P0nvg!A1iO3LDyMTdKzb_4zPQEZYLRBvvdL1zjinidbq3c8d1Q14y7xeCHFwYFqNBPJIpkbcYZ8MhLGA$<https://urldefense.com/v3/__http://www.pszjlaw.com/attorneys-130.html__;!!Hj9Y_P0nvg!A1iO3LDyMTdKzb_4zPQEZYLRBvvdL1zjinidbq3c8d1Q14y7xeCHFwYFqNBPJIpkbcYZ8MhLGA$>> | LinkedIn<https://urldefense.com/v3/__https://www.linkedin.com/in/gregory-demo-482aa112__;!!Hj9Y_P0nvg!A1iO3LDyMTdKzb_4zPQEZYLRBvvdL1zjinidbq3c8d1Q14y7xeCHFwYFqNBPJIpkbcarZZ_Ypw$<https://urldefense.com/v3/__https://www.linkedin.com/in/gregory-demo-482aa112__;!!Hj9Y_P0nvg!A1iO3LDyMTdKzb_4zPQEZYLRBvvdL1zjinidbq3c8d1Q14y7xeCHFwYFqNBPJIpkbcarZZ_Ypw$>>
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From: Dandeneau, Debra A. [mailto:Debra.Dandeneau@bakermckenzie.com]
Sent: Monday, January 04, 2021 8:34 PM
To: Gregory V. Demo; Jeff Pomerantz; Ira Kharasch
Cc: 'Frances A. Smith'; 'Eric Soderlund'; Hartmann, Michelle
Subject: RE: HIGHLAND: Question re Convenience Class Election under the Plan -- SENDING AGAIN WITH GREG'S CORRECT EMAIL

Thanks, Greg. I don't mean to be dense about this, but I want to make sure that we are all on the same page in terms of what you mean by "liquidated," especially as I have never seen this kind of qualification in a plan before. I am not trying to box anyone into anything in terms of the debtor's ability to object to our clients' claims, but I would like to make sure it is clear what claims will not be subject to the dropdown election and what claims are permitted to make the dropdown election. The three categories below are what comprise the "Earned Amounts" category in the draft stipulation. The draft stipulation provides that all rights are reserved with respect to other claims. I know that our clients have not signed the stipulation, but we would like to make sure that any future awards or other claims will be part of Class 8 and not subject to Class 7 treatment if our clients make the Class 7 election. Conversely, we also want to make sure that, subject to whatever rights the debtor has to object to our clients' claims, if our clients do not prevail in asserting their administrative expenses, the categories of claims that I listed below are subject to treatment under Class 7.

I think these are fair questions to ask, and I did not see any explanation of your use of the term "liquidated" in the disclosure statement that would help me understand how the debtor intends for the provision to work.

Finally, in case you are concerned about duplication of effort, I first checked with David Neier to see if he had clarified this issue, and he confirmed that he has not clarified this outside of the context of the draft stipulation.

Best,

Deb

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From: Gregory V. Demo <GDemo@pszjlaw.com>
Sent: Monday, January 4, 2021 5:17 PM
To: Dandeneau, Debra A. <Debra.Dandeneau@bakermckenzie.com>; Jeff Pomerantz <jpomerantz@pszjlaw.com>; Ira Kharasch <ikharasch@pszjlaw.com>
Cc: 'Frances A. Smith' <Frances.Smith@judithwross.com>; 'Eric Soderlund' <Eric.Soderlund@judithwross.com>; Hartmann, Michelle <Michelle.Hartmann@bakermckenzie.com>
Subject: [EXTERNAL] RE: HIGHLAND: Question re Convenience Class Election under the Plan -- SENDING AGAIN WITH GREG'S CORRECT EMAIL

Ms. Dandeneau,

As we conveyed to Mr. Neier, only fully liquidated claims are allowed to elect convenience class treatment. Art. I.B.43; Art. III.H.8. Assuming that any portion of your clients' claim is allowed and/or liquidated, partially liquidated claims, like your clients', are not eligible for conversion.

Best,
Greg
Gregory V. Demo
Pachulski Stang Ziehl & Jones LLP
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vCard<https://urldefense.com/v3/__http:/www.pszjlaw.com/vcard-130.vcf__;!!Hj9Y_P0nvg!AeuXWQZthwrPR4C88B9yDpUme92tHjUNNmu8UENohmXbycpJ08D0ubpNEqelUnLjLcTKa1-_Sw$<https://urldefense.com/v3/__http:/www.pszjlaw.com/vcard-130.vcf__;!!Hj9Y_P0nvg!AeuXWQZthwrPR4C88B9yDpUme92tHjUNNmu8UENohmXbycpJ08D0ubpNEqelUnLjLcTKa1-_Sw$>> | Bio<https://urldefense.com/v3/__http:/www.pszjlaw.com/attorneys-130.html__;!!Hj9Y_P0nvg!AeuXWQZthwrPR4C88B9yDpUme92tHjUNNmu8UENohmXbycpJ08D0ubpNEqelUnLjLcSqMuP9BA$<https://urldefense.com/v3/__http:/www.pszjlaw.com/attorneys-130.html__;!!Hj9Y_P0nvg!AeuXWQZthwrPR4C88B9yDpUme92tHjUNNmu8UENohmXbycpJ08D0ubpNEqelUnLjLcSqMuP9BA$>> | LinkedIn<https://urldefense.com/v3/__https:/www.linkedin.com/in/gregory-demo-482aa112__;!!Hj9Y_P0nvg!AeuXWQZthwrPR4C88B9yDpUme92tHjUNNmu8UENohmXbycpJ08D0ubpNEqelUnLjLcT-iwCu7Q$<https://urldefense.com/v3/__https:/www.linkedin.com/in/gregory-demo-482aa112__;!!Hj9Y_P0nvg!AeuXWQZthwrPR4C88B9yDpUme92tHjUNNmu8UENohmXbycpJ08D0ubpNEqelUnLjLcT-iwCu7Q$>>
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From: Dandeneau, Debra A. [mailto:Debra.Dandeneau@bakermckenzie.com]
Sent: Monday, January 04, 2021 7:43 PM
To: Jeff Pomerantz; Ira Kharasch; Gregory V. Demo
Cc: 'Frances A. Smith'; 'Eric Soderlund'; Hartmann, Michelle
Subject: RE: HIGHLAND: Question re Convenience Class Election under the Plan -- SENDING AGAIN WITH GREG'S CORRECT EMAIL

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From: Dandeneau, Debra A.
Sent: Monday, January 4, 2021 4:33 PM
To: 'jpomerantz@pszjlaw.com' <jpomerantz@pszjlaw.com<mailto:jpomerantz@pszjlaw.com>>; 'ikharasch@pszjlaw.com' <ikharasch@pszjlaw.com<mailto:ikharasch@pszjlaw.com>>; 'gdemo@pszglaw.com' <gdemo@pszglaw.com<mailto:gdemo@pszglaw.com>>
Cc: 'Frances A. Smith' <Frances.Smith@judithwross.com<mailto:Frances.Smith@judithwross.com>>; Eric Soderlund <Eric.Soderlund@judithwross.com<mailto:Eric.Soderlund@judithwross.com>>; Hartmann, Michelle <Michelle.Hartmann@bakermckenzie.com<mailto:Michelle.Hartmann@bakermckenzie.com>>
Subject: HIGHLAND: Question re Convenience Class Election under the Plan

Dear Pachulski friends,

As you know, Baker McKenzie and the Ross & Smith firm have been retained by Scott Ellington, Frank Waterhouse, Isaac Leventon, and Thomas Surgent (the “Senior Employees”) to represent them in connection with the Highland Capital Management case.

As you also know, the Senior Employees also assert that they have a right to payment in full of all their compensation-related claims as administrative expenses. I acknowledge that the debtor disagrees. Therefore, reserving all of our respective rights with respect to the administrative expense issue, I want to clarify how the plan works with respect to the election by Class 8 to drop down to Class 7 assuming that the debtor prevails in treating such claims as General Unsecured Claims.

The definition of "Convenience Class Election" in the plan references "a General Unsecured Claim that is a liquidated Claim as of the Confirmation Date." With respect to the Senior Employees, it is our understanding that what is meant by "a liquidated Claim as of the Confirmation Date" only refers to the PY 2018 Bonus Installment 3 2/28/2020, the 2017 Deferred Award 3 Year Cliff Vest 5/31/2020, and the PY 2018 Bonus Installment 4 8/31/2020 and that all other claims that might be characterized as General Unsecured Claims will remain in Class 8 notwithstanding the Class 7 election.

Is this consistent with the debtor's understanding? If not, could you please explain what the debtor's understanding is and what "a General Unsecured Claim that is a liquidated Claim as of the Confirmation Date" means?

As the deadline for returning ballots is tomorrow, I would appreciate a quick response on this.

Thanks and best regards,

Deb

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Appendix Exhibit 75

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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.

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 Funds[2] 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 Act[3] 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 Entities[10] 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 am 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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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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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.

Exhibit A

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).	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). 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). 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).	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
	Certificates Paying Agency Agreement. PMA § 9.		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). 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).	
Red River 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
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).	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). 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 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).	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
	Servicer, as provided in the Indenture. SA § 9. The Indenture references a Preference Shares Paying Agency Agreement. Indenture § 1.1 (Definitions--Preference Share Documents).		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).	
Valhalla CLO, Ltd.	[No Preference Shares or Class E Certificates.]	[No Preference Shares or Class E Certificates.]	[No Preference Shares or Class E Certificates.]	
Westchester 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.

Appendix Exhibit 76

United States Department of Justice
Office of the United States Trustee
1100 Commerce St. Room 976
Dallas, Texas 75242
(202) 834-4233

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

IN RE:	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	**Case No. 19-34054**
	§	
	§	
	§	
Debtors-in-Possession.	§	

United States Trustee's Limited Objection to Confirmation of Debtors' Fifth Amended Plan of Reorganization (Docket Entry No. 1472)

To the Honorable Stacey J. Jernigan,
United States Bankruptcy Judge:

The United States Trustee for Region 6 files this Limited Objection (the "**Objection**") to the Debtor's Fifth Amended Plan of Reorganization (the "Plan" -- docket entry [D.E.] 1472, filed 11/24/2020). In support of the relief requested, the United States Trustee respectfully submits as follows:

Summary

The United States Trustee objects to confirmation of the Plan because the releases exceed the scope permitted by Fifth Circuit precedent. The United States Trustee has resolved other objections with the Debtors, and these resolutions will be announced and incorporated in the confirmation order.

Facts: Relevant Plan Provisions

Salient Definitions:

1. The Plan defines exculpated and released parties as follows:

a. "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."

b. "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.

Plan, D.E. 1472; definitions 61, 111, p. 16.

Releasing Third Parties:

2. The Plan releases third parties who would share liability with the Debtor:

> "[E]ach 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.

Plan, D.E. 1472, p. 48.

3. The releases for Released Parties exclude "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." Plan, D.E. 1472, pp. 48-49.

4. The Plan releases do not contemplate any type of channeling injunction.

Exculpating Third Parties:

5. The exculpation provisions broadly cover third parties:

> 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)-(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. 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.

Argument and Authority

Plan Contains Non-Consensual Third-Party Releases and Exculpation in Contravention of Fifth Circuit Precedent.

6. The Plan contains non-consensual third-party releases that should be stricken under Fifth Circuit precedent.

7. The Plan's exculpation provisions are similarly overbroad.

8. While the Plan specifies that the releases and exculpation are allowed to "the maximum extent allowed by law," the law in the Fifth Circuit is that they are not allowed.

9. Like the Highland Capital Plan, the *Pacific Lumber* plan contained exculpation and release provisions that carved out willful or intentional conduct. *Scotia Pacific Co., LLC v. Official Unsecured Creditors' Committee (In re Pacific Lumber Co.)*, 584 F.3d 229

(5th Cir. 2009). Reviewing four prior Fifth Circuit bankruptcy cases, the *Pacific Lumber* court concluded these cases "seem broadly to foreclose non-consensual non-debtor releases and permanent injunctions." *Id.* at 252 (citations omitted). The Fifth Circuit struck these non-consensual provisions as to parties who were co-liable with the debtor but noted that committee members and committee professionals received qualified immunity. *Id.*

10. The *Pacific Lumber* court disallowed the exculpation and releases of the debtors' officers, directors, and professionals because there was no evidence that they "were jointly liable for any . . . pre-petition debt. They are not guarantors or sureties, nor are they insurers. Instead, 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. The fresh start § 524(e) provides to debtors is not intended to serve this purpose." *Id.* at 252-53.

11. Bankruptcy Courts in the Northern District of Texas have resolved objections to exculpation or release provisions by replacing such provisions with channeling injunctions. *See* Memorandum Opinion and Order, Docket Entry No. 4614, *In re Pilgrim's Pride Corporation, et al.*, Case No. 08-45664-DML-11 (January 14, 2010); Fourth Amended Joint Chapter 11 Plan of CHC Group Ltd. and its Affiliated Debtors (Section 10.8), Docket Entry No. 1701, *In re CHC Group, Ltd.*, Case No. 16-31854-BJH-11, United States Bankruptcy Court for the Northern District of Texas, Dallas Division (February 16, 2017).

12. The Plan release and exculpation provisions should be limited. Unless they exclude the Debtors' professionals, the Debtors' officers and directors, and others not protected by quasi-immunity, confirmation should be denied.

Conclusion

Wherefore, the United States Trustee requests that the Court deny approval of the Plan and grant to the United States Trustee such other and further relief as is just and proper.

DATED: January 5, 2021

Respectfully submitted,

WILLIAM T. NEARY
UNITED STATES TRUSTEE

/s/ Lisa L. Lambert
Lisa L. Lambert
Asst. U.S. Trustee, TX 11844250
Office of the United States Trustee
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(202) 834-4233

Certificate of Service

There undersigned hereby certifies that on January 5, 2020, a copy of the foregoing pleading was served via ECF to parties requesting notice via ECF.

/s/ Lisa L. Lambert
Lisa L. Lambert

Appendix Exhibit 77

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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 pursing 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
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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

Appendix Exhibit 78

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ATTORNEYS FOR CLO HOLDCO, LTD.

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

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

CLO HOLDCO, LTD.'S JOINDER TO OBJECTION TO CONFIRMATION OF FIFTH AMENDED PLAN OF REORGANIZATION OF HIGHLAND CAPITAL MANAGEMENT, L.P. [DKT NO 1670] AND SUPPLEMENTAL OBJECTIONS TO PLAN CONFIRMATION

TO THE HONORABLE STACEY G. JERNIGAN, U.S. BANKRUPTCY JUDGE:

CLO Holdco, Ltd. ("**CLO Holdco**") respectfully files this *Joinder to Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. [Dkt. No. 1670] and Supplemental Objection to Plan Confirmation* (the "**CLO Holdco Objection**") which seeks entry of an order from this Court denying confirmation of the Debtor's *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "**Plan**") [Dkt. No. 1472] for the reasons stated in that certain *Objection to Confirmation of Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* filed by the entities defined therein as the "Funds and Advisors" on January 5, 2020 [Dkt. No. 1670] (the

"**F&A Objection**"), and the additional reasons set forth below. In support of the CLO Holdco Objection, CLO Holdco respectfully states as follows:

I.
PRELIMINARY STATEMENT

1. CLO Holdco owns interests in certain funds managed by the Debtor pursuant to portfolio management and servicing agreements, including the following funds ("**Managed CLOs**"): Aberdeen Loan Funding, Ltd.; Acis CLO 2017-7; Brentwood CLO, Ltd.; Grayson CLO, Ltd.; Liberty CLO, Ltd.; Red River CLO, Ltd.; Rockwall CDO, Ltd.; Loan Funding II, LLC (Valhalla); and Westchester CLO, Ltd. As evidenced by the Debtor's *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* (the "**Plan Assumption Notice**") [Dkt. No. 1648], the Debtor intends to assume management contracts for substantially all of the aforementioned Managed CLOs (the "**CLO Management Contracts**").

2. In many instances, CLO Holdco, the Funds, and Advisors, collectively own or manage a majority or even super-majority of the remaining beneficial interests in the Managed CLOs. Accordingly, CLO Holdco and the Funds and Advisors have a vested interest in the successful management of the Managed CLOs on a going-forward basis. That interest is real, and many millions of dollars are at stake. Astonishingly, though the Debtor intends to assume the CLO Management Contracts, the Debtor discloses in its Plan and *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "**Disclosure Statement**") [Dkt. No. 1473] that it may terminate its investment management employees by the end of January 2021 and that the Reorganized Debtor may employ a Sub-Servicer to perform the Debtor's current portfolio management duties and obligations.

3. Moreover, the Debtor intends to wind down all "Managed Funds" under the Plan. The term Managed Funds is defined in the Plan to include "any other investment vehicle managed

by the Debtor pursuant to an Executory Contract assumed pursuant to this Plan." PLAN, Art. I.B.83. The CLOs subject to assumed CLO Management Contracts are therefore "Managed Funds" under the Plan, and will be wound down by the Reorganized Debtor regardless of the will of the financial interest holders in those Managed Funds. The Plan lacks flexibility for the appropriate management of Managed Funds, enjoins fund interest owners like CLO Holdco from challenging the appropriateness of a fund wind down, and effectively strips fund interest owners of their contractual rights to seek alternative management for the funds under the agreements assumed by the Debtor.

4. In its most distilled essence, the Plan would allow the Debtor to assume only select Debtor-favorable provisions of the CLO Management Contracts, while effectively discarding potentially adverse governance provisions. The Debtor's proposed assumption of the CLO Management Contracts under the Plan is so illusory that it would empower the Debtor—or a designated Sub-Servicer—to liquidate funds in which the Debtor has no interest for the purported benefit of the Debtor's creditors: (i) in direct contravention of the expressed interests of a majority of the beneficial owners of those funds; and (ii) with no recourse despite express provisions of the CLO Management Contracts that entitle interest holders to replace the Debtor as manager.

5. In conjunction with the Debtor's proposed "cherry picking" of provisions of assumed contracts, the Plan's excessively broad injunction, exculpation, and release provisions render it unconfirmable under applicable United States Supreme Court and Fifth Circuit precedent.

II.
BACKGROUND

6. CLO Holdco is a Cayman limited partnership that owns interests in various funds and serves as part of a greater philanthropic endowment generally referred to as the DAF, or Donor Advised Fund. While often painted as a pernicious bad actor before this Court, CLO Holdco facilitates the annual donation of millions of dollars to charitable organizations, and has paid tens of

millions of dollars to the Debtor in recent years pursuant to a Second Amended and Restated Investment Advisory Agreement, dated January 1, 2017, and a Second Amended and Restated Service Agreement dated January 1, 2017, both of which the Debtor is terminating in Q1, 2021.

7. While CLO Holdco willingly complied with a Debtor request that it amend its claim from more than $11 million to $0 following this Court's approval of the Debtor's settlement with the Redeemer Committee [Dkt. No. 1273], it still has interests affected by the Debtor's proposed Plan. As described above, CLO Holdco owns interests in certain collateralized loan obligations referred to herein as the Managed CLOs. The Managed CLOs are securitization vehicles that were formed to acquire and hold pools of debt obligations. The Managed CLOs also issued various tranches of notes and preferred shares, which are intended to be repaid from proceeds of the subject Managed CLO's pool of debt obligations. The notes issued by the Managed CLOs are paid according to a contractual waterfall, and after the notes are paid in full all remaining value in the Managed CLOs flows to holders of the preferred shares.

8. Most of the Managed CLOs have paid off all the tranches of notes or all but the last tranche. Accordingly, most of the economic value remaining in the Managed CLOs, and all of the upside, belongs to the holders of the preferred shares, like CLO Holdco. As detailed in the F&A Objection, CLO Holdco, "the registered investment companies, [and] business development company…represent a majority of the investors in the CLOs as follows: … Liberty CLO, Ltd. 70.43%, Stratford CLO, Ltd. 69.05%, 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%." F&A OBJECTION, ¶ 15.

9. As more fully set forth in the F&A Objection, each of the aforementioned CLOs entered into contracts pursuant to which the Debtor would serve as the fund's portfolio manager. While the contracts vary to some degree, each imposes a duty on the Debtor to maximize the value

of the CLO's assets for the benefit of the CLO's noteholders and preference shareholders. Each also allows a majority or supermajority of the CLO's noteholders to replace the Debtor as portfolio manager either for cause or, in some instances, without cause.

10. Correspondence with Debtor's counsel, in addition to language found in the Plan and Disclosure Statement, makes it abundantly clear that the Debtor intends to assume the CLO Management Contracts, but preclude CLO Holdco and other similarly situated preference shareholders from exercising their contractual rights to remove the Debtor as portfolio manager under those agreements either upon a finding of cause, where required, or requisite majority or super majority vote where no cause is required.

JOINDER

11. CLO Holdco hereby joins the objections to plan confirmation set forth in the F&A Objection.

SUPPLEMENTAL OBJECTIONS

A. PARTIAL ASSUMPTION – THE PLAN VIOLATES CONTROLLING SUPREME COURT PRECEDENT

12. As detailed above, the CLO Management Contracts provide preference shareholders an opportunity to replace the CLO manager, in this case the Debtor, for cause and, in some instances, even without cause upon satisfaction of a requisite vote. The Debtor's Plan would allow the Debtor to assume the CLO Management Contracts, while precluding preference shareholders from exercising their contractual rights under the assumed agreements. The result is de facto "cherry picking" in which the Debtor assumes only favorable provisions of the CLO Management Contracts to the detriment of contract parties. Such "cherry picking" violates controlling Supreme Court and Fifth Circuit precedent, and precludes confirmation of the Plan.

(i) The Plan Deprives Preference Shareholders Their Remedies Under Assumed CLO Management Contracts

13. In its Disclosure Statement, the Debtor explains that under the Plan "The Reorganized Debtor will manage the wind down of the Managed Funds as well as the monetization of the balance of the Reorganized Debtor Assets." DISCLOSURE STATEMENT, Art. I.C.1 (emphasis added). The Debtor further states that "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." *Id.* at Art. III.F.1. Rather, "[t]he Reorganized Debtor may, in its discretion…utilize a Sub-Servicer in addition to or in lieu of the retention of officers and employees" post confirmation to effectuate the wind down of the Managed Funds. *Id.* at Art. III.F.3.d.

14. In other words, while the Plan guarantees that the Managed Funds, including the Managed CLOs, will be wound down, the Reorganized Debtor may terminate its employee-advisors and delegate the wind down to an unidentified third party sub-servicer. Should the Reorganized Debtor and Sub-Servicer's conduct constitute cause for removal under the assumed CLO Management Contracts, the CLO preference shareholders must be entitled to effectuate their contractual rights and remedies. Alternatively, where the CLO Management Contracts do not require cause for removal of the portfolio manager, the preference shareholders must remain entitled to effectuate their contractual rights and remedies. For instance if the preference shareholders determine that an expedited liquidation is not in their best interests and desire a longer investment horizon, or if they have reason to believe that the Reorganized Debtor or Sub-Servicer is negligently managing their investments, they should be able to seek the replacement of the portfolio manager. It is important to remember, after all, that it is the preference shareholders' money that is at stake, and that the portfolio manager operates for the benefit of the investors, not vice versa.

15. Unfortunately, the injunction found in Article IX.F. of the Plan precludes parties in interest—like preference shareholders of CLO Managed Funds—from "taking any actions to

interfere with the implementation or consummation of the Plan." Under this egregious injunction, preference shareholders appear barred from "taking any actions" that would in any way interfere with the Reorganized Debtor's efforts to "wind down…the Managed Funds." *See* PLAN, Art. IX.F.

16. By assuming the CLO Management Contracts through the Plan, defining them as Managed Funds, and subjecting parties-in-interest under the agreements to the Plan's staggeringly expansive injunction, the Debtor has effectively carved out the preference shareholders' rights and remedies under the CLO Management Contracts in contravention of section 365 of the Bankruptcy Code. The preference shareholders are left without recourse—despite their contractual rights—even if the Reorganized Debtor's winding up of the Managed Funds is negligent, a breach of its duties under the CLO Management Contracts, or cause for removal as portfolio manager.

(ii) Controlling Case Authority Precludes the Debtor's Proposed Partial Assumption of the CLO Management Contracts

17. A debtor seeking to assume an executory contract under section 365 of the Bankruptcy Code must assume the contract in its entirety, *cum onere*. *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531-32 (1984) (citing *In re Italian Cook Oil Corp.*, 190 F.2d 994, 996 (3d Cir. 1951)). As explained by the Third Circuit in a ruling adopted by the United States Supreme Court, a debtor-in-possession seeking to assume an executory contract "may not blow hot and cold. If he accepts the contract he accepts it *cum onere*. If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other." *Italian Cook Oil*, 190 F.2d at 996. This Court recently adopted and cited the Supreme Court's *Bildisco* holding in the *Senior Care* bankruptcy cases, ruling that "If a debtor chooses to assume an unexpired lease, it must assume the lease *in its entirety*." *In re Senior Care Centers*, 607 B.R. 580, 587 (Bankr. N.D. Tex. 2019) (emphasis added).

18. Like this Court, the Fifth Circuit also agreed with the Third Circuit and Supreme Court's reasoning in *In re National Gypsum Co.* *See In re Nat'l Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000). In that case the Fifth Circuit ruled that "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." *Id.*

19. Importantly, the Fifth Circuit also recognizes that a court cannot, through orders or otherwise, effectively modify an executory contract over the objection of parties to the contract. *In re Escarent Entities, L.P.*, 423 Fed.Appx, 462, 466 (5th Cir. 2011). In that case, the Fifth Circuit noted that "The court, moreover, effectively rewrote the parties' contract by adding" certain terms disadvantageous to the counterparty, and that the "un-agreed-to modification betokened more than a mere assumption of the parties' contract." *Id.* The Fifth Circuit condemned the lower court's actions, ruling that they "violated its obligation to ensure that [the debtor] assumed the contract *in toto*." *Id.* Other courts have similarly ruled that a debtor cannot modify an executory contract through assumption without the agreement of parties to the contract. *See, e.g., In re Network Access Solutions, Corp.*, 330 B.R. 67, 74 (Bankr. D. Del. 2005) (citing *In re Fleming Cos.*, No. 03–10945, 2004 WL 385517 at *3 (Bankr. D. Del. Feb. 27, 2004) ("[A] debtor's assumption ... cannot modify an agreement's express terms[.]").

20. Courts should scrutinize whether a debtor is using a proposed plan of reorganization to effectively modify assumed executory contracts. *See Nat'l Gypsum Co.*, 208 F.3d at 506-07. As the Fifth Circuit ruled in *National Gypsum*, payment obligations due under an assumed executory contract could not be nullified by discharge provisions of the debtor's plan. *Id.* Similarly, the court in *In re Cajun Electric Power Co-Op, Inc.* ruled that the debtor's plan of reorganization was improper where the "natural effect" of the plan was the nonconsensual modification of an assumed executory contract. *In re Cajun Elec. Power Co-Op., Inc.*, 230 B.R. 693, 712-14 (M.D. La. 1999). The court's decision in *Cajun Electric* is pertinent here. As ruled by that court:

> The court finds that the natural effect of the Trustee's Plan results in an improper modification of the Supply Contracts. The court has determined that the Trustee may assume and assign the Supply Contracts; however, in designing a plan which *inter alia* binds the Members for 25 years to treatment which they do not want and

> for which they did not contract, the Trustee has, in effect, achieved a result inconsistent with those jurisprudential directives denying the ability to modify such contracts.

Id. at 713-14. A debtor cannot construct a plan that would, in effect, alter the terms and conditions of the very executory contracts the debtor seeks to assume. *Id.*

21. Other courts have similarly ruled that a debtor cannot modify its contracts through its plan of reorganization without consent, including the consent of *third-party beneficiaries*, regardless of whether the contract was executory. *In re Texas Rangers Baseball Partners*, 498 B.R. 679, 704-05 (Bankr. N.D. Tex. 2013); *In re Coates*, No. 17-00481, 2017 WL 6520456, at *1 (Bankr. M.D. Pa. 2017); *In re Exide Technologies*, 378 B.R. 762, 765 (Bankr. D. Del. 2007) (Noting that purported assumption of executory contracts under plan must comply with the express requirements of section 365 of the Bankruptcy Code).

22. In *Texas Rangers*, the debtor sought to assume and amend a contract through its plan of reorganization. *Texas Rangers*, 498 B.R. at 704-05. The debtor then used certain language in the plan to effectuate an amendment to the contract that reduced the remaining term of the contract from seven years to three months, without the express consent of third-party beneficiaries to the agreement. *Id.* When the amendment was later challenged, the court ruled that the amendment was invalid and unenforceable "since done without the consent of the third-party beneficiary," and that the debtor's efforts to amend the contract through the plan assumption process without the consent of the third-party beneficiaries "circumvented proper procedures under section 365 of the Bankruptcy Code." *Id.* at 705.

23. In this case, the Debtor, through its injunction and exculpation provisions, would effectively preclude parties to the CLO Management Contracts, including CLO Holdco, from taking any actions that could, in any way, affect the Reorganized Debtor's efforts to wind down the Managed CLOs. Approving the Plan, as written, would therefore affect the nature of the CLO

Management Contracts and result in a non-consensual modification of those agreements in violation of *Bildisco*, *Escarant*, *National Gypsum*, and *Texas Rangers*. As ruled by the Supreme Court in *Bildisco*, should the Debtor seek to assume the CLO Management Contracts, it must assume them in their entirety, taking benefits with risks. *Bildisco*, 465 U.S. at 531-32.

B. THE PLAN'S EXCULPATION AND INDEMNIFICATION PROVISIONS OPERATE AS THIRD PARTY RELEASES AND VIOLATE CONTROLLING CASE PRECEDENT

24. The exculpation and release clauses found in Article IX of the Plan are excessive, and violate controlling Fifth Circuit precedent. The Plan defines "Exculpated Parties" to include, among others, all of the Debtor's majority-owned subsidiaries, all Managed Funds, the Independent Directors, and all of the aforementioned parties' "Related Persons," a term itself staggeringly expansive. PLAN, Art. I.B.61., 110. The Plan similarly defines "Protected Parties", which also includes all Managed Funds and their Related Persons. *Id.* at Art. 1.B.104.

25. Under the Plan, all Exculpated Parties are absolved of potential liability associated with any claims or causes of action that may arise related to the implementation of the Plan. *Id.* at Art. IX.C. That would inherently include all actions related to the wind down of the Managed Funds, including any breaches of contract, duties, or even the Advisers Act of 1940. While not expressly worded as a release, the Plan's exculpation clause effectively releases the Exculpated Parties from all such claims or causes of action.

26. Similarly, Protected Parties are effectively released from all claims in any way related to "the administration of the Plan…the wind down of the business of the Debtor or Reorganized Debtor, the administration of the Claimant Trust, or the transactions in furtherance of the foregoing…" other than those arising from "bad faith, criminal misconduct, willful misconduct, fraud, or gross negligence…." *Id.* at Art. IX.F.

27. The Fifth Circuit has addressed the issue of release and exculpation clauses that applied to non-debtor third parties and held that such releases are overly broad. *See, e.g., In re Pacific*

Lumber Co., 584 F.3d 229, 251 (5th Cir. 2009) (citing 11 U.S.C. § 524(e)). Section 524(e) releases only the debtor, not co-liable third parties, and certainly not the Debtor's contract counterparties like the Managed Funds. *See id.* at 252 (citing *See, e.g., 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)).

28. The Bankruptcy Court for the Northern District of Texas has also ruled that exculpation clauses must be so narrow that they cannot extend to employees and officers and directors of a debtor. *In re ReoStar Energy Corp.*, 2012 WL 1945801 (Bankr. N.D. Tex. May 30, 2012). Even, post-confirmation permanent injunctions that *effectively* release non-debtors from liability are prohibited. *In re Zale Corp.*, 62 F.3d at 761; 11 U.S.C. § 524(e). In line with this holding, the District Court for the Northern District of Texas recently found clear error where a bankruptcy court confirmed a debtor's plan that provided for injunctions shielding various non-debtor third parties. *In re Thru, Inc.* 2018 WL 5113124, at *21 (N.D. Tex. 2018).

29. The Plan injunction and exculpation provisions, which effectively release the Managed Funds and non-debtor parties from liability for post-confirmation activities, therefore violate well established and controlling Fifth Circuit and Northern District case precedent and preclude confirmation.

IV.
PRAYER FOR RELIEF

WHEREFORE, CLO Holdco requests that this Court grant the CLO Holdco Objection and enter an order denying confirmation of the Debtor's Plan.

DATED: January 5, 2020

Respectfully submitted,

KANE RUSSELL COLEMAN LOGAN PC

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ATTORNEYS FOR CLO HOLDCO, LTD.

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2020, a true and correct copy of the foregoing CLO Holdco Objection was served via the Court's electronic case filing (ECF) system upon all parties receiving such service in this bankruptcy case; and via e-mail upon the United States Trustee at Lisa.L.Lambert@usdoj.gov and upon the following parties:

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Appendix Exhibit 79

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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]	§	Case No. 19-34054-sgj11
Debtor.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Plaintiff,	§	Adversary Proceeding No.
vs.	§	_____
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., NEXPOINT ADVISORS, L.P.,	§	

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

HIGHLAND INCOME FUND, NEXPOINT STRATEGIC OPPORTUNITIES FUND, NEXPOINT CAPITAL, INC., AND CLO HOLDCO, LTD.,	§ § § §
Defendants.	

PLAINTIFF HIGHLAND CAPITAL MANAGEMENT, L.P.'S VERIFIED ORIGINAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession ("Plaintiff" or the "Debtor"), by its undersigned counsel, files this *Original Complaint for Declaratory and Injunctive Relief* (the "Complaint") against defendants Highland Capital Management Fund Advisors, L.P. ("HCMFA"), NexPoint Advisors, L.P. ("NPA," and together with HCMFA, the "Advisors"), Highland Income Fund, NexPoint Strategic Opportunities Fund, NexPoint Capital, Inc. (collectively, the "Funds"), and CLO Holdco, Ltd. ("CLO Holdco" and together with the Advisors and the Funds, the "Defendants") seeking declaratory and injunctive relief pursuant to sections 105(a) and 362 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 7001(7) and 7065 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of its Complaint, the Debtor alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT

1. Mr. James Dondero ("Mr. Dondero") directly or indirectly owns and/or controls each of the Defendants. The Defendants have interfered with, and impeded, the Debtor's business, and they have threatened to initiate a process aimed at removing the Debtor as the portfolio manager of certain collateralized loan obligation vehicles ("CLOs") – although they have refused to actually bring a motion to lift the automatic stay for that purpose, thereby

contributing to the necessity of these proceedings. The Funds invested in certain of the CLOs at the direction of the Advisors. CLO Holdco also invested in the CLOs.

2. As alleged below, the Defendants have damaged the Debtor and threaten to upset the status quo by interfering with the Debtor's contractual rights.

3. Thus, the Debtor seeks damages, declaratory relief, and an order preliminarily and permanently enjoining the Defendants from: (a) interfering with or otherwise impeding, directly or indirectly, the Debtor's business, including but not limited to the Debtor's (i) management of the CLOs, (ii) decisions concerning the purchase or sale of any assets on behalf of the CLOs, or (iii) contractual right to serve as the portfolio manager (or other similar title) of the CLOs; (b) otherwise violating section 362(a) of the Bankruptcy Code; (c) seeking to terminate the portfolio management agreements and/or servicing agreements between the Debtor and the CLOs ((a)-(c), the "Prohibited Conduct"), (d) conspiring, colluding, or collaborating with (x) Mr. Dondero, (y) any entity owned and/or controlled by Mr. Dondero, and/or (z) any person or entity acting on behalf of Mr. Dondero or any entity owned and/or controlled by him, to, directly or indirectly, engage in any Prohibited Conduct, and (e) engaging in any Prohibited Conduct with respect to any of the Successor Parties (as that term is defined below).

JURISDICTION AND VENUE

4. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and § 1334(b). This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.

6. This adversary proceeding is commenced pursuant to Bankruptcy Rules 7001 and 7065, Bankruptcy Code sections 105(a) and 362, 28 U.S.C. §§ 2201 and 2202, and applicable Delaware law.

THE PARTIES

7. Plaintiff 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.

9. Upon information and belief, NPA is a limited partnership with offices located in Dallas, Texas.

10. Upon information and belief, Highland Income Fund is an investment fund managed by HCMFA in Dallas, Texas.

11. Upon information and belief, NexPoint Strategic Opportunities Fund is an investment fund managed by NPA in Dallas, Texas.

12. Upon information and belief, NexPoint Capital, Inc. is an investment fund managed by NPA in Dallas, Texas

13. Upon information and belief, CLO Holdco is a holding company that is directly or indirectly owned and/or managed by Mr. Dondero and others acting on his behalf in Dallas, Texas.

CASE BACKGROUND

14. On October 16, 2019 (the "Petition Date"), 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, (b) Meta-e Discovery, (c) UBS Securities LLC and UBS AG London Branch (collectively, "UBS"), and (d) Acis Capital Management, L.P. and Acis Capital Management GP LLC (collectively, "Acis").

16. On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].[2]

17. The Debtor has continued to operate and manage its business as a debtor-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee or examiner has been appointed in this chapter 11 case.

18. On November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (the "Plan"). The Court has scheduled a confirmation hearing on the Plan for January 13, 2021. If confirmed, the Debtor will be succeeded by the Reorganized Debtor and Plan will create a Claimant Trust and a Litigation Sub-Trust (as those terms are defined in the Plan) (the Reorganized Debtor, the Claimant Trust, and the Litigation Sub-Trust are collectively referred to herein as the "Successor Entities," and together with the Successor Entities' directors, officers, employees, professionals, and agents, including but not limited to the Claimant Trustee and the Litigation Trustee (as those terms are defined in the Plan), and any professionals engaged by the Claimant Trustee and Litigation Trustee, the "Successor Parties").

[2] All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

STATEMENT OF FACTS

A. Mr. James Dondero Owns and/or Controls Each of the Defendants

19. Mr. Dondero directly or indirectly owns and/or effectively controls each of the Defendants.

The Advisors and the Funds

20. On December 16, 2020, Mr. Dustin Norris ("Mr. Norris") testified under oath in support of the *Motion for Order Imposing Temporary Restrictions on Debtor's Ability, as Portfolio Manager, to Initiate Sales by Non-Debtor CLO Vehicles* [Docket No. 1528] that was brought by the Advisors and Funds (the "Restriction Motion").

21. Mr. Norris is the Executive Vice President of each the Advisors and each of the Funds.

22. During the hearing on the Restriction Motion (the "Hearing"), Mr. Norris testified that Mr. Dondero (a) directly or indirectly owns and controls each of the Advisors, and (b) is the portfolio manager of each of the Funds, each of which is advised by one of the Advisors.

23. Mr. Norris's testimony is corroborated by, among other things, (a) the Funds' public filings with the Securities and Exchange Commission in which each of the Funds disclosed that the Advisors were owned and controlled by Mr. Dondero, and that Mr. Dondero was the portfolio manager for each of the Funds, and (b) the assertion in a letter dated December 31, 2020, sent on behalf of the Advisors and the Funds, that "Mr. Dondero is the lead (and in some cases the sole) portfolio manager for certain of the Funds. He is intimately involved in the day-to-day operations and investment decisions regarding those Funds and the operations of the Advisors."

CLO Holdco

24. CLO Holdco is a wholly-owned and controlled subsidiary of the DAF. On information and belief, the DAF is managed by the Charitable DAF Holdco, Ltd. ("DAF Holdco"), which is the managing member of the DAF.

25. On information and belief, DAF Holdco is owned by three different charitable foundations: Highland Dallas Foundation, Inc., Highland Santa Barbara Foundation, Inc., and Highland Kansas City Foundation, Inc. (collectively, the "Highland Foundations"). On information and belief, Mr. Dondero is the president and one of the three directors of each of the Highland Foundations. On information and belief, Mr. Grant Scott ("Mr. Scott"), is an intellectual property lawyer based in Raleigh, North Carolina, Mr. Dondero's college roommate, is also an officer and director of each of the Highland Foundations.

26. Although the Debtor is the non-discretionary investment advisor to the DAF, the Debtor does not have the right or ability to control or direct the DAF or CLO Holdco. Instead, on information and belief, the DAF takes and considers investment and payment advice from the Debtor, but ultimate decisions are in the control of Mr. Scott who acts substantially at Mr. Dondero's direction.

B. This Court has Entered Two Orders that are Implicated by the Defendants' Actions and Threatened Actions

27. This Court has entered two Orders that are relevant to the injunctive relief sought by the Debtor.

28. On December 27, 2019, the Debtor filed that certain *Motion of the Debtor for Approval of Settlement with the Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 281] (the "Settlement Motion"). On January 9, 2019, this Court entered an Order granting the Settlement Motion [Docket No. 339] (the "Settlement Order").

29. As part of the Settlement Order, this Court also approved a term sheet (the "Term Sheet") [Docket No. 354-1] between the Debtor and the Official Committee of Unsecured Creditors (the "Committee") pursuant to which Mr. John S. Dubel, Mr. Russell Nelms, and Mr. Seery were appointed to the Board.

30. As required by the Term Sheet, on January 9, 2020, Mr. James Dondero resigned from his roles as an officer and director of Strand and as the Debtor's President and Chief Executive Officer.

31. Among other things, the Settlement Order directed Mr. Dondero not to "cause any Related Entity to terminate any agreements with the Debtor."

32. Each of the Defendants is a "Related Entity" as defined in the Term Sheet because each of the Defendants is directly or indirectly owned and/or controlled by Mr. Dondero and/or Mr. Scott.

33. Defendants' actions and threatened actions also implicate the *Order Granting Debtor's Motion for a Temporary Restraining Order Against James Dondero* [Adv. Pro. No. 20-03190-sgj, Docket No. 10], entered on December 10, 2020 (the "TRO" and together with the Settlement Order, the "Orders").

34. Pursuant to the TRO, the Court temporarily enjoined and restrained Mr. Dondero from, among other things, "interfering with or otherwise impeding, directly or indirectly, the Debtor's business" and from "causing, encouraging, or conspiring with (a) any entity owned or controlled by [Mr. Dondero], and/or (b) any person or entity acting on his behalf, from, directly or indirectly, engaging in any Prohibited Conduct [as defined in the TRO]," including interfering or impeding the Debtor's business.

C. Defendants Interfere with and Impede the Debtor's Business and Threaten to Terminate the Debtor's Management Contracts

35. In addition to filing the Restriction Motion, on at least four separate occasions the Defendants have either interfered with and impeded the Debtor's business or have threatened to do so by initiating the process for removing the Debtor as the portfolio manager of the CLOs. Such conduct violates the Orders and flouts the Court's decision on the Restriction Motion and the Court's observations made at the Hearing.

36. ***First***, on December 22, 2020, employees of NPA and HCMFA interfered with and impeded the Debtor's business by refusing to settle the CLOs' sale of AVYA and SKY securities that Mr. Seery had personally authorized. The Advisors engaged in this conduct notwithstanding (a) the denial of the Restriction Motion and the Court's pointed comments during that Hearing on the Restriction Motion, and (b) Mr. Norris's sworn acknowledgments on behalf of the Advisors and Funds during the Hearing that (i) the Debtor's management of the CLOs is governed by written contracts as to which none of the Advisors or Funds are parties; (ii) the Debtor has the exclusive duty and responsibility to buy and sell assets on behalf of the CLOs; and (iii) as the Advisors knew when they invested in the CLOs on behalf of the Funds, that holders of preference shares (such as the Funds) have no right to make investment decisions on behalf of the CLOs.

37. Notably, the Advisors' interference with trades that Mr. Seery authorized on behalf of the CLOs is the same type of conduct that led the Court to impose the TRO against Mr. Dondero. *See Declaration of Mr. James P. Seery, Jr. in Support of Debtor's Motion for a Temporary Restraining Order Against Mr. James Dondero* [Adv. Pro. No. Docket No. 4] ¶¶21-23, Ex. 8.

38. ***Second***, also on December 22, 2020, the Defendants wrote to the Debtor and renewed their "request" that the Debtor refrain from selling any assets on behalf of the CLOs until the confirmation hearing (the "December 22 Letter"). In support of their "request," the Debtor re-asserted almost verbatim the arguments advanced in connection with the Restriction Motion – all of which were soundly rejected by the Court.

39. The Debtor responded on December 24, 2020, demanding that Defendants withdraw their December 22 Letter and confirm that neither the Defendants nor anyone acting on their behalf will take any further steps to interfere with the Debtor's directions as the CLOs' portfolio manager by the close of business on December 28, 2020. The Defendants failed to comply with the Debtor's demands.

40. ***Third***, the Defendants threatened to seek to remove the Debtor as the portfolio manager of the CLOs. Specifically, in a letter dated December 23, 2020 (the "December 23 Letter"), the Defendants informed the Debtor that one or more of them "intend to notify the relevant trustee and/or issuers that the process of removing the Debtor as fund manager should be initiated, subject to and with due deference for the applicable provisions of the United State Bankruptcy Code, including the automatic stay of Section 362."

41. The Debtor responded to the December 23 Letter the next day and advised the Defendants that the Settlement Order prohibited the termination of the Debtor's management agreements with the CLOs, and that there was no factual, legal, or contractual basis to remove the Debtor as the CLOs' portfolio manager in any event. The Debtor demanded that the Defendants withdraw their December 23 Letter and commit not to take any actions, directly or indirectly, to terminate the CLO management agreements, by the close of business on December 28, 2020. The Defendants failed to comply with the Debtor's demands.

42. Because Mr. Dondero owns and/or effectively controls the Defendants, the Debtor forwarded the correspondence between the Debtor and the Defendants, including the Defendant's Letters, to Mr. Dondero's counsel. In response, Mr. Dondero's counsel contended that "[w]hile there are relationships between my client and some of the movants, I believe they are separate entities and should be treated as such."

43. On December 30, 2020, the Debtor specifically requested that the Defendants promptly bring the matters to the Court for resolution by bringing a motion to terminate the CLO management agreements and for related relief, or the Debtors would be forced to commence an action for declaratory relief and bring this Motion in order to bring clarity to the Debtor's contractual rights. In response, Defendants' counsel would not commit to bring any motion, only that they would file an objection to Debtor's plan of reorganization. The Debtor believes that its disputes with the Defendants can and must be promptly resolved.

44. ***Finally,*** because Mr. Dondero continues to interfere with the Debtor's business and engage in disruptive behavior, the Debtor gave notice to Mr. Dondero on December 23, 2020, that the Debtor would evict him and terminate all services provided to him, as of December 30, 2020. On December 31, 2020, counsel to the Advisors and the Funds sent a letter to Debtor's counsel (the "December 31 Letter" and together with the December 22 Letter and December 23 Letter, the "Defendants' Letters") contending that the Debtor's decision to remove Mr. Dondero from the Debtor's offices and services was damaging the Advisors and the Funds and implied that the Debtor would be economically responsible for such damage.

45. On January 4, 2021, the Debtor responded to the December 31 Letter by noting that (a) Mr. Dondero did not seek judicial relief, make any of the contentions the advanced in the December 31 Letter, or even complain to the Debtor, (b) no action was taken against Entities,

only against Mr. Dondero, (c) Mr. Dondero was given reasonable notice of his eviction and the termination of the Debtor's services to him, such that he could have and should have made alternative arrangements to avoid any disruption, and (d) nothing prevents Mr. Dondero from continuing to work on behalf of the Entities. The Debtor also noted that it will take all steps to protect its interests against any further frivolous claims and threats made by the Defendants.

46. Upon information and belief, Mr. Dondero has taken no steps to cause the Defendants – entities that he owns and/or effectively controls and that are each a "Related Entity" under the Term Sheet – to comply with the Debtor's demands made in response to the Defendants' Letters.

FIRST CLAIM FOR RELIEF

(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

47. The Debtor repeats and realleges each of the allegations in each of the foregoing paragraphs as though fully set forth herein.

48. A bona fide, actual, present dispute exists between the Plaintiff and the Defendants concerning their respective rights and obligations concerning the CLOs.

49. A judgment declaring the parties' respective rights and obligations will resolve their disputes.

50. Pursuant to Bankruptcy Rule 7001, the Debtor specifically seeks declarations that:

- Each of the Defendants is directly or indirectly controlled by Mr. Dondero;
- Each of the Defendants is an "affiliate" of the Debtor for purposes of the CLO Management Agreements;
- The Plaintiff has the exclusive contractual right to manage the CLOs;
- The Plaintiff has the exclusive duty and responsibility to buy and sell assets on behalf of the CLOs;

- Holders of preference shares have no right to make investment decisions on behalf of the CLOs;

- The Debtor's decision to evict Mr. Dondero from the Debtor's offices, and to terminate the provision of services to him, did not violate any contract with, or duty owed to, any of the Defendants; and

- The demands and requests set forth in Defendants' Letters constitute interference with the Plaintiff's business and management of the CLOs.

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SECOND CLAIM FOR RELIEF

(Violation of the automatic stay under section § 362(a) of the Bankruptcy Code)

51. The Debtor repeats and realleges each of the allegations in each of the foregoing paragraphs as though fully set forth herein.

52. The Defendants' interference with the Plaintiff's contractual rights and course of dealing violates the automatic stay pursuant to § 362(a) of the Bankruptcy Code.

53. To the extent Defendants engaged in such conduct after the entry of the Court's Order on the Restriction Motion, such conduct was willful.

54. The Plaintiff is entitled to damages in an amount to be determined at trial arising from, and related to, the Defendants' violation of the automatic stay.

THIRD CLAIM FOR RELIEF

(Tortious Interference with Contract)

55. The Debtor repeats and realleges each of the allegations in each of the foregoing paragraphs as though fully set forth herein.

56. Since November 2020, Defendants have tortuously interfered with the Debtor's CLO management contracts.

57. The Debtors' CLO management contracts constitute are valid contracts, and, upon information and belief, the Debtor knows of the terms and conditions of such contracts because they were prepared and executed at Mr. Dondero's direction.

58. The Defendants have willfully and intentionally impeded the Debtor's ability to fulfill its contractual duties and obligations pursuant to its CLO management contracts, by, among other things, (1) hindering the Debtor's ability to sell certain CLO assets, (2) threatening to initiate the process for removing the Debtor as the portfolio manager of the CLOs, and (3) otherwise attempting to influence and interfere with the Debtor's decisions concerning the purchase or sale of any assets on behalf of the CLOs.

59. Defendants' conduct has proximately caused, and will continue to cause, damage and loss to the Debtor's estate.

60. The Plaintiff is entitled to damages in an amount to be determined at trial arising from, and related to, the Defendants' tortious interference with its CLO management contracts.

FOURTH CLAIM FOR RELIEF

(For Injunctive Relief -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7065)

61. The Debtor repeats and realleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

62. Pursuant to Bankruptcy Code section 105(a) and Bankruptcy Rule 7065, the Debtor seeks a preliminary and permanent injunction enjoining Defendants from (1) engaging in any Prohibited Conduct, and (2) conspiring, colluding, or collaborating with (a) Mr. Dondero, (b) any entity owned and/or controlled by Mr. Dondero, and/or (c) any person or entity acting on behalf of Mr. Dondero or any entity owned and/or controlled by him, to, directly or indirectly, engage in any Prohibited Conduct.

63. Bankruptcy Code section 105(a) authorizes the Court to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a).

64. Bankruptcy Rule 7065 incorporates by reference rule 65 of the Federal Rules of Civil Procedure and authorizes the Court to issue injunctive relief in adversary proceedings.

65. The interference and threats described herein are embodied in written communications and are without any justification, and constitute willful and intentional interferences with the Debtor's management contracts that, if not prohibited, will cause the Debtor irreparable damages; the Debtor is therefore likely to prevail on its underlying claim for tortious interference with contract.

66. In the absence of injunctive relief, the Debtor will be irreparably harmed because Defendants are likely to engage in some or all of the Prohibited Conduct, thereby interfering with the Debtor's operations, management of assets, and contractual obligations, all to the detriment of the Debtor, its estate, its creditors and the creditors and stakeholders of the Successor Entities.

67. In light of, among other things, (a) the Debtor's status as a debtor in bankruptcy subject to the jurisdiction of this Court, (b) the Settlement Order and Term Sheet, (c) Mr. Dondero's resignations as the Debtor's President and CEO and later as portfolio manager and an employee, (d) the authority vested in the Board and Mr. Seery, as CEO and CRO, (e) the TRO, (f) Mr. Norris's testimony during the Hearing, and (g) the Court's denial of the Restriction Motion, there is no legal or equitable basis for Defendants to engage in any of the Prohibited Conduct, and the balance of the equities strongly favors the Debtor in the request to enjoin Defendants from engaging in any Prohibited Conduct.

68. Injunctive relief would serve the public interest by re-enforcing the implicit mandate in the Bankruptcy Code that debtors and their successors are to be managed and controlled only by court-authorized representatives, free from threats and coercion.

69. Based on the foregoing, the Debtor requests that the Court preliminarily and permanently enjoin Defendants from engaging in any Prohibited Conduct or from causing, encouraging, or conspiring with Mr. Dondero, or any entity controlled by Mr. Dondero or agent acting on Mr. Dondero' s behalf, from engaging in any Prohibited Conduct.

PRAYER

WHEREFORE, the Debtor prays for judgment as follows:

(a) On the First Cause of Action, a judgment declaring that: (i) each of the Defendants is directly or indirectly controlled by Mr. Dondero, (ii) each of the Defendants is an "affiliate" of the Debtor for purposes of the CLO Management Agreements; (iii) the Plaintiff has the exclusive contractual right to manage the CLOs; (iv) the Plaintiff has the exclusive duty and responsibility to buy and sell assets on behalf of the CLOs; (v) holders of preference shares have no right to make investment decisions on behalf of the CLOs; (vi) the Debtor's decision to evict Mr. Dondero from the Debtor's offices, and to terminate the provision of services to him, did not violate any contract with, or duty owed to, any of the Defendants; and (vii) the demands and requests set forth in Defendants' Letters constitute interference with the Plaintiff's business and management of the CLOs;

(b) On the Second Cause of Action, damages in an amount to be determined at trial arising from Defendants' violation of the automatic stay;

(c) On the Third Cause of Action, damages in an amount to be determined at trial arising from the Defendants' tortious interference with the Plaintiff's CLO management contracts;

(d) On the Fourth Cause of Action, a preliminary and permanent injunction enjoining Defendants from conspiring, colluding, or collaborating with (a) Mr. Dondero, (b) any entity owned and/or controlled by Mr. Dondero, and/or (c) any person or entity acting on behalf of Mr. Dondero or any entity owned and/or controlled by him, to, directly or indirectly, engage in any Prohibited Conduct;

(h) For such other and further relief as this Court deems just and proper.

Dated: January 6, 2021.

PACHULSKI STANG ZIEHL & JONES LLP

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Ira D. Kharasch (CA Bar No. 109084)
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Counsel for Plaintiff Highland Capital Management, L.P.

VERIFICATION

I have read the foregoing VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF and know its contents.

☐ I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☒ I am the Chief Executive Officer and Chief Restructuring Officer of Highland Capital Management, L.P., the Plaintiff in this action, and am authorized to make this verification for and on behalf of the Plaintiff, and I make this verification for that reason. I have read the foregoing document(s). I am informed and believe and on that ground allege that the matters stated in it are true.

☐ I am one of the attorneys of record for _____, a party to this action. Such party is absent from the county in which I have my office, and I make this verification for and on behalf of that party for that reason. I have read the foregoing document(s). I am informed and believe and on that ground allege that the matters stated in it are true.

I certify and declare under penalty of perjury under the laws of the United States that the foregoing is true and correct as of this 6th day of January 2021.

/s/ James P. Seery, Jr.
James P. Seery, Jr.

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	**ADVERSARY PROCEEDING NUMBER** (Court Use Only)

PLAINTIFFS	**DEFENDANTS**
Highland Capital Management, L.P.	Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, NexPoint Capital, Inc., and CLO Holdco, Ltd.
ATTORNEYS (Firm Name, Address, and Telephone No.) Hayward PLLC 10501 N. Central Expressway, Suite 106, Dallas, TX 75231 Tel.: (972) 755-7100	**ATTORNEYS** (If Known)
PARTY (Check One Box Only) ☑ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☑ Other ☐ Trustee

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

Count 1: Declaratory relief pursuant to 11 U.S.C. 105(a) and Fed. R. Bankr. P. 7001; Count 2: Violation of the automatic stay under 11 U.S.C. 362(a); Count 3: Tortious interference with contract; Count 4: Injunctive relief pursuant to 11 U.S.C. 105(a) and Fed. R. Bankr. P. 7065

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
- ☐ 11-Recovery of money/property - §542 turnover of property
- ☐ 12-Recovery of money/property - §547 preference
- ☐ 13-Recovery of money/property - §548 fraudulent transfer
- ☐ 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- ☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- ☐ 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- ☐ 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- ☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- ☐ 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- ☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- ☐ 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- ☐ 61-Dischargeability - §523(a)(5), domestic support
- ☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
- ☐ 63-Dischargeability - §523(a)(8), student loan
- ☐ 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- ☐ 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- ☐ 71-Injunctive relief – imposition of stay
- ☑ 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- ☐ 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- ☑ 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action
- ☐ 01-Determination of removed claim or cause

Other
- ☐ SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- ☑ 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

☐ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ Check if a jury trial is demanded in complaint	Demand $ Damages in amount to be determined at trial

Other Relief Sought Declaratory judgment and injunctive relief

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 6, 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.

Appendix Exhibit 80

D. Michael Lynn
State Bar I.D. No. 12736500
John Y. Bonds, III
State Bar I.D. No. 02589100
John T. Wilson, IV
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ATTORNEYS FOR JAMES DONDERO

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

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

JAMES DONDERO'S OBJECTION TO DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST
[Relates to Docket No. 1625]

James Dondero ("Respondent"), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files this Objection to *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154)* [Docket No. 1625] (the "Motion") filed by Highland Capital Management, L.P. (the "Debtor"). Through the Motion, the Debtor seeks approval of its compromise with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, "HarbourVest") pursuant to Rule 9019 of the Federal

Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of this objection, Respondent respectfully represents as follows:

I. INTRODUCTION

1. Under Bankruptcy Rule 9019, the Bankruptcy Court is tasked with making an independent judgment on the merits of a proposed settlement to ensure that the proposed settlement is "fair, equitable, and in the best interest of the estate."[1] While Respondent recognizes the Debtor's efforts in arranging a settlement, there are at least three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim (as hereinafter defined); (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor's plan by giving HarbourVest a significant claim to which it would not otherwise be entitled; and (iii) the proposed settlement seeks to improperly classify the HarbourVest Claim[2] in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. Moreover, the proposed settlement does not satisfy the factors for approval fixed by case law. On information and belief, Debtor's CEO/CRO, Mr. Seery, has previously asserted on multiple occasions that the HarbourVest Claim had no value and that the Debtor could resolve such claim for no more than $5 million. While Respondent and Mr. Seery have had a number of disagreements in this case, Respondent agrees with Mr. Seery's initial conclusion that the HarbourVest Claim is substantially without merit. Respondent understands that any settlement will not necessarily provide the best possible outcome for the Debtor, but in this instance the proposed settlement far exceeds the bounds of reasonableness and, on its face, is an attempt by the Debtor to purchase votes in favor

[1] *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

[2] While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. *See* Claim Nos. 143, 147, 149, 150, 153, and 154.

of confirmation of its Plan. Given the Debtor's prior positions as to the merits of HarbourVest Claim it is necessary for the Court to closely scrutinize the settlement to determine why the Debtor now believes granting HarbourVest a net claim of nearly $60 million[3] resulting from HarbourVest's investment in a non-debtor entity (which was and is managed by a non-debtor) to be in the best interest of the estate. Upon close scrutiny, Respondent believes the Court will find that the proposed settlement is not reasonable or in the best interest of the estate and the Motion therefore should be denied.

II. BACKGROUND

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

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

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

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

[3] The proposed settlement provides that HarbourVest shall receive an allowed general unsecured (Class 8) claim in the amount of $45 million and an allowed subordinated general unsecured (Class 9) claim in the amount of $35 million. As part of the settlement, HarbourVest will then transfer its entire interest in Highland CLO Funding, Ltd. ("HCLOF") to an entity to be designated by the Debtor. The Debtor states that the value of this interest is approximately $22 million as of December 1, 2020.

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

7. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. *See* Docket No. 854.

8. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the "HarbourVest Claim")[4].

9. On July 30, 2020, the Debtor filed *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 906] (the "Debtor Objection"), which contained an objection to the HarbourVest Claim.

10. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "HarbourVest Response").

11. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. Docket No. 1625.

III. LEGAL STANDARD

12. The merits of a proposed compromise should be judged under the criteria set forth in *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968). *TMT Trailer* requires that a compromise must be "fair and equitable." *TMT Trailer*, 390

[4] While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. *See* Claim Nos. 143, 147, 149, 150, 153, and 154.

U.S. at 424; *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984). The terms "fair and equitable," commonly referred to as the "absolute priority rule," mean that (i) senior interests are entitled to full priority over junior interests; and (ii) the compromise is reasonable in relation to the likely rewards of litigation. *In re Cajun Electric Power Coop.*, 119 F.3d 349, 355 (5th Cir. 1997); *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980).

13. In determining whether a proposed compromise is fair and equitable, a Court should consider the following factors:

(i) the probabilities of ultimate success should the claim be litigated;

(ii) the complexity, expense, and likely duration of litigating the claim;

(iii) the difficulties of collecting a judgment rendered from such litigation; and,

(iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

TMT Trailer, 390 U.S. at 424.

14. In considering whether to approve a proposed compromise, the bankruptcy judge "may not simply accept the trustee's word that the settlement is reasonable, nor may he merely 'rubber stamp' the trustee's proposal." *In re Am. Res. Corp.*, 841 F.2d 159, 162 (7th Cir. 1987). "[T]he bankruptcy judge must apprise himself of all facts necessary to evaluate the settlement and make an informed and independent judgment about the settlement." *See TMT Trailer*, 390 U.S. at 424, 434.

15. While the trustee's business judgment is entitled to a certain deference, "business judgment is not alone determinative of the issue of court approval." *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). Further, the business judgment rule does not provide a debtor with "unfettered freedom" to do as it wishes. *See In re Pilgrim's Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) ("[A]s a fiduciary holding its estate in trust and responsible

to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight."). The Court must conduct an "intelligent, objective and educated evaluation"[5] of the proposed settlement "to ensure that the settlement is fair, equitable, and in the best interest of the estate and creditors." *See In re Mirant Corp.*, 348 B.R. 725, 739 (Bankr. N.D. Tex. 2006) (quoting *Conn. Gen. Life Ins. Co. v. Foster Mortgage Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995)).

IV. ARGUMENT AND AUTHORITIES

16. As discussed in detail below, there are three significant issues with the terms of the settlement that merit denial of the Motion: (i) the proposed settlement is not reasonable or in the best interest of the estate given the weakness of the HarbourVest Claim; (ii) the proposed settlement is a blatant attempt to purchase votes in support of Debtor's plan by giving HarbourVest a substantial claim to which it is not entitled; and (iii) the proposed settlement seeks to improperly classify HarbourVest's one claim in two separate classes in order to gerrymander an affirmative vote on its reorganization plan. For these and certain additional reasons as discussed below, the Motion should be denied.

A. Through its Claim, HarbourVest Seeks to Revisit this Court's Orders in the Acis Case

17. As an initial matter, through its proofs of claim, HarbourVest appears to be second guessing the Court's judgment in the Chapter 11 case of Acis Capital Management, LP and Acis Capital Management GP, LLC (collectively, "Acis") and seeking to revisit the Court's orders entered in that case years ago. HarbourVest appears to being arguing that the TRO and injunction

[5] *In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) ("To assure a proper compromise the bankruptcy judge, must be apprised of all the necessary facts for an intelligent, objective and educated evaluation. He must compare the terms of the compromise with the likely rewards of litigation.").

entered in the Acis case that prevented redemptions or resets in the CLOs are now the root cause of the decrease in value of its investment in HCLOF.

18. Specifically, the claim states that HarbourVest incurred "financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF."[6]

19. Essentially, HarbourVest is saying that the orders entered in the Acis case did not actually protect the investors and their investments, but instead were a triggering cause for the alleged diminution in value of its investment in HCLOF. Nevertheless, even though the value of HCLOF dropped dramatically only after the Effective Date of Acis's Plan, years later and despite the lack of Debtor involvement in managing HarbourVest's investment, HarbourVest now seeks to impute liability to the Debtor through a flimsy narrative designed to recoup investment losses unrelated to the Debtor and for which the Debtor owed HarbourVest no duty.

20. That HarbourVest now, years later, seeks to revisit this Court's Acis orders raises a number of issues, including those as to HarbourVest's involvement (or lack thereof) in the Acis case, whether the orders, Plan, or Confirmation Order in the Acis case may bar some of the relief requested by HarbourVest here, and questions related to the merits of the HarbourVest Claim and the legal grounds allegedly supporting it.

[6] See Proof of Claim 143, para. 3 ("Due to the Acis bankruptcy and certain conduct alleged to have been undertaken by the Debtor (to whom Acis subcontracted its functions) and Debtor's employees (who were officers, employees, and agents of Acis), the Claimant has suffered significant harm. Such harm includes, but is not limited to, financial harm resulting from, among other things (i) court orders in the Acis bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise regulated the activity of HCLOF; and (ii) significant fees and expenses related to the Acis bankruptcy that were charged to HCLOF.").

B. The HarbourVest Claim Lacks Merit and the Proposed Settlement is Not Reasonable

21. Based on the HarbourVest Claim and its filed response to the Debtor's objection, Respondent believes that the HarbourVest claim is meritless and the proposed settlement is not reasonable, fair and equitable, or in the best interest of the estate.

22. First, the proposed settlement is concerning particularly because HarbourVest's bare bones proof of claim contains very little in terms of allegations of specific conduct against the Debtor that would give rise to a $60 million claim against this estate. While HarbourVest's response to the Debtor's claim objection is lengthy, it contains very little in real substance supporting its right to such a claim against the estate. The response also omits a number of key facts that are relevant and potentially fatal to its claim for damages against the Debtor's estate. Among them is the fact that Acis (and thereafter Reorganized Acis), along with Mr. Joshua Terry, managed HarbourVest's investment for years after it was made.[7] Despite this fact, HarbourVest's alleged damages appear to be based largely on the difference between the value of its initial investment at confirmation of Acis's Plan and the current value of the investment—which amount was directly determined by the performance of the CLOs that Acis managed during this time.[8] Neither the claim nor the response directly address the implications of Acis's management of the CLOs during the period following HarbourVest's investment. Nor does HarbourVest address or discuss performance of the CLOs, the market forces that may have caused HarbourVest's investment to lose value, or other factors influencing the current value of its investment. The

[7] *See, e.g.*, HarbourVest Proof of Claim 143, p. 5 ("The Claimant is a limited partner in one of the Debtor's managed vehicles, Highland CLO Funding, Ltd. ("HCLOF"). Acis Capital Management GP, L.L.C. and Acis Capital Management L.P. (together, "Acis"), the portfolio manager for HCLOF, filed for chapter 11 in the United States Bankruptcy Court for the Northern District of Texas (the "Court") on January 30, 2018.").

[8] *See* HarbourVest Response, Docket No. 1057, para. 40 ("HarbourVest has been injured from the Investment: not only has the Investment failed to accrue value, its value plummeted. The Investment's current value is far less than HarbourVest's initial contribution.").

speculative nature of the damages and the lack of specificity of the HarbourVest Claim and the role of Acis in the loss of value to HarbourVest all call into question the reliability of the allegations and the legal basis for the claim amount awarded in the settlement.

23. Also absent from Harbourvest's papers is any discussion of any contract or agreement between (i) HarbourVest and the Debtor; and (ii) any agreement that was executed in conjunction with HarbourVest's initial investment. While the proof of claim references a number of agreements, there is no explanation in the claim or in HarbourVest's response to the Debtor's claim objection of how these agreements give rise to liability against the *Debtor*. For example, neither the claim nor the HarbourVest Response (which includes more than 600 pages of attachments) attach *any* written agreement between HarbourVest and **any other party**. While HarbourVest has alleged a number of claims sounding in tort, many of those claims cannot exist absent a contract or other express relationship between the parties. Moreover, the terms of the relevant contracts themselves likely contain a number of provisions that may call into question Debtor's liability or would be otherwise relevant to merits of the HarbourVest Claim. For example, HarbourVest in its papers appears to assert or imply that the Debtor made a number of false or fraudulent representations to solicit HarbourVest's investment, but then fails to discuss or even identify the applicable agreements it alleges it was induced into signing in connection with its investment (this despite the substantial value of the investment when the Acis plan was confirmed).

24. Given these issues, among many others, the HarbourVest Claim is unsustainable both from a liability and damages standpoint and there are many very high hurdles HarbourVest would have to clear in seeking to prove liability against the Debtor and in proving its damages. For a long period of time, its investment was managed by Acis and the investment's performance was directly tied to Acis's inadequate performance as portfolio manager. Further, the value of

HarbourVest's investment is also directly tied to various market forces that may have impacted its value. The HarbourVest Claim is largely lacking in relevant facts and omits much salient information, such as who it contracted with in connection with its investment, the terms of such agreements, who controlled its investment during the entire period from November 2017 to the present, and the performance of its investment during the last two years. Given these issues, HarbourVest will be unable to demonstrate a causal connection between any conduct of the Debtor and the alleged damages it suffered from a reduction in value of its investment.

25. Because of the speculative nature of the HarbourVest Claim, and the fact that very little pleading or litigation has occurred, the proposed settlement in granting such a large claim is unreasonable, not fair and equitable, and not in the best interest of the estate. The lack of pending litigation, narrowing of threshold questions, and lack of detail in HarbourVest Claim make it impossible to determine whether the huge claim awarded under the proposed settlement is justified under the facts. Accordingly, the Motion should be denied.

C. The Proposed Settlement is an Improper Attempt by the Debtor to Purchase Votes in Support of its Plan and the Separate Classification of the HarbourVest Claim Constitutes Gerrymandering in Violation of 11 U.S.C. § 1122

26. The proposed settlement is a flagrant attempt by the Debtor to purchase votes in support of its Plan by giving HarbourVest a significant claim to which it has not shown itself entitled. Moreover, the separate classification of the HarbourVest Claim into two separate classes constitutes impermissible gerrymandering in violation of section 1122 of the Bankruptcy Code. The proposed settlement essentially gives HarbourVest a claim it is not entitled to in exchange for votes in two separate classes. This is not a proper basis for a settlement and the Court should deny the Motion.

27. Section 1122 of the Bankruptcy Code provides as follows:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

11 U.S.C. § 1122.

28. "Chapter 11 requires classification of claims against a debtor for two reasons. Each class of creditors will be treated in the debtor's plan of reorganization based upon the similarity of its members' priority status and other legal rights against the debtor's assets. Proper classification is essential to ensure that creditors with claims of similar priority against the debtor's assets are treated similarly." *In re Greystone III Joint Venture*, 995 F.2d 1274, 1277 (5th Cir. 1991).

29. "Section 1122 consequently must contemplate some limits on classification of claims of similar priority. A fair reading of both subsections suggests that ordinarily substantially similar claims, those which share common priority and rights against the debtor's estate, should be placed in the same class." *Id.* at 1278.

30. The Fifth Circuit has stated that there is "one clear rule that emerges from otherwise muddled caselaw on § 1122 claims classification: thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan." *Id.* at 1279. The Court observed:

> There must be some limit on a debtor's power to classify creditors in such a manner. . . . Unless there is some requirement of keeping similar claims together, nothing would stand in the way of a debtor seeking out a few impaired creditors (or even one such creditor) who will vote for the plan and placing them in their own class.

In re Greystone III Joint Venture, 995 F.2d 1274, 1279 (5th Cir. 1991) (quoting *In re U.S. Truck Co.*, 800 F.2d 581, 586 (6th Cir. 1986)).

31. Here, the HarbourVest settlement and the classification of the HarbourVest Claim under the Plan blatantly violate the Fifth Circuit's "one rule" concerning the classification of claims under section 1122. To the extent that HarbourVest even has a legitimate claim, not only should its claim be classified together with other unsecured creditors, its claim should be classified solely in one class. To allow the Debtor to do otherwise as proposed is improper gerrymandering in order to obtain a consenting class in express violation of section 1122.

D. There Are Other Reasons for the Court to Closely Scrutinize the Proposed Settlement that May Warrant Denial of the Motion

32. There are a number of other reasons for the Court to closely scrutinize the proposed settlement that may warrant denial of the Motion.

33. First, the granting to HarbourVest of a claim in the total amount of $80 million potentially allows HarbourVest to achieve a significant windfall at the expense of other creditors and equity holders. The Debtor has asserted numerous times that the estate is solvent and, for this reason, the purported subordinated claim of $35 million (if allowed and approved) may be worth just as much as its general unsecured claim. This is a huge figure in this case, outshined only by the Redeemer Committee, which has an actual arbitration award obtained after lengthy litigation. By contrast, the HarbourVest Claim contains only a few paragraphs of generalized allegations that essentially argue that the Debtor's alleged actions related to the Acis bankruptcy, and this Court's orders in the Acis case, are a "but for" cause of the loss of its investment. While the HarbourVest Response is lengthy, it lacks necessary details for the Court to determine whether HarbourVest *may* be entitled to the relief requested by the Motion. The other significant creditors in this case—*inter alia*, Redeemer, UBS and Acis—all had pending claims that were litigated. Nor is HarbourVest a trade creditor, vendor, or other contract counter-party of the Debtor. The HarbourVest Claim is thus uniquely situated in this case and, given the size and the nature of its

claims, should invite close scrutiny. Under these facts, the potential allowance of an $80 million claim (less the value of its share in HCLOF, which may suffer by continued management by Acis) against the estate for an investment which was not held or managed by the Debtor would be a huge undue windfall.

34. Second, the Motion states that HarbourVest will vote its proposed allowed Class 8 (proposed at $45 million) and Class 9 (proposed at $35 million) claims in support of confirmation. There are at least two potential issues with this proposal. First, the deadline for parties to submit ballots was January 5, 2021, and as of the close of business on January 5, the HarbourVest Claim has not been allowed for voting purposes.[9] Second, the Motion and proposed settlement agreement state that the HarbourVest Claim will be allowed for voting purposes only as a general unsecured claim in the amount of $45 million. It is unclear how HarbourVest can, or would be authorized to, vote its purported Class 8 and 9 Claims in support of the Plan after the voting deadline and when the settlement provides only for a voting claim in Class 8.

35. Third, while the Motion addresses the factor of probability of success in the litigation, it does not discuss in detail the cost of doing so in relation to the amount to be paid to HarbourVest under the settlement or the likelihood that the Debtor will succeed in the litigation. In addition, unlike the claims filed by Acis and UBS, the HarbourVest Claim does not arise from pending litigation. At this point, relatively little litigation has occurred and the parties have not addressed threshold issues that might dramatically narrow the scope of the HarbourVest Claim. Rule 9019 requires an analysis as to whether the probability of success in litigation is outweighed by the consideration achieved under the settlement. *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980) (The Court must "compare the terms of the compromise with the likely rewards

[9] The hearing on the 3018 and 9019 motions are set concurrently with confirmation.

of litigation."). Given the excessive amount to be paid under the settlement and the weakness of the HarbourVest Claim, this factor weighs in favor of denial of the Motion.

36. Fourth, it is unclear from the settlement papers whether the transfer by HarbourVest of its interest in HCLOF to the Debtor or an entity the Debtor designates will cause the value of the investment to be received by the Debtor's estate. Further, the interest of HCLOF being conveyed under the proposed settlement may be subject to the Acis plan injunction, which could potentially prevent the Debtor's estate from realizing the value of this interest. In the event the Court is inclined to approve the settlement, the order should make clear that the available value of the investment should be realized by the Debtor's estate.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Court enter an order denying the Motion and providing Respondent such other and further relief to which he may be justly entitled.

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Dated: January 6, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on January 6, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Debtor and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink
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Appendix Exhibit 81

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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 DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND AUTHORIZING ACTIONS CONSISTENT THEREWITH

The Dugaboy Investment Trust and Get Good Trust (jointly, "Objectors"), submit this Objection for the purpose of objecting to the *Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Dkt. #1625] (the "Motion") filed by Highland Capital Management, L.P. (the "Debtor"). Through the Motion, the Debtor seeks approval of its compromise with HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, "HarbourVest") pursuant to Rule 9019 of the

Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of this objection, Objectors respectfully represent as follows:

I. INTRODUCTION

1. Objectors recognize that Courts favorably view settlements and, as a matter of course, generally approve settlements as being in the best interest of the bankruptcy estate. The settlement proposed herein, however, is different than other settlements inasmuch as it represents a 180 degree departure from the Debtor's own analysis of the Claim of HarbourVest and the fact that the settlement is tied to HarbourVest approving the Debtor's plan. Little or no information is provided by the Debtor as to why its initial analysis was flawed and what information or legal principal it discovered to change a zero claim into a massive claim that will have a significant impact on the recovery to creditors.

II. BACKGROUND

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

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

4. On December 4, 2019, the venue of this case was transferred. [Dkt. #186].

5. On July 16, 2020, this Court entered an order authorizing the Debtor to employ James P. Seery, Jr. as Chief Executive Officer and Chief Restructuring Officer of the Debtor. [See Dkt. #854].

6. On April 8, 2020, HarbourVest filed Proofs of Claim Numbers 143, 149, 149, 150, 153, and 154 (collectively, the "HarbourVest Claim")[1].

7. On July 30, 2020, the Debtor filed *Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #906] (the "Debtor Objection"), which contained an objection to the HarbourVest Claim.

8. On September 11, 2020, HarbourVest filed *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No Liability Claims; and (F) Insufficient-Documentation Claims* [Dkt. #1057] (the "HarbourVest Response").

9. The Debtor, in its *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Dkt. #1473 pgs. 40-41], described its position relative to the HarbourVest Claim as follows:

> The Debtor intends to **vigorously** defend the HarbourVest Claims on various grounds ….. The HarbourVest Entities invested approximately $80,000,000.00 in HCLOF but seek an allowed claim in excess of 300 million dollars (after giving effect to treble damages for the alleged RICO violations)

10. On December 23, 2020, the Debtor filed the Motion seeking approval of a proposed settlement of the HarbourVest Claim under Rule 9019. [Dkt. # 1625].

11. The proposed settlement provides HarbourVest with the following:

a. An allowed, general unsecured claim in the amount of $45,000,000.00 [Dkt. #1625 pg. 9 pp.f]; and

[1] While HarbourVest has filed a number of claims, each filed claim is exactly the same except in the name of the claimant. See Claim Nos. 143, 147, 149, 150, 153, and 154.

b. A $35,000,000 claim in Class 9 [Dkt. #1625 pg. 9 pp.f].

12. An integral element of the settlement requires that HarbourVest will "support confirmation of the Debtor's Plan including, but not limited to, voting its claims in support of the Plan."

13. The settlement also contains a provision that HarbourVest will transfer its entire interest in HCLOF to an entity to be designated by the Debtor. It is unclear whether HarbourVest has a right to transfer the interest and secondly, what the Debtor will do with the interest [Dkt. #1625 pp.f].

14. The sole support for the Motion is the Declaration of John Morris [Dkt. #1631] which fails to account for the enormous change in the Debtor's position between November 24, 2020 when the Disclosure Statement was approved and December 23, 2020 when the Motion was filed, a period of less than thirty (30) days.

15. The Declaration of John Morris [Dkt. #1631] also contains no information as to the potential cost of the litigation, whether HarbourVest can transfer the interest or reasons, other than conclusory reasons, as to why the settlement is beneficial to the estate. The Debtor makes the assertion that the interest it is acquiring was worth $22,000,000.00 as of December 1, 2020 without advising as to the basis for the valuation. Is it a book value and, if not, what was the methodology employed to arrive at the valuation? The Court has no basis to evaluate the settlement without essential information as to 1) how the asset being acquired is valued; 2) can the Debtor acquire the interest; and 3) how will the Debtor bring value to the estate in connection with the interest inasmuch as the Debtor has discretion as to where to place the asset to be acquired.

A. LEGAL STANDARDS

16. The law relative to approval of motions pursuant to BR 9019 is well settled. The settlement must be fair and equitable**.** *See In re Jackson Brewing Co.*, 624 F.2d 599, 602 (5th Cir. 1980). The factors the Court should consider are the following:

(i) the probabilities of ultimate success should the claim be litigated;

(ii) the complexity, expense, and likely duration of litigating the claim;

(iii) the difficulties of collecting a judgment rendered from such litigation; and,

(iv) all other factors relevant to a full and fair assessment of the wisdom of the compromise.

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968).

17. Although the Debtor's business judgment is entitled to a certain deference, "business judgment" is not alone determinative of the issue of court approval. *See In re Endoscopy Ctr. of S. Nev., LLC*, 451 B.R. 527, 536 (Bankr. D. Nev. 2011). However, notwithstanding the business judgment rule, a debtor does not have unfettered freedom to do what it wishes. *See In re Pilgrim's Pride Corp.*, 403 B.R. 413, 426 (Bankr. N.D. Tex. 2009) ("[A]s a fiduciary holding its estate in trust and responsible to the court, a debtor in possession must administer its case and conduct its business in a fashion amenable to the scrutiny to be expected from creditor and court oversight.").

B. ISSUES WITH THE SETTLEMENT

18. Objectors believe that the following issues are not explained or addressed in the Motion and, thus, the Motion should be denied:

a) The settlement represents a radical change in the Debtor's position that was set forth in its Disclosure Statement. While the Debtor asserts that its position is

based on its fear of parties' oral testimony, the size of the transactions at issue make the case a document case, as opposed to who said what, when and how. A review of the applicable documents to determine whether they support the Debtor's initial position is warranted, as opposed to stating that the case is based upon the credibility of a witness. This settlement is not the settlement of an automobile accident where the parties are disputing who ran a red light;

b) The settlement requires HarbourVest to support and vote in favor of the Debtor's Plan. On its face this appears to be vote buying. The settlement should not be conditioned upon HarbourVest's support or non-support of the Plan and its vote in favor or against the Plan; and

c) No information is provided as to whether the Debtor can acquire the interest in HCLOF, liquidate the interest, who will receive the interest, or how will the estate benefit from the interest to be acquired.

CONCLUSION

The settlement with HarbourVest has too many questions to be approved on the record before this Court and the parties, due to the Notice of the Motion, the holidays and the press of other litigation in this case, do not have the time to adequately investigate the propriety of the settlement.

January 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 8th day of January, 2021, a copy of the above and foregoing *Objection To Debtor's Motion For Entry Of An Order Approving Settlement With Harbourvest (Claim Nos. 143, 147, 149, 150, 153, 154) And Authorizing Actions Consistent Therewith* 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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Appendix Exhibit 82

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ATTORNEYS FOR CLO HOLDCO, LTD.

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

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

CLO HOLDCO, LTD.'S OBJECTION TO HARBOURVEST SETTLEMENT

TO THE HONORABLE STACEY G. JERNIGAN, U.S. BANKRUPTCY JUDGE:

CLO Holdco, Ltd. ("**CLO Holdco**") respectfully files this *Objection to Harbourvest Settlement* (the "**Harbourvest Settlement Objection**") which seeks entry of an order from this Court denying the Debtor's *Motion for Entry of an Order Approving Settlement with Harbourvest (Claims Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* (the "**Harbourvest Settlement Motion**") for the reasons stated below. In support of the Harbourvest Settlement Objection, CLO Holdco respectfully states as follows:

I.
BACKGROUND

A. TRANSFERRING SHARES IN HCLOF

1. CLO Holdco owns 75,061,630.55 shares, or about 49.02% of Highland CLO Funding, Ltd. ("**HCLOF**"). Other shareholders include Harbourvest 2017 Global AIF L.P., Harbourvest Global Fund L.P., Harbourvest Dover Street IX Investment L.P., and Harbourvest Skew Base AIF L.P., and HV International VIII Secondary L.P. (collectively, "**Harbourvest**"). Harbourvest owns approximately 49.98% of HCLOF. The remaining 1% is owned by the Debtor and a five other investors.

2. HCLOF is governed by a *Members Agreement Relating to the Company* dated November 15, 2017 by and between each of the members of HCLOF, including Harbourvest, the Debtor, and CLO Holdco (the "**Member Agreement**"). A copy of that agreement is attached hereto as **Exhibit A**.

3. Section 6 of the Member Agreement addresses the "Transfer or Disposals of Shares." MEMBER AGREEMENT, § 6. The Member Agreement places strict restrictions on the sale or transfer of shares to entities other than the initial Member's own affiliates. *See id.* at §§ 6.1, 6.2. Before a Member can transfer its interests to a party other than its own affiliates it must: (i) obtain the prior written consent of the Portfolio Manager; and (ii) "offer to the other Members a right to purchase the Shares, on a pro rata basis with respect to their current Shares, at the same price (which must be cash) as such Shares are proposed to be purchased by the prospective third party purchaser pursuant to an irrevocable offer letter" (the "**Right of First Refusal**"). *Id.* As further stated in section 6.2 of the Member Agreement, "The other Members will have 30 days following receipt of the letter to determine whether to purchase their entire pro rata portion of the Shares proposed to be Transferred." *Id.* at § 6.2.

B. THE HARBOURVEST SETTLEMENT

4. On December 23, 2020, the Debtor filed the Harbourvest Settlement Motion. On the following day, the Debtor filed a copy of the Settlement Agreement referenced in the

Harbourvest Settlement Motion (the "**Settlement Agreement**") [Dkt. No. 3]. In the Settlement Agreement, Harbourvest represents and warrants that it is authorized to transfer its interest in HCLOF to the Transferee, HCMLP Investments, LLC (the "**Transferee**"). SETTLEMENT AGREEMENT, Ex. A. § 3. Further, the Transferee and Debtor agree to be bound by the terms and conditions of the Member Agreement. *Id.* at § 1.c.

5. In exchange for conveniently classified allowed claims under the Debtor's *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "**Plan**") [Dkt. No. 1472], Harbourvest agrees to vote in favor of the Plan and to transfer all of its interests in HCLOF to the Transferee. SETTLEMENT AGREEMENT, § 1.

6. As detailed below, CLO Holdco objects to the Harbourvest Settlement Motion because Harbourvest has no authority to transfer its interests in HCLOF without first complying with the Right of First Refusal. The only way to effectuate such a transfer without first providing other members the Right of First Refusal is an intentionally inaccurate interpretation of the Member Agreement's contractual provisions that would render specific passages redundant and meaningless. More simply put, the only way Harbourvest and the Debtor could effectuate the Settlement Agreement is by violating fundamental tenets of contract interpretation.

II.
ARGUMENTS AND AUTHORITIES

A. CONTRACT INTERPRETATION – AVOIDING REDUNDANCIES AND SURPLUS LANGUAGE

7. The Fifth Circuit recognizes fundamental tenets of contract interpretation, and notes that "contracts should be read as a whole, viewing particular language in the context in which it appears. *Woolley v. Clifford Chance Rogers & Wells, L.L.P.*, 51 F. App'x 930 (5th Cir. 2002) (citing Restatement (Second) of Contracts § 202 (1981)). The Fifth Circuit has applied substantially the same tenets of contract interpretation across the laws of various jurisdictions, and consistently reasons that "[a]ll parts of the agreement are to be reconciled, if possible, in order to avoid an

inconsistency. A specific provision will not be set aside in favor of a catch-all clause." *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 947 (5th Cir. 1981) (internal citations omitted); and *see Hawthorne Land Co. v. Equilon Pipeline Co., LLC*, 309 F.3d 888, 892–93 (5th Cir. 2002); *Luv N' Care, Ltd. v. Groupo Rimar*, 844 F.3d 442, 447 (5th Cir. 2016); *Wooley*, 51 F.Appx. at 930.

8. Reconciliation of terms that would otherwise render other parts of a contract redundant is fundamental to proper contract interpretation. *Hawthorne Land*, 309 F.3d at 892-93. As the Firth Circuit explained in *Hawthorne Land*, "each provision of a contract must be read in light of the other provisions so that each is given the meaning suggested by the contract as a whole. A contract should be interpreted so as to avoid neutralizing or ignoring a provision or treating it as surplusage." *Id.* (internal citations and quotations omitted). In other words, provisions of a contract should be read to create harmony, not internal inconsistencies, redundancies, and unnecessary surplus language. *See, e.g., Luv N' Care*, 844 F.3d at 447 (overturning district court on appeal by interpreting contract in manner that eliminated perceived redundancy).

B. ANALYZING THE MEMBER AGREEMENT

9. Section 6.1 of the Member Agreement will almost certainly be cited by the Debtor and Harbourvest as authority for their entry into the Settlement Agreement, regardless of whether other Members or the Portfolio Manager consent. It states, in pertinent part, that:

> No Member shall sell, pledge, charge, mortgage, assign, assign by way of security, transfer, convey, exchange or otherwise dispose of its Shares or its commitment to settle purchases of Shares under the Subscription and Transfer Agreement (each a "Transfer"), other than to an Affiliate of an initial Member party hereto, without the prior written consent of the Portfolio Manager…

MEMBER AGREEMENT, § 6.1. Harbourvest will likely stress that under the terms of the Member Agreement, it can transfer its interests so long as the transfer is to "an Affiliate of an initial Member." Indeed, the Debtor will no doubt point out to this Court that Harbourvest is

conveniently transferring its interests in HCLOF to an Affiliate of the Debtor, and that the Debtor is an initial Member listed in the Member Agreement.

10. Section 6.1, however, must be read in the context of the Member Agreement, and in conjunction with the transfer restrictions found in section 6.2. Read together it is clear that the consent exception allowing a transfer in 6.1 was intended to allow a Member to transfer its shares to *its* own Affiliate, without required consents and effectuating a Right of First Refusal. Doing so would allow inter-company transfers within a corporate structure without the need for complicated procedures. Applying Fifth Circuit precedent, this interpretation fits squarely within the agreement and gives weight to the terms of section 6.2 of the Member Agreement, as explained below.

(i) Surplusage – Specific Allowance of Transfers by CLO Holdco to Debtor Affiliates

11. Recall that both CLO Holdco and the Debtor are initial Members to the Member Agreement. MEMBER AGREEMENT, p. 3. Section 6.2 of the Member Agreement states, in pertinent part, that "Prior to making any Transfer of Shares (other than Transfers to Affiliates of an initial Member or, *in the case of CLO Holdco or a Highland Principal, to Highland, its Affiliates or another Highland Principal*) a Member must first…" comply with the Right of First Refusal. *Id.* at § 6.2 (emphasis added). The italicized language above is important for two reasons: (i) it specifically enumerates that CLO Holdco can transfer its interests to Debtor Affiliates without having to pursue the Right of First Refusal; and (ii) it allows only limited transfers between Members, as opposed to between a Member and an Affiliate of an initial Member.

12. If, as the Debtor and Harbourvest will likely argue, Members are allowed to transfer their interests to any Affiliates of any other initial Members, there is absolutely no need for the Member Agreement to specifically authorize CLO Holdco to transfer its interests to the Debtor's Affiliates. Per Fifth Circuit fundamentals of contract interpretation, that purported redundancy

should not be discarded as mere surplusage, and the Member Agreement should be interpreted in a manner that gives weight to that provision. *Hawthorne Land*, 309 F.3d at 892-93.

13. If the Member Agreement is read to literally allow all "Transfers to Affiliates of an initial Member" there would be no reason to expressly set forth allowed transfers between specific Members and other Member's Affiliates. If the Member Agreement sought to list all allowed transfers between Members and their Affiliates, it should have similarly noted that any Member could transfer its interest to any Harbourvest Member entity, as each Harbourvest Member entity is an Affiliate of the other Harbourvest Member entities. Alternatively, if the specific enumeration of CLO Holdco and the Highland Principals' transfer rights was surplusage, it would presumably have listed other parties' rights, or had inclusive language such as "including but not limited to" or "for example." The Member Agreement lacks such language and, as a result, should be interpreted in a manner that both gives weight to the specific provision while reconciling other provisions of the contract.

(ii) Absurd Results – Disparate Transfer Rights Between Members

14. Note that the Member Agreement does not generally allow a transfer of interests from Member to Member unless specifically enumerated. Section 6.2 specifically allows only CLO Holdco and the Highland Principals to make transfers to other Members, but those other Members include only the Debtor or another Highland Principal. MEMBER AGREEMENT, § 6.2. It does not allow the Debtor to transfer interests to any Member, and does not expressly allow any Member, other than limited transfers by CLO Holdco and the Highland Principals, to transfer interests to any other Member. *Id.* For instance, if the Debtor wished to transfer its interests to CLO Holdco, it would first have to offer *all* of the other Members their Right of First Refusal. *Id.*

15. Similarly, if Harbourvest wished to transfer its interest to CLO Holdco, it could not do so without first providing the Right of First Refusal to all other Members. *Id.* As noted above,

however, allowing a Member to transfer its interest to an Affiliate of any initial Member would allow *all* of the Members to transfer their interests to any Harbourvest Member entity, as the Harbourvest Members are Affiliates of each other. Given the specific enumeration of CLO Holdco and the Highland Principals' rights to inter-Member transfers, it would be inconsistent to expand that specific provision to allow all transfers by all Members to any Harbourvest entity without first providing a Right of First Refusal.

16. Such a reading would lead to absurd results. It would grant similarly situated Members profoundly disparate rights under the agreement, and could easily lead to manipulation. For instance, because the Harbourvest Members are technically Affiliates of an initial Member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer. No other Member could do that. For instance, if CLO Holdco wished to acquire other Members' interests, the transferring member (including Harbourvest) would have to offer a Right of First Refusal in *every instance*. To resolve that potential disparate treatment—though CLO Holdco and Harbourvest own nearly identical ownership interests in HCLOF—CLO Holdco would have to form an Affiliate and acquire interests through the Affiliate. That simply *cannot* be the intended result of the Member Agreement.

17. Instead, the Member Agreement must be read to require Harbourvest to provide a Right of First Refusal to the other Members of HCLOF before transferring its interests to either the Debtor or the Transferee.

C. THE RIGHT OF FIRST REFUSAL IN BANKRUPTCY

18. Most cases addressing third party rights of first refusal in bankruptcy involve the assignment of leases and landlords' rights of first refusal. In those cases, courts analyze whether such a provision in the *debtor's* contract is a defacto restriction on assignment that may be excised

from the agreement. This case is very different. Here, it is a creditor that owes a right of first refusal to another non-debtor entity.

19. Even so, at least one court has issued telling commentary on a bankruptcy court's ability to excise provisions of a bargained-for contract, stating "A bankruptcy court's authority to excise a bargained for element of a contract is questionable and modification of a nondebtor contracting party's rights is not to be taken lightly." *In re E-Z Serve Convenience Stores, Inc.*, 289 B.R. 45, 51-52 (Bankr. M.D.N.C. 2003) (citing *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1091 (3d Cir. 1991)). CLO Holdco was unable to find any case that would allow a bankruptcy court to invalidate or otherwise excise a third party's right of first refusal in what largely amounts to a non-debtor contract.

20. As the Member Agreement requires Harbourvest to provide a Right of First Refusal to the non-Debtor Members under section 6.2 of the Agreement, and such Members have 30 days to review and determine whether to purchase their pro-rata shares offered by Harbourvest, Harbourvest lacks contractual authority to enter into the Settlement Agreement.

D. HARBOURVEST'S LACK OF AUTHORITY PRECLUDES ENFORCEMENT OF SETTLEMENT

21. Harbourvest has not completed its conditions precedent to the transfer of its interest to Transferee under the Member Agreement. As detailed above, and in section 6.2 of the Agreement, Harbourvest must effectuate the Right of First Refusal before it can transfer its interests in HCLOF. MEMBER AGREEMENT, § 6.2. Harbourvest is, in essence, bound by the condition precedent of effectuating the Right of First Refusal before it is authorized under the Member Agreement to enter into the Settlement Agreement.

22. Courts should not enforce a settlement agreement where a party has a condition precedent to entry into the agreement and fails to satisfy that condition. *In re De La Fuente*, 409 B.R. 842, 846 (Bankr. S.D. Tex. 2009). As noted in part in *De La Fuente*, the court would not recognize

or enforce a settlement where the parties were subject to conditions precedent before the settlement could be effective, and the conditions precedent were not satisfied. This Court should similarly deny Harbourvest's proposed settlement, as it would deny the Members' Right of First Refusal, which is the benefit of their bargain under the Member Agreement.

III.
PRAYER FOR RELIEF

WHEREFORE, CLO Holdco requests that this Court grant the Objection and enter an order denying the Harbourvest Settlement Motion.

DATED: January 8, 2020

Respectfully submitted,

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ATTORNEYS FOR CLO HOLDCO, LTD.

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2020, a true and correct copy of the foregoing CLO Holdco Objection was served via the Court's electronic case filing (ECF) system upon all parties receiving such service in this bankruptcy case; and via e-mail upon the United States Trustee at Lisa.L.Lambert@usdoj.gov and upon the following parties:

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Appendix Exhibit 83

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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]	)	Case No. 19-34054-sgj11
Debtor.	)	**Re: Docket Nos. 1625, 1697, 1706, 1707**

DEBTOR'S OMNIBUS REPLY IN SUPPORT OF DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154), AND AUTHORIZING ACTIONS CONSISTENT THEREWITH

[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.

The above-captioned debtor and debtor-in-possession (the "Debtor") hereby submits this reply (the "Reply") in support of its *Motion for Entry of an Order Approving Settlement with HarbourVest (Claim No.143,147, 149, 150, 153, 154), and Authorizing Actions Consistent Therewith* [Docket No. 1625] (the "Motion").[2] In further support of the Motion, the Debtor respectfully states as follows:

PRELIMINARY STATEMENT

1. If granted, the Motion will resolve a $300 million general unsecured claim against the Debtor's estate for less than $16.8 million in actual value.[3] The settlement is another solid achievement for the Debtor and – not surprisingly – is opposed by no one except Mr. Dondero and entities affiliated with him.

2. As discussed in the Motion, in November 2017, HarbourVest invested $80 million in exchange for a 49.98% membership interest in HCLOF – an entity managed by a subsidiary of the Debtor. The balance of HCLOF's interests are held by CLO Holdco, Ltd. (an entity affiliated with Mr. Dondero), the Debtor, and certain of the Debtor's employees. Subsequent to its investment in HCLOF, HarbourVest incurred substantial losses on its investment in HCLOF and filed claims against the Debtor's estate.

3. HarbourVest asserts claims for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

[2] All capitalized terms used but not defined herein have the meanings given to them in the Motion.

[3] Under the proposed settlement, HarbourVest would receive an allowed, general unsecured claim of $45 million and an allowed, subordinated claim of $35 million. Based on the estimated recovery for general unsecured creditors of 87.44% (which is a recovery based on certain outdated assumptions discussed *infra*), HarbourVest's $45 million general unsecured claim is estimated to be worth approximately $39.3 million and the $35 million subordinated claim, which is junior to the general unsecured claim, is currently estimated to have value only if there are litigation recoveries. In addition, HarbourVest is transferring to an affiliate of the Debtor its interest in HCLOF, which is estimated to be worth approximately $22.5 million. Thus, HarbourVest's estimated recovery on its general unsecured and subordinated claims is estimated at approximately $16.8 million on a net economic basis. This estimate, however, is dated and is based on the claims that were settled as of the filing of the Debtor's plan in November 2020.

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. In furtherance of these claims, HarbourVest alleges it was misled by the Debtor and its employees, including Mr. Scott Ellington (then the Debtor's general counsel), and that subsequent to investing in HCLOF, Mr. Dondero and the Debtor used HCLOF both as a piggybank to fund the litigation against Acis Capital Management, L.P. ("Acis") and as a scapegoat for the Debtor's litigation strategy, in each case to HarbourVest's substantial detriment.

4. Specifically, HarbourVest alleges that:

- the Debtor and its employees, including Mr. Ellington, misled HarbourVest about its intentions with respect to Mr. Terry's arbitration award against Acis and orchestrated a series of fraudulent transfers and corporate restructurings, the true purpose of which was to denude Acis of assets and make it judgment proof;
- the Debtor and its employees, including Mr. Ellington, misled HarbourVest as to the intent and true purpose of these restructurings and led HarbourVest to believe that Mr. Terry's claims against Acis were meritless and a simple employment dispute that would not affect HarbourVest's investment;
- the Debtor, through Mr. Dondero, improperly exercised control over or misled HCLOF's Guernsey-based board of directors to cause HCLOF to engage in unnecessary, unwarranted, and resource-draining litigation against Acis;
- the Debtor improperly caused HCLOF to pay substantial legal fees of various entities in the Acis bankruptcy that were unwarranted, imprudent, and not properly chargeable to HCLOF; and
- the Debtor used HarbourVest as a scapegoat in its litigation against Acis by asserting that the Debtor's improper conduct and scorched-earth litigation strategy was at HarbourVest's request, which was untrue.

5. The Debtor believed, and continues to believe, that it has viable defenses to HarbourVest's claims. Nevertheless, those defenses would be subject to substantial factual disputes and would require expensive and time-consuming litigation that would likely be resolved only after a lengthy trial all while the Debtor (or its successor) assumes the risk that the defenses might fail. The evidence will show that the proposed settlement is the product of substantial, arm's length – and sometimes quite heated – negotiations between and among the

principals and their counsel. The evidence will also show that one of HarbourVest's primary concerns in settling its claim was that part of that settlement would include the extrication of HarbourVest from the Highland web of entities and the related litigation. The proposed settlement accomplishes that and does so in compliance with HCLOF's governing agreements.

6. Pursuant to the proposed settlement, (a) HarbourVest will receive (i) an allowed, general unsecured claim in the amount of $45 million, and (ii) an allowed, subordinated claim in the amount of $35 million; (b) HarbourVest will transfer its 49.98% interest in HCLOF (valued at approximately $22.5 million) to a wholly-owned subsidiary of the Debtor; and (c) the parties will exchange mutual and general releases. The Debtor believes that the proposed settlement is reasonable and results from the valid and proper exercise of its business judgment. And the Debtor's creditors apparently agree. None of the major parties-in-interest or creditors in this case has objected to the Motion: not the Committee, the Redeemer Committee, Acis, Patrick Daugherty, or UBS.

7. In distinction, the only objecting parties are Mr. Dondero, his family trusts (the Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good," and together with Dugaboy, the "Trusts")), and CLO Holdco (a wholly-owned subsidiary of Mr. Dondero's Charitable Donor Advised Fund, L.P. (the "DAF")) (collectively, the "Objectors"). Each of the Objectors has only the most tenuous economic interest in and connection to the Debtor's settlement with HarbourVest. Each of the Objectors is also controlled directly or indirectly by Mr. Dondero who has coordinated each of the Objectors litigation strategies against the Debtor.[4] Mr. Dondero's efforts to litigate every issue in this case – directly and by proxy – should be rebuffed, and the objections overruled. The following is a brief summary of the objections.

[4] *See Debtor's Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Pro. 20-3190-sgj, Docket No. 46], Exhibit Q.

Pleading	Objection/Reservation	Response
Objection of James Dondero [Docket No. 1697] (the "Dondero Objection")	Because HarbourVest was damaged by the injunction entered in Acis, the settlement seeks to revisit this Court's rulings in Acis.	Mr. Dondero is misdirecting the Court. HarbourVest's claim arises from the misrepresentations of Mr. Dondero, Mr. Ellington, and others, not this Court's rulings in Acis, including the failure to disclose the fraudulent transfer of assets.
	The settlement is not fair and equitable because it does not address (1) Acis's mismanagement, (2) how the Debtor is liable for HarbourVest's damages, (3) the success on the merits, (4) the costs of litigation, and (5) the Debtor's ability to realize the value of the HCLOF interests in light of the Acis injunction.	Mr. Dondero ignores the dangers of the litigation and HarbourVest's claims against the estate for misrepresentation and overestimates the ability to resolve the litigation. The Debtor has assessed the value of the HCLOF interests in light of all factors, including the Acis injunction.
	The HarbourVest settlement represents a substantial windfall to HarbourVest.	Mr. Dondero ignores the economics of this case, which have value breaking in Class 8 (General Unsecured Claims). The value of the settlement is not $60 million; it is approximately $16.8 million against a claim of $300 million. There is no windfall.
	The HarbourVest settlement is improper gerrymandering because it provides HarbourVest with a general unsecured claim and a subordinated claim in order to secure votes for the plan.	The HarbourVest settlement provides for the resolution of HarbourVest's claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest's rejection of the Debtor's plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest's Class 9 vote to confirm a plan.
Objection of the Dugaboy Investment Trust and Get Good Trust [Docket No. 1706] (the "Trusts Objection")	The settlement represents a radical change in the Debtor's earlier position on the HarbourVest settlement.	Mr. Dondero ignores the dangers of the litigation and HarbourVest's claims against the estate for misrepresentation and overestimates the ability to resolve the litigation.
	The settlement appears to buy HarbourVest's vote.	The HarbourVest settlement provides for the resolution of HarbourVest's claim. It is nonsensical to think that the Debtor would reach a settlement with HarbourVest that would include HarbourVest's rejection of the Debtor's plan, and there is nothing wrong with requiring acceptance of a plan as part of a settlement. Further, the Debtor does not need HarbourVest's Class 9 vote to confirm a plan.
	No information is provided as to whether the Debtor can acquire HarbourVest's interest in HCLOF or the value of that interest to the estate.	As discussed below, the HCLOF interest will be transferred to a wholly-owned subsidiary of the Debtor. Mr. Seery will testify as to the benefit of the HCLOF interests to the estate.
Objection of CLO Holdco [Docket No. 1707] ("CLOH Objection")	HarbourVest cannot transfer its interests in HCLOF unless it complies with the right of first refusal.	CLO Holdco misinterprets the operative agreements and tries to create ambiguity where none exists.

8. These objections are just the latest objections filed by Mr. Dondero and his related entities to any attempt by the Debtor to resolve this case,[5] including the Debtor's settlement with Acis [Docket No. 1087] and the seven separate objections filed by Mr. Dondero and his related entities to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (the "Plan").[6] It will not shock this Court to hear that each of the Objectors is also objecting to the Plan. In contradistinction, the Debtor has heard this Court's admonishments about old Highland's culture of litigation as evidenced by this case, Acis's bankruptcy, and beyond. Although the Debtor has vigorously contested claims when appropriate, the Debtor has also sought to settle claims and limit the senseless fighting. The Debtor has successfully resolved the largest claims against the estate, including the claims of the Redeemer Committee, Acis, and, as recently announced to this Court, UBS. The Debtor would ask this Court to see through the pretense of the Dondero-related entities' objections to the HarbourVest settlement and approve it as a valid exercise of the Debtor's business judgment.

[5] As an example of Mr. Dondero's litigiousness, on January 12, 2021, Mr. Dondero filed notice that he will be appealing the preliminary injunction entered against him earlier on January 12, 2021.

[6] (1) *James Dondero's Objection to Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1661]; (2) *Objection to Confirmation of the Debtor's Fifth Amended Plan of Reorganization (filed by Get Good Trust, The Dugaboy Investment Trust)* [Docket No. 1667]; (3) *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]; (4) *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]; (5) *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]; (6) *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]; and (7) *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].

REPLY

A. Standing

9. **James Dondero.** In the Dondero Objection, Mr. Dondero asserts he is a "creditor, indirect equity security holder, and party in interest" in the Debtor's bankruptcy. While that claim is ostensibly true, it is tenuous at best. On April 8, 2020, Mr. Dondero filed three unliquidated, contingent claims that he promised to update "in the next ninety days."[7] More than nine months later, Mr. Dondero has yet to "update" those claims to assert an actual claim against the Debtor's estate.[8]

10. Mr. Dondero's claim as an "indirect equity security holder" is also a stretch. Mr. Dondero holds no direct equity interest in the Debtor. Mr. Dondero instead owns 100% of Strand Advisors, Inc. ("Strand"), the Debtor's general partner. Strand, however, holds only 0.25% of the total limited partnership interests in the Debtor through its ownership of Class A limited partnership interests. The Class A limited partnership interests are junior in priority of distribution to the Debtor's Class B and Class C limited partnership interests. The Class A interests are also junior to all other claims filed against the Debtor. Finally, Mr. Dondero's recovery on his indirect equity interest is junior to any claims against Strand itself. Consequently, before Mr. Dondero can recover on his "indirect" equity interest, the Debtor's estate must be solvent, priority distributions to Class B and Class C creditors must be satisfied, and all claims against Strand must be satisfied.

11. **Dugaboy and Get Good.** Dugaboy and Get Good are sham Dondero "trusts" with only the most attenuated standing. Dugaboy has filed three proofs of claim [Claim Nos. 113; 131; 177]. In two of these claims, Dugaboy argues that (1) the Debtor is liable to Dugaboy

[7] Mr. Dondero filed two other proofs of claim that he has since withdrawn with prejudice. *See* Docket No. 1460.

[8] Without knowing the nature of the "updates," the Debtor does not concede that any "updates" would have been procedurally proper and reserves the right to object to any proposed amendment to Mr. Dondero's claims.

for its postpetition mismanagement of the Highland Multi Strategy Credit Fund, L.P., and (2) this Court should pierce the corporate veil and allow Dugaboy to sue the Debtor for a claim it ostensibly has against the Highland Select Equity Master Fund, L.P. – a Debtor-managed investment vehicle. The Debtor believes that each of the foregoing claims is frivolous and has objected to them. [Docket No. 906].

12. In its third claim, Dugaboy asserts a claim against the Debtor arising from its Class A limited partnership interest in the Debtor (which represents just 0.1866% of the total limited partnership interests in the Debtor). Similarly, Get Good filed three proofs of claim [Claim Nos. 120; 128; 129] arising from its prior ownership of limited partnership interests in the Debtor. Because each these claims arises from an equity interest, the Debtor will seek to subordinate them under 11 U.S.C. § 510 at the appropriate time. As set forth above, these interests are out of the money and are not expected to receive any economic recovery.

13. Consequently, Mr. Dondero, Dugaboy, and Get Good's standing to object to the HarbourVest settlement is attenuated and their chances of recovery in this case are extremely speculative at best. *See In re Kutner*, 3 B.R. 422, 425 (Bankr. N.D. Tex. 1980) (finding that a party had standing only when it had a "pecuniary interest . . . directly affected by the bankruptcy proceeding"); *see also In re Flintkote Co.*, 486 B.R. 99, 114-15 (Bankr. D. Del. 2012), *aff'd.* 526 B.R. 515 (D. Del. 2014) (a claim that is speculative cannot confer party in interest standing). Mr. Dondero, Dugaboy, and Get Good's minimal interest in the estate should not allow them to overrule the estate's business judgment or veto settlements with creditors, especially when no actual creditors and constituents have objected. "[A] bankruptcy judge must not blindly follow the hue and cry of the most vocal special interest groups; rather, [the judge] should consider all salient factors . . . and . . . act to further the diverse interests of the debtor, creditors and equity

holders, alike." *In re Lionel*, 722 F.2d 1063, 1071 (2d Cir. 1983).

B. Mr. Dondero's Objection and his "Trusts" Objection Are Without Merit

14. As discussed in the Motion, under applicable Fifth Circuit precedent, a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See, e.g., In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). In making this determination, courts look to the following factors:

- probability of success in the litigation, with due consideration for the uncertainty of law and fact;
- complexity and likely duration of the litigation and any attendant expense, inconvenience and delay; and
- all other factors bearing on the wisdom of the compromise, including (i) "the paramount interest of creditors with proper deference to their reasonable views" and (ii) whether the settlement is the product of arm's length bargaining and not of fraud or collusion.

Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.), 119 F.3d 349, 356 (5th Cir. 1997) (citations omitted). *See also Age Ref. Inc.*, 801 F.3d at 540; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 918 (5th Cir. 1995).

15. **The Settlement Seeks to Revisit the Acis Orders.** In the Dondero Objection, Mr. Dondero argues that HarbourVest's claim is based on the financial harm caused to HarbourVest from Acis's bankruptcy and the orders entered in the Acis bankruptcy. Mr. Dondero extrapolates from this that HarbourVest is seeking to challenge this Court's rulings in Acis. (Dondero Obj., ¶¶ 17-20) Mr. Dondero misinterprets HarbourVest's claims and the dangers such claims pose to the Debtor's estate.

16. HarbourVest's claims are for fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, breach of fiduciary duty

and unfair prejudice (under Guernsey law), violations of state securities laws, and RICO. HarbourVest is not arguing that Acis or this Court caused its damages; HarbourVest is arguing that *the Debtor* – led by Mr. Dondero – (a) misled HarbourVest as to the nature of Mr. Terry's claims against the Debtor and the litigation with Acis, (b) knowingly and intentionally failed to disclose that the Debtor was engaged in the fraudulent transfer of assets to prevent Mr. Terry from collecting his judgment, and (c) that *the Debtor* – under the control of Mr. Dondero – improperly engaged in a crusade against Mr. Terry and Acis, which substantially damaged HarbourVest and its investment in HCLOF, in each case in order to induce HarbourVest to invest in HCLOF.

17. Again, HarbourVest does not contend that Acis caused its damages. Rather, HarbourVest contends that the fraudulent transfer of assets as part of the Debtor's crusade against Mr. Terry and Acis and the false statements and omissions about those matters caused HarbourVest to make an investment it would never have made had Mr. Dondero and the Debtor been honest and transparent. The Acis litigation – in HarbourVest's estimation – never should have happened. Acis did not cause HarbourVest's damages. Mr. Dondero's crusade against Mr. Terry and the Debtor's allegedly fraudulent statements to HarbourVest about the fraudulent transfers, Mr. Terry and Acis caused HarbourVest's damages.

18. **The HarbourVest Claim Lacks Merit.** In their objections, Mr. Dondero and the Trusts argue that the HarbourVest settlement is not fair and equitable and not in the best interests of the estate because (a) it does not address the Debtor's arguments against the HarbourVest claims and (b) there is a lack of pending litigation seeking to narrow the claims against the estate. These arguments only summarily address the first two factors of *Cajun Electric*, which deal with success in the litigation, and, in doing so, mischaracterize the dangers to the Debtor's estate

posed by HarbourVest's claims. (Dondero Obj., ¶¶ 21-25; Trusts Obj., ¶ 18(a))

19. Both the Dondero Objection and – to a much lesser extent - the "Trusts" Objection allege that (a) HarbourVest's losses were caused by Acis and its (mis)management of HCLOF's investments (Dondero Obj.,¶ 22, 24), (b) there is no contract that supports HarbourVest's claims (Dondero Obj. ¶ 23; Trusts Obj., ¶ 18(a)), (c) there is no causal connection between HarbourVest's losses and the Debtor's conduct (Dondero Obj., ¶ 24), and (d) the Debtor should litigate all or a portion of HarbourVest's claim before settling (Dondero Obj., ¶ 25). Again, though, as set forth above, both Mr. Dondero and the "Trusts" seek to shift the cause of HarbourVest's damages away from the Debtor's misrepresentations and to Mr. Terry's management of HCLOF's investments. This is simple misdirection.

20. HarbourVest's claims are that it invested in HCLOF based on the Debtor's fraudulent misrepresentations. Fraudulent misrepresentation sounds in tort, not contract. *See, e.g., Clark v. Constellation Brands, Inc.*, 348 Fed. Appx. 19, 21 (5th Cir. 2009) (referring to party's claim based on fraudulent misrepresentation as a tort); *Eastman Chem. Co. v. Niro, Inc.*, 80 F. Supp. 2d 712, 717 (S.D. Tex. 2000) (noting that party had common law duty not to commit intentional tort of fraudulent misrepresentation). There is thus no need for HarbourVest to point to a contractual provision to support its claim.[9] Moreover, in order to defend against HarbourVest's claims, the Debtor would need to elicit evidence showing that its employees did not make misrepresentations to HarbourVest. Such a defense would require the Debtor to rely on the veracity of Mr. Ellington's testimony, among others. That is a high hurdle, and no reasonable person would expect the Debtor to stake the resolution of HarbourVest's $300 million claim on the Debtor's ability to convince this Court that Mr. Ellington was telling HarbourVest

[9] Subsequent to filing the Motion, the Objectors requested all agreements between HarbourVest, HCLOF, and the Debtor, and such agreements were provided.

the truth. This is especially true in light of the evidence supporting Mr. Ellington's recent termination for cause and the evidence recently provided by HarbourVest supporting its claim for fraudulent misrepresentations.

21. Finally, neither Mr. Dondero nor the "Trusts" even address the third factor analyzed by the Fifth Circuit: all other factors bearing on the wisdom of the compromise, including "the paramount interest of creditors with proper deference to their reasonable views." This is telling because no creditor or party in interest has objected to the settlement. Mr. Dondero and his proxies' preference for constant litigation should not outweigh the preference of the Debtor and its creditors for a reasonable and expeditious settlement of HarbourVest's claims.

22. **The HarbourVest Settlement Is a Windfall to HarbourVest.** Both the Dondero Objection and the "Trusts" Objection argue that the HarbourVest settlement represents a substantial windfall to HarbourVest. Both Mr. Dondero and the "Trusts" ignore the facts. Specifically, Mr. Dondero argues that HarbourVest is receiving $60 million dollars in *actual* value for its claims. Mr. Dondero's contention, however, wrongly assumes that both the $45 million general unsecured claim and the $35 million subordinated claim provided to HarbourVest under the settlement will be paid 100% in full and that HarbourVest will receive $80 million in cash. From that $80 million, Mr. Dondero subtracts $20 million, which represents the value Mr. Dondero ascribes to HarbourVest's interests in HCLOF that are being transferred to the Debtor. Mr. Dondero's math ignores the reality of this case.

23. The Debtor very clearly disclosed in the projections filed with the *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.,* [Docket No. 1473] (the "Projections") that general unsecured claims would receive an 87.44% recovery *only if* the claims of UBS, HarbourVest, Integrated Financial Associates, Inc., Mr.

Daugherty, and the Hunter Mountain Investment Trust were zero. Because of the Debtor's success is settling litigation, that assumption is proving to be inaccurate. Regardless, even if general unsecured claims receive a recovery of 87.44%, because the subordinated claims are junior to the general unsecured claims, the subordinated claims' projected recovery is currently zero. As such, assuming the HCLOF's interests are worth $22.5 million,[10] the actual recovery to HarbourVest will be less than $16.8 million. This is not a windfall. HarbourVest's investment in HCLOF was $80 million and its claim against the estate was over $300 million. The settlement represents a substantial discount.

24. **Improper Gerrymandering and/or Vote Buying.** Each of Mr. Dondero and the Trusts argue in one form or another that the HarbourVest settlement is improper as it provides HarbourVest a windfall on its claims in exchange for HarbourVest voting to approve the Plan. These unsubstantiated allegations of vote buying should be disregarded. As an initial matter, and as set forth above, HarbourVest is *not* getting a windfall. HarbourVest is accepting a substantial discount in the settlement. HarbourVest's incentive to support the Plan comes from HarbourVest's determination that the Plan is in its best interests. There is also nothing shocking about a settling creditor supporting a plan. Indeed, it would be nonsensical for a creditor to settle its claims and then object to the plan that would pay those claims.

25. More importantly, HarbourVest's votes in Class 9 (Subordinated Claims) are not needed to confirm the Plan. As will be set forth in the voting declaration, Class 2 (Frontier Secured Claim), Class 7 (Convenience Claims), and Class 8 (General Unsecured Claims) have voted in favor of the Plan.[11] In brief, the Plan was approved without HarbourVest's Class 9 vote,

[10] It is currently anticipated that Mr. James P. Seery, Jr., the Debtor's chief executive officer and chief restructuring officer, will testify as to the value of the HCLOF interests to the Debtor's estate.

[11] The Debtor anticipates that Mr. Dondero and his related entities will argue that neither Class 7 nor Class 8 voted to accept the Plan because of the votes cast against the Plan in those Classes by current and former Debtor

and the Debtor, therefore, has no need to "buy" HarbourVest's Class 9 claims. Accordingly, any claims of gerrymandering or vote buying are without merit.

C. CLOH Objection

26. CLO Holdco (and to a much lesser extent, the "Trusts") object to HarbourVest's transfer of its interests in HCLOF as part of the settlement. Currently, the settlement contemplates that HarbourVest will transfer 100% of its collective interests in HCLOF to HCMLP Investments, LLC ("HCMLPI"), a wholly-owned subsidiary of the Debtor. As set forth in the *Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd*. (which was appended as Exhibit A to the Settlement Agreement) [Docket No. 1631-1], each of the Debtor, HarbourVest, Highland HCF Advisors, Ltd. (HCLOF's investment manager) ("HHCFA"), and HCLOF agree that HarbourVest is entitled to transfer its interests to HCMLPI pursuant to that certain *Members Agreement Relating to the Company*, dated November 15, 2017 (the "Members Agreement"),[12] without offering that interest to other investors in HCLOF.

27. The *only* party to object to the transfer of HarbourVest's interests in HCLOF to HCMLPI is CLO Holdco. CLO Holdco holds approximately a 49.02% interest in HCLOF and is the wholly-owned subsidiary of the DAF, Mr. Dondero's donor-advised fund. CLO Holdco argues that the Member Agreement requires HarbourVest to offer its interest first to the other investors in HCLOF before it can transfer its interests to HCMLPI. In so arguing, CLO Holdco attempts to create ambiguity in an unambiguous contract and to use that ambiguity to disrupt the Debtor's settlement with HarbourVest.

28. As an initial matter, the Debtor and CLO Holdco agree that the transfer of HarbourVest's interests in HCLOF to HCMLPI is governed by Article 6 (Transfers or Disposals

employees, including Mr. Ellington and Mr. Isaac Leventon. The Debtor will demonstrate at confirmation that those objections are without merit and that Class 7 and Class 8 voted to accept the Plan.

[12] A true and accurate copy of the Members Agreement is attached hereto as Exhibit A.

of Shares) of the Members Agreement (an agreement governed by Guernsey law). (CLOH Obj., ¶ 3) The parties diverge, however, as to how to interpret Article 6. The Debtor, as set forth below, believes Article 6 is clear in that it allows HarbourVest to transfer its interests in HCLOF to any "Affiliate of an initial Member party" without requiring the right of first refusal in Section 6.2 of the Members Agreement. CLO Holdco's position appears to be that the Members Agreement, despite its clear language, should be interpreted as limiting transfers to an "initial Member's ***own*** affiliates" and that any other transfer requires the consent of HHCFA and satisfaction of the right of first refusal. (*Id.* (emphasis added)) CLO Holdco's reading is contrary to the actual language of the Members Agreement.

29. First, Section 6.1 of the Members Agreement provides, in pertinent part:

[redacted]

(Members Agmt, § 6.1 (emphasis added)) Under the Members Agreement, "Affiliate" is defined, in pertinent part, as "[redacted]

(Id., § 1.1) A "Member" in turn is a [redacted]." The "initial Member[s]" are the initial Members of HCLOF listed on the first page of the Members Agreement and include the Debtor, HarbourVest, and CLO Holdco.

30. As such, under the plain language of Section 6.1, HarbourVest is entitled – without the consent of any party – to "Transfer" its interests in HCLOF to an "Affiliate" of any of the Debtor, HarbourVest, or CLO Holdco. And that is exactly what is contemplated by the settlement. HarbourVest is transferring its interests to HCMLPI, a wholly owned and controlled subsidiary of the Debtor, and therefore an "Affiliate" of the Debtor. That transfer is indisputably

allowed under Section 6.1; it is a transfer to an "Affiliate of an initial Member." CLO Holdco may, tongue in cheek, call this structure "convenient" but that sarcasm is an attempt to avoid the fact that the Members Agreement clearly allows HarbourVest to transfer its interest to HCMLPI without the consent of any party.[13] The fact that CLO Holdco does not now like the language it previously agreed to when CLO Holdco and the Debtor were both controlled by Mr. Dondero is not a reason to re-write Section 6.1 of the Members Agreement.

31. Second, Section 6.2 of the Members Agreement is also unambiguous and, by its plain language, allows HarbourVest to "Transfer" its interests in HCLOF to "Affiliates of an initial Member" (*i.e.*, HCMLPI) without having to first offer those interests to the other Members (such obligation, the "ROFO"). CLO Holdco attempts to create ambiguity in Section 6.2 by arguing that it must be read in conjunction with Section 6.1 and that interpreting the plain language of Section 6.2 to allow HarbourVest to transfer its interests to HCMLPI without restriction makes certain other language surplus and meaningless. (CLOH Obj., ¶ 11-13) Again, CLO Holdco is attempting to create controversy and ambiguity where none exists.

32. Section 6.2 of the Members Agreement provides, in pertinent part:

[redacted]

(Members Agmt., § 6.2 (emphasis added)) Like Section 6.1, Section 6.2 is clear on its face. It exempts from the requirement to comply with the ROFO two categories of "Transfers": (1) Transfers to "affiliates of an initial Member" from Members *other than* CLO Holdco and the

[13] Although HHCFA's consent is not necessary for HarbourVest to transfer its interests to HCMLPI, HHCFA will consent to the transfer.

"Highland Principals" (*i.e.*, the Debtor and certain of its employees)[14] and (2) Transfers from CLO Holdco or a Highland Principal to the Debtor, the Debtor's "Affiliates," or another Highland Principal. The fact that a narrower exemption is provided to CLO Holdco and the Debtor than to HarbourVest (or any other Member) under Section 6.2 is of no moment; the language says what it says and was agreed to by all Members, including CLO Holdco, when they executed the Members Agreement.

33. In addition, and although not relevant, the language of Section 6.2 makes sense in the context of the deal. Although CLO Holdco and the Debtor may have disclaimed an "Affiliate" relationship, they are related through Mr. Dondero and invest side by side with the Debtor in multiple deals.[15] The different standards in Section 6.2 serve to ensure that HarbourVest's (or any successor to HarbourVest) right to Transfer its shares without satisfying the ROFO is limited to three parties: (i) HarbourVest's Affiliates, (ii) the Debtor's Affiliates, and (iii) CLO Holdco's Affiliates. This restriction keeps the relative voting power of each Member static and ensures that CLO Holdco and the Debtor, together, will *always* have more than fifty percent of HCLOF's total interests and that HarbourVest will *always* have less than fifty percent. This counterintuitively also explains the greater restrictions placed on CLO Holdco and the "Highland Principals." The Highland Principals include certain Debtor employees. Those employees – as well as CLO Holdco and the Debtor – are prohibited from transferring their HCLOF interests outside of the Dondero family. This restriction makes sense. If, for example, a Debtor employee wanted to transfer its interests to an Affiliate of HarbourVest, HarbourVest could have more than fifty percent of the HCLOF interests because of the thinness

[14] "**Highland Principals**" means: [redacted] (Members Agmt., § 1.1)

[15] There can be no real dispute that Mr. Dondero effectively controls CLO Holdco.

of the Dondero-family's majority (approximately 0.2%). At the time the Members Agreement was executed, CLO Holdco and the Debtor were under common control. Section 6.2 preserves those related entities' control over HCLOF by restricting transactions that would transfer that control unless the ROFO is complied with.

34. As such, and notwithstanding CLO Holdco's protestations, Section 6.1 and Section 6.2 are consistent as written and clear on their face. This consistency is further evidenced by HCLOF's Articles of Incorporation[16] and HCLOF's offering memorandum, which each include language identical to Section 6.1 and 6.2 of the Members Agreement.[17] It seems highly unlikely, if not implausible, that sophisticated parties such as CLO Holdco would include the exact same language in six separate places over three documents without a reason for that language and without the intent that such language be interpreted as it is clearly written – not as CLO Holdco now wants it to be interpreted. Accordingly, since HarbourVest is transferring its interests to HCMLPI, an Affiliate of an initial Member, the plain language of Section 6.2

[16] *See* Articles of Incorporation, adopted November 15, 2017, a true and correct copy of which is attached hereto as Exhibit B.

[redacted]

(Articles of Incorporation, § 18.1)

[redacted]

(*Id.*, § 18.2)

[17] *See* Offering Memorandum, dated November 15, 2017, a true and correct copy of which is attached hereto as Exhibit C.

[redacted]

(Offering Memorandum, page 89)

exempts HarbourVest from having to comply with the ROFO.

35. Third, and finally, CLO Holdco makes the nonsensical argument that because Section 6.2 provides different treatment to similarly situated Members that this Court should re-write Section 6.2. (CLOH Obj., ¶¶ 15-17) Contracts provide different treatment to ostensibly similarly situated parties all the time and no one objects that that creates an absurd result. It just means that different parties bargained for and received different rights.

36. CLO Holdco's attempt to justify why this Court should re-write the Members Agreement to correct the "disparate treatment" is also unavailing. As an example of the absurd result caused by the "disparate treatment," CLO Holdco states: "[B]ecause the HarbourVest Members are technically Affiliates of an initial member (each other), they could obtain control of all of the interests in HCLOF without any Member receiving a Right of First Refusal for any transfer." (*Id.*, ¶ 16) The scenario posited by CLO Holdco, however, is *exactly* the scenario prevented by the clear language of Section 6.2. For HarbourVest to obtain control of HCLOF, it would – as a matter of mathematical necessity – need the interests held by CLO Holdco (49.02%) and/or the Highland Principals (1% in the aggregate). Section 6.2, however, *expressly* prohibits CLO Holdco and the Highland Principals from transferring their interests to HarbourVest or its Affiliates without satisfying the ROFO. As set forth above, it is Section 6.2 that prevents control from being transferred away from the Dondero family without compliance with the ROFO. In fact, Section 6.2 would only break down if the limiting language in Section 6.2 were read out of it in the manner advocated by CLO Holdco.

37. Ultimately, Article 6 of the Members Agreement is clear as written and expressly allows HarbourVest to transfer its interests to HCMLPI. If CLO Holdco had an objection to the rights provided to HarbourVest under the Members Agreement, CLO Holdco

should have raised that objection three and a half years ago before agreeing to the Members Agreement. CLO Holdco should not be allowed to create ambiguity in an unambiguous contract or to re-write that agreement to impose additional restrictions on HarbourVest. *See Clardy Mfg. Co. v. Marine Midland Bus. Loans Inc.*, 88 F.3d 347, 352 (5th Cir. 1996) (enforcing the "unambiguous language in a contract as written," noting that where a contract is unambiguous, a party may not create ambiguity or "give the contract a meaning different from that which its language imports") (internal quotations omitted); *Texas v. Am. Tobacco Co.*, 463 F.3d 399, 407 (5th Cir. 2006) ("Courts interpreting unambiguous contracts are confined to the four corners of the document, and cannot look to extrinsic evidence to create an ambiguity.").

38. It should go without saying, but CLO Holdco (and the other parties to the Members Agreement) should also be required to satisfy their obligations under the Members Agreement and execute the "Adherence Agreement" as required by Section 6.6 of the Members Agreement in connection with the Transfer of HarbourVest's interests to HCMLPI or any other permitted Transfer.

39. Finally, and notably, although CLO Holdco spends considerable time arguing that HarbourVest should be required to comply with the ROFO, nowhere in the CLOH Objection does CLO Holdco state that it wishes to purchase HarbourVest's interests in HCLOF. This omission is telling. CLO Holdco and the other Objectors have no interest in actually exercising their alleged right of first refusal contained in the Members Agreement. Rather, their only interest is in causing the Debtor to spend time and money responding to a legion of related (and coordinated) objections.[18]

[18] *See Debtor's Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Pro. 20-3190-sgj, Docket No. 46], Exhibit Q; Exhibit T (email from Mr. Dondero as forwarded to Mr. Ellington stating "Holy bananas….. make sure we object [to the HarbourVest Settlement]"); Exhibit Y.

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WHEREFORE, for the reasons set forth above and in the Motion, the Debtor respectfully requests that the Court grant the Motion.

Dated: January 13, 2021

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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	*	

MOTION TO APPOINT EXAMINER PURSUANT TO 11 U.S.C. § 1104(c)

NOW INTO COURT, through undersigned counsel, comes The Dugaboy Investment Trust and Get Good Trust (jointly, "Movers") and respectfully move this Court for the appointment of an Examiner for the reasons set forth herein:

I.

BACKGROUND

1. On December 23, 2019, the United States Trustee filed its *United States Trustee's Motion for an Order Directing the Appointment of a Chapter 11 Trustee* [Dkt. No. 271]. The United States Trustee's motion was denied by this Court's *Order Denying United States Trustee's Motion for an Order Directing the Appointment of a Chapter 11 Trustee* [Dkt.

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No. 428]. Since around that time, the Debtor has been operating as a debtor-in-possession at the direction of an appointed independent board of directors.

2. On November 24, 2020, the Court approved the Debtor's *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "Disclosure Statement") [Dkt. No. 1476]. As detailed in Article II.B. of the Disclosure Statement, the value of the Debtor's Assets has decreased by more than $235 million, or about 42%, from the commencement of the case to September 30, 2020. The Debtor's Monthly Operating Report for November of 2020 reports a loss in value of $248 million [Dkt. No. 1710].

3. The Plan of Reorganization proposed by the Debtor and set for hearing on January 26, 2021 contains significant release and exculpation provisions for the management of the Debtor and the Independent Directors that are not allowable under applicable 5th Circuit law (*Opposition to Confirmation of the Debtor's Fifth Amended Plan of Reorganization* filed by The Dugaboy Investment Trust and Get Good Trust [Dkt. No. 1667] and the *United States Trustee's Limited Objection to Confirmation of Debtors' Fifth Amended Plan of Reorganization* filed by the United States Trustee [Dkt. No. 1671]).

4. At a hearing held on January 8, 2021, this Court voiced a concern about costs and expenses in connection with this case. The Court noted that it believed over sixty (60) lawyers attended the hearing and that a mere Preliminary Injunction hearing, based upon a back of the envelope calculation, cost the estate and parties in interest in excess of $300,000.00.

5. On January 12, 2021, counsel for Movers sent a letter to various counsel enlisting their support to the appointment of an Examiner to investigate various issues in this case and

to author a report that could be used by the Court and parties in interest. It was suggested by The Dugaboy Investment Trust that the appointment of an Examiner was a less costly means to resolve issues, as opposed to full blown litigation between the various parties and their legions of lawyers. The letter suggested that an Examiner be appointed to provide to the Court and the parties in interest a report that would address key matters. The Examiner's investigation and report would address issues and items that would not delay or cause a continuance of the confirmation hearing on the Debtor's Plan.

6. The appointment of a neutral, third party Examiner who would serve as an independent agent for the estate would be in the best interests of the Debtor and its creditors. The Examiner's investigation would alleviate the need for discovery disputes and litigation by getting to the bottom of the legitimacy of the allegations made by the parties and potential claims that may exist on behalf of the estate or against persons acting on behalf of the estate. The present claims retention statement filed by the Debtor is merely a laundry list of potential claims and parties and provides no real guidance or explanation as to the retained claims.

7. Movers will fully cooperate with the Examiner with respect to any examination of potential issues concerning the claims of or against Movers.

II.

REQUEST FOR RELIEF

8. Movers request that this Court appoint an Examiner in this case under section 1104(c) of the Bankruptcy Code in order to perform investigations and to prepare a report under section 1106(b). Section 1104(c) of the Bankruptcy Code states, in pertinent part:

> If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the

> United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor…
> 11 U.S.C. § 1104(c) (emphasis added).

9. The express language of section 1104(c) and c(2) makes clear that where, as in this case, a party has previously moved for the appointment of a Chapter 11 trustee and the fixed liquidated unsecured debts exceed $5 million, the court shall appoint an Examiner at the request of a party in interest. Id. Even so, other courts note that an application to appoint a trustee is not a prerequisite for the appointment of an Examiner, only that no such trustee has been appointed in the case. *Keene Corp. v. Coleman* (*In re Keene Corp.*), 164 B.R. 844, 855 (Bankr. S.D.N.Y. 1994) (looking to identical language in § 1104(b), finding that the denial of a motion to appoint a trustee is not a prerequisite to appointing an Examiner); See also *In re Residential Capital, LLC*, 474 B.R. 112, 118, 121 (Bankr. S.D.N.Y. 2012) (requiring only that a chapter 11 trustee must not have been appointed).

10. Here, all elements for the appointment of an Examiner have been met under section 1104(c)(2) of the Bankruptcy Code: (i) the Court has not previously appointed a trustee in this case; (ii) Movers, parties in interest, move for the appointment of an Examiner prior to plan confirmation; and (iii) it is indisputable that the Debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.[1]

11. When all such elements are met, courts have no discretion whether to grant relief, and must appoint an Examiner. *In re Erickson Retirement Communities*, LLC, 425 B.R. 309, 313 (Bankr. N.D. Tex. 2010). This Court in *Erickson Retirement Communities* stated:

[1] See Debtor's Amended Schedules E-F, Dkt. No. 1082-1, and Dkt. Nos. 1273 and 1302.

"This court agrees with such courts that, where the $5 million unsecured debt threshold is met, a bankruptcy court ordinarily has no discretion. This Court has complete discretion as to the matters that are examined."

12. The Court in *Erickson* denied the appointment of an Examiner due to the fact that "there was no allegations of wrongdoing on the part of the Debtor" at 313. In *Erickson* the Examiner was requested to report on an "appropriate value allocation". In this case Movers are requesting, and the Court should want, an explanation from a neutral third party as to why the assets of the Debtor had such a significant reduction in value during the case. Was it due to mismanagement or negligence? The reason for the decline in value is not an investigation that the Debtor or its counsel can make (they are not disinterested) but one that must be made by an independent third party. The discussion in the Debtor's Disclosure Statement [Dkt. No. 1473, pgs. 28-29] is conclusory and only accounts for $90 million of the decline in value. The balance is not explained except to assert that Covid was in part responsible. Leading market indicators for the period between October of 2019 and October of 2020 reflect annualized growth rate for the Dow of 4.67%, the S&P 14.95% and Nasdaq 43.11%. In light of these market gains, questions exist as to why the Debtor's Assets declined in value and whether the Debtor's management acted in a prudent fashion.

III.

SUGGESTED AREAS OF INQUIRY AND METHODOLOGY

13. Movers have received responses from the Debtor and the Creditors' Committee relative to Movers' letter of January 12, 2021, wherein the Debtor and the Creditors' Committee rejected joining in the Examiner motion and contended that the request was designed to

delay confirmation and that the Litigation Trustee would investigate the claims possessed by the estate. The letters received from the Debtor and the Creditors' Committee assert that the claims that have been made against the Debtor and the parties it seeks to have released and exculpated in its Plan are frivolous. The letters go on to state that the claims will be investigated by Marc Kirschner who is a highly qualified professional.

14. The areas of inquiry suggested by Movers below will not delay confirmation of the Debtor's Plan and the suggestion that the Litigation Trustee, through the use of its counsel, will investigate the claims in a more efficient manner than a highly qualified Examiner would misses the entire point of Movers' letter. The assertion that the Litigation Trustee will investigate all claims is inaccurate since claims against the Debtor's management are released and exculpated and are not included in any retained claims. It is difficult to believe that the Creditors' Committee does not want to know why there is a loss of over $200 million in Asset value and whether any of that loss could be recovered from responsible parties. Secondly, this Court, under the Plan, will have no control over the costs and expenses of the Litigation Trustee and its counsel in pursuing such litigation, and the only means of ensuring benefit to the estate for the activities of the Litigation Trustee would be to require that counsel pursing the claims on behalf of the Litigation Trustee work on a contingent fee basis.

15. The Plan filed by the Debtor contains significant releases and exculpations for the persons overseeing the Debtor's activities in the case. Movers are troubled by the fact that the Debtor's Assets have declined in value with only a portion of the loss explained by "reserves" and forced stock sales due to margin issues. The Court, at the Preliminary Injunction hearing, indicated that it was concerned with the dissipation in the value of

assets. A neutral Examiner could provide an independent view as to the loss in value and avoid costly fights over production of documents. Is the Debtor afraid to allow a third party to review and answer the question "Why"?

16. The Debtor should welcome an Examiner viewing the claims that it and the Litigation Trustee have against various parties. An Examiner's report would be difficult to rebut and, in all likelihood, would bring about settlement of claims without the need for multiyear and costly litigation.

17. Movers suggest that each party provide the Court with a written submission suggesting areas of inquiry for an Examiner's report. The Court can then fashion the areas of inquiry such that they do not slow down the confirmation process but provide a meaningful cost savings to the creditors of the estate and the potential party litigants.

IV.

PRAYER FOR RELIEF

WHEREFORE, The Dugaboy Investment Trust and Get Good Trust request that this Court grant this motion and appoint an Examiner under section 1104(c) of the Bankruptcy Code to conduct an investigation of the propriety of the Debtor's post-petition operations, sales, and trades in accordance with section 1106(b) of the Bankruptcy Code.

January 14, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 14th day of January, 2021, a copy of the above and foregoing *Motion to Appoint Examiner Pursuant to 11 U.S.C. § 1104(c)* 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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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	*	

ORDER GRANTING THE MOTION TO APPOINT EXAMINER PURSUANT TO 11 U.S.C. § 1104(c)

Upon consideration of the *Motion to Appoint Examiner Pursuant to 11 U.S.C. § 1104(c)* (the "***Motion***") filed on January 14, 2021, by The Dugaboy Investment Trust and Get Good Trust (jointly, "***Movers***") seeking an order appointing an examiner; and the Court having jurisdiction to consider the Motion and all relief requested therein, as well as all related proceedings; and due and sufficient notice of the Motion having been given under the circumstances; and the Court having convened a hearing at which counsel for all interested parties had an opportunity to appear and be heard; and good and sufficient cause appearing, the Court finds that the Motion should be, and thereby is, Granted.

It is, therefore,

1. ORDERED that an Examiner be appointed for Highland Capital Management, L.P. in the captioned matter for the purposes set forth herein; and it is further

2. ORDERED that the United States Trustee for the Northern District of Texas (Dallas Division) (the "***United States Trustee***"), shall timely file its Application for Order Approving the Appointment of an Examiner and a proposed Order thereon (the "***UST Appointment Application Order***"); and it is further

3. ORDERED that immediately upon the entry of the UST Appointment Application Order, the Examiner is authorized to investigate the matters identified in a futher order issued by this Court; and it is further

4. ORDERED that within three (3) days of the entry of this Order, any party wishing to have a matter investigated by the Examiner shall submit in writing to this Court the following: a) identification of the matter to be investigated; b) a reason why such investigation is necessary; and c) why such investigation of the matter identified will not delay confirmation of a plan in this Case; and it is further

5. ORDERED that the Examiner shall have the duties, powers and responsibilities of an examiner under Section 1106(b) of the Bankruptcy Code; provided, however, that the scope of the Examiner's duties, unless expanded or limited by further order of this Court, shall be limited to the investigations identified by this Court in a Supplemental Order to be entered ; and it is further

6. ORDERED that the Examiner shall be a "party in interest" under Section 1109 of the Bankruptcy Code with respect to matters that are within the scope of the duties set forth in this Order and shall be entitled to appear at hearings held in these cases and to be heard at such hearing with respect to matters that are within the scope of the Examiner's duties; and it is further

7. ORDERED that nothing contained in this Order shall diminish the powers and authority of the Debtor , Committee, Reorganized Debtor and Litigation Trust under the Bankruptcy Code, including the powers to investigate transactions and entities, commence contested matters and adversary proceedings, and object to claims, and it is further

8. ORDERED that neither communications between the Examiner and Debtor nor communications between the Examiner and the Committee shall be deemed a waiver of any attorney–client or work product privilege otherwise belonging to the Examiner, the Debtor or the Committee; and it is further

9. ORDERED that any and all objections to the relief granted herein are overruled; and it is further

10. ORDERED that this Court shall retain exclusive jurisdiction over any dispute concerning this Order.

End of Order

Submitted by:

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

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

JAMES DONDERO'S JOINDER IN SUPPORT OF MOTION TO APPOINT EXAMINER PURSUANT TO 11 U.S.C. § 1104(C)

James Dondero ("Dondero"), a creditor, indirect equity security holder, and party in interest in the above-captioned bankruptcy case, hereby files this Joinder in support of the *Motion to Appoint Examiner Pursuant to 11 U.S.C. § 1104(c)* [Docket No. 1745] (the "Motion") filed by The Dugaboy Investment Trust and The Get Good Trust (collectively, the "Movants"). In support thereof, Dondero respectfully represents as follows:

1. For the reasons set forth in the Motion, Dondero believes that an Examiner should be appointed in this case. There is a reasonable basis for a neutral, independent examiner to investigate, among other things, the Debtor's affairs and to ascertain the cause of the decline in

value of Debtor's assets since this case was filed. In addition, an Examiner may be helpful as a go between for the various parties and may lead the parties to a global settlement.

2. Accordingly, Dondero hereby joins in and adopts in full, and hereby incorporates by reference, the Motion and the arguments and authorities asserted by Movants therein.

CONCLUSION

For the reasons set forth above, Dondero respectfully requests that the Court grant the Motion, appoint an independent examiner in this case, and provide Dondero and the Movants such other and further relief to which they may be justly entitled.

Dated: January 15, 2021

Respectfully submitted,

/s/ D. Michael Lynn

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State Bar I.D. No. 02589100
John T. Wilson, IV
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ATTORNEYS FOR JAMES DONDERO

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on January 15, 2021, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on counsel for the Debtor and on all other parties requesting or consenting to such service in this case.

/s/ Bryan C. Assink
Bryan C. Assink

Appendix Exhibit 86

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]	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
	§	
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 dues 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)
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

$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

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	**DEFENDANTS**
Highland Capital Management, L.P.	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) ☑ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☑ Creditor ☐ Other ☐ 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.)

FRBP 7001(1) – Recovery of Money/Property
- [2] 11-Recovery of money/property - §542 turnover of property
- ☐ 12-Recovery of money/property - §547 preference
- ☐ 13-Recovery of money/property - §548 fraudulent transfer
- ☐ 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- ☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- ☐ 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- ☐ 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- ☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- ☐ 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- ☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- ☐ 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- ☐ 61-Dischargeability - §523(a)(5), domestic support
- ☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
- ☐ 63-Dischargeability - §523(a)(8), student loan
- ☐ 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- ☐ 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- ☐ 71-Injunctive relief – imposition of stay
- ☐ 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- ☐ 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- ☐ 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action
- ☐ 01-Determination of removed claim or cause

Other
- [1] SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- ☐ 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

☑ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ 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.

Appendix Exhibit 87

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*)
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HAYWARD PLLC
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Zachery Z. Annable
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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.	§	_____
	§	
HIGHLAND CAPITAL MANAGEMENT FUND 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, 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

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	**DEFENDANTS**
Highland Capital Management, L.P.	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) ☑ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☑ Other ☐ 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
- [2] 11-Recovery of money/property - §542 turnover of property
- ☐ 12-Recovery of money/property - §547 preference
- ☐ 13-Recovery of money/property - §548 fraudulent transfer
- ☐ 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- ☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- ☐ 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- ☐ 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- ☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- ☐ 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- ☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- ☐ 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- ☐ 61-Dischargeability - §523(a)(5), domestic support
- ☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
- ☐ 63-Dischargeability - §523(a)(8), student loan
- ☐ 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- ☐ 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- ☐ 71-Injunctive relief – imposition of stay
- ☐ 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- ☐ 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- ☐ 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action
- ☐ 01-Determination of removed claim or cause

Other
- ☐ SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- [1] 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

☑ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ 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.

Appendix Exhibit 88

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*)
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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.	§	_____
	§	
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

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Fax: (972) 755-7110

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 interested 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

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

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 interested 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**

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	**DEFENDANTS**
Highland Capital Management, L.P.	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) ☑ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☑ Other ☐ 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
- [2] 11-Recovery of money/property - §542 turnover of property
- [ ] 12-Recovery of money/property - §547 preference
- [ ] 13-Recovery of money/property - §548 fraudulent transfer
- [ ] 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- [ ] 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- [ ] 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- [ ] 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- [ ] 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- [ ] 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- [ ] 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- [ ] 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- [ ] 61-Dischargeability - §523(a)(5), domestic support
- [ ] 68-Dischargeability - §523(a)(6), willful and malicious injury
- [ ] 63-Dischargeability - §523(a)(8), student loan
- [ ] 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- [ ] 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- [ ] 71-Injunctive relief – imposition of stay
- [ ] 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- [ ] 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- [ ] 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action
- [ ] 01-Determination of removed claim or cause

Other
- [ ] SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- [1] 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

☑ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ 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.

Appendix Exhibit 89

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*)
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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.	§	_____
	§	
HIGHLAND CAPITAL MANAGEMENT SERVICES, INC,	§	
	§	
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, 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

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-

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Counsel for Highland Capital Management, L.P.

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.

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.

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:

FRANK WATERHOUSE

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

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

Appendix A

ABA #:	322070381
Bank Name:	East West Bank
Account Name:	Highland Capital Management, LP
Account #:	5500014686

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 interested 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**

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

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	**DEFENDANTS**
Highland Capital Management, L.P.	Highland Capital Management Services, Inc.
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) ☑ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☑ Other ☐ 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
- [2] 11-Recovery of money/property - §542 turnover of property
- [ ] 12-Recovery of money/property - §547 preference
- [ ] 13-Recovery of money/property - §548 fraudulent transfer
- [ ] 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- [ ] 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- [ ] 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- [ ] 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- [ ] 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- [ ] 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- [ ] 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- [ ] 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- [ ] 61-Dischargeability - §523(a)(5), domestic support
- [ ] 68-Dischargeability - §523(a)(6), willful and malicious injury
- [ ] 63-Dischargeability - §523(a)(8), student loan
- [ ] 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- [ ] 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- [ ] 71-Injunctive relief – imposition of stay
- [ ] 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- [ ] 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- [ ] 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action
- [ ] 01-Determination of removed claim or cause

Other
- [ ] SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- [1] 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

☑ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ Check if a jury trial is demanded in complaint	Demand $7,704,768.38 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.

Appendix Exhibit 90

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
Melissa S. Hayward
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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:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Plaintiff,	§	Adversary Proceeding No.
	§	
vs.	§	_____
	§	
HCRE PARTNERS, LLC (N/K/A/ NEXPOINT REAL ESTATE PARTNERS, LLC,	§	
	§	
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 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)
Ira D. Kharasch (CA Bar No. 109084)
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-and-

HAYWARD PLLC

/s/ Zachery Z. Annable

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Fax: (972) 755-7110

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

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 interested 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

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	**DEFENDANTS**
Highland Capital Management, L.P.	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) ☑ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☑ Other ☐ 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
- [2] 11-Recovery of money/property - §542 turnover of property
- [ ] 12-Recovery of money/property - §547 preference
- [ ] 13-Recovery of money/property - §548 fraudulent transfer
- [ ] 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- [ ] 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- [ ] 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- [ ] 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- [ ] 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- [ ] 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- [ ] 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- [ ] 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- [ ] 61-Dischargeability - §523(a)(5), domestic support
- [ ] 68-Dischargeability - §523(a)(6), willful and malicious injury
- [ ] 63-Dischargeability - §523(a)(8), student loan
- [ ] 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support)
- [ ] 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- [ ] 71-Injunctive relief – imposition of stay
- [ ] 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- [ ] 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- [ ] 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action
- [ ] 01-Determination of removed claim or cause

Other
- [ ] SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- [1] 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

☑ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ 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.

Appendix Exhibit 91

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)

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717)
Ira D. Kharasch (CA Bar No. 109084)
Gregory V. Demo (NY Bar No. 5371992)
10100 Santa Monica Boulevard, 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910
Facsimile: (310) 201-0760
Email: jpomerantz@pszjlaw.com
ikharasch@pszjlaw.com
gdemo@pszjlaw.com

HAYWARD & ASSOCIATES PLLC
Melissa S. Hayward (TX Bar No. 24044908)
Zachery Z. Annable (TX Bar No. 24053075)
10501 N. Central Expy, Ste. 106
Dallas, TX 75231
Telephone: (972) 755-7100
Facsimile: (972) 755-7110
Email: MHayward@HaywardFirm.com
ZAnnable@HaywardFirm.com:

Counsel for the 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.

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Page

Page

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 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 Trust[2]

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 Clamant 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 nay 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.

[Remainder of Page Intentionally Blank]

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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and

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Counsel for the Debtor and Debtor-in-Possession

Appendix Exhibit 92

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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.	)	Case No. 19-34054 (SGJ11)
Debtor.	)	(Jointly Administered)

EMERGENCY MOTION OF NEXPOINT ADVISORS, L.P. TO FILE COMPETING PLAN AND DISCLOSURE STATEMENT UNDER SEAL AND FOR PROCEDURE TO FILE PUBLICLY

TO THE HONORABLE STACEY G.C. JERNIGAN, U.S. BANKRUPTCY JUDGE:

COMES NOW NexPoint Advisors, L.P. ("NexPoint"), a creditor and party-in-interest in the above styled and numbered Chapter 11 bankruptcy case (the "Bankruptcy Case") of Highland Capital Management, L.P. (the "Debtor"), and files this its *Emergency Motion to File Competing Plan and Disclosure Statement Under Seal and for Procedure to File Publicly* (the "Motion"), respectfully stating as follows:

1. Exclusivity has expired. *See* Docket No. 1092.

2. NexPoint, together with Highland Capital Management Fund Advisors, L.P. and James Dondero, have prepared a competing plan of reorganization and proposed disclosure statement. NexPoint will not discuss that competing plan in detail in this Motion, but it is the type of "pot" plan the Court heard outlined in open Court before, except that: (i) Mr. Dondero has substantially increased his proposed monetary consideration; (ii) there is the assumption of tens of millions of dollars in liability; and (iii) there is the voluntary subordination of more than ten million dollars of liability, including asserted administrative claims.

3. Normally, NexPoint would simply file its competing plan and disclosure statement, although it would not take any action to solicit the same.

4. Here, however, because of various allegations of interference and various orders of the Court in place, NexPoint submits that the safer course is to first file these documents under seal, see if any party has an objection to the public filing of these documents, and, if it does, that the Court consider the matter on an emergency basis.

5. Voting on the Debtor's plan is over, and the deadline for plan objections expired weeks ago. Thus, the filing of a competing plan cannot possibly unduly interfere with the Debtor's plan, but it can offer options if for some reason the Debtor's plan is not confirmed. Conversely, a competing plan that provides greater returns and options to all creditors is in everyone's best interest, and in the interests of the bankruptcy process itself. That competing plan may have little support, and it may be dead in the water in a matter of days if the Debtor's plan is confirmed, but NexPoint cannot even start the process of a potential competing plan unless and until it is first able to file one without fear of allegations that that filing somehow violates an order of this Court.

6. Accordingly, NexPoint respectfully requests that the Court enter an order: (i) permitting it to file its proposed competing plan and disclosure statement under seal immediately (with copies provided to the U.S. Trustee, Debtor, and Committee; (ii) that any objection to the unsealing thereof be filed no later than forty-eight (48) hours after the entry of such order and, if no such objection is filed, that NexPoint (and the other plan proponents) be permitted to file the competing plan and disclosure statement on the docket of the case, but not to solicit the same or otherwise violate any law or rule related to solicitation; and (iii) if there be such an objection, that the Court hold an emergency hearing thereon.

RESPECTFULLY SUBMITTED this 25th day of January, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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- and -

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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 the Debtor, who stated that the Debtor does not oppose the filing of the competing plan and disclosure under seal and it being shared as such with the major constituents, but that the Debtor does object to the plan and disclosure statement being unsealed or filed publicly prior to the confirmation decision on the Debtor's plan.

The undersigned further certifies that he requested from counsel for the Committee and the U.S. Trustee whether they oppose the relief requested herein but, as of this filing, has not received a response.

By: /s/ Davor Rukavina
Davor Rukavina, Esq.

CERTICIATE OF SERVICE

The undersigned hereby certifies that, on this the 25th day of January, 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 the Debtor, the Committee, and the U.S. Trustee.

By: /s/ Davor Rukavina
Davor Rukavina, Esq.

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)

EMERGENCY MOTION OF NEXPOINT ADVISORS, L.P. TO FILE COMPETING PLAN AND DISCLOSURE STATEMENT UNDER SEAL AND FOR PROCEDURE TO FILE PUBLICLY

CAME ON FOR CONSIDERATION the *Emergency Motion of NexPoint Advisors, L.P. to File Competing Plan and Disclosure Statement Under Seal and for Procedure to File Publicly* (the "Motion"), filed by NexPoint Advisors, L.P. Having considered the Motion, and finding cause for granting the same, it is hereby:

ORDERED that the Motion is GRANTED; it is further

ORDERED that NexPoint is authorized to immediately file its proposed competing plan and disclosure statement under seal, sharing the same only with the Court, the debtor, the official committee of unsecured creditors, and the U.S. Trustee; it is further

ORDERED that any party may object to the filing of the foregoing publicly no later than two (2) days after the entry of this Order, and serve the same on NexPoint, and that, if no such objection is timely made, NexPoint may file the foregoing publicly, but that, if such objection is timely made, the Court shall consider the matter on an emergency basis and NexPoint shall not publicly file the same pending such consideration; it is further

ORDERED that, for the avoidance of doubt, nothing in this Order prejudices any issue with respect to whether the foregoing documents must or should be filed under seal or publicly, and nothing herein in any way approves or authorizes any solicitation of any proposed competing plan of NexPoint.

END OF ORDER # #

Appendix Exhibit 93

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	Tuesday, January 26, 2021
	9:30 a.m. Docket
Debtor.	
	MOTION FOR ENTRY OF ORDER AUTHORIZING DEBTOR TO IMPLEMENT KEY EMPLOYEE PLAN [1777]
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 21-3000-sjg**
Plaintiff,	
v.	PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AGAINST CERTAIN ENTITIES OWNED AND/OR CONTROLLED BY MR. JAMES DONDERO [5]
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.	
Defendants.	

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

WEBEX APPEARANCES:

For the Debtor: Jeffrey Nathan Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

For the Debtor: John A. Morris
PACHULSKI STANG ZIEHL & JONES, LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024
(212) 561-7700

should issue a preliminary injunction, and the December letters, the emails, the communications, they lead me to believe that this preliminary injunction is needed because someone doesn't understand that Mr. Seery is in charge and the preferred shareholders, the Funds, the Advisors, they don't have the ability to interfere with what he's doing in running the company.

And the threats of we're going to, you know, direct -- we may direct the CLO Issuer to terminate the Debtor: I mean, it's just -- there's no sound business justification for that. Okay? I don't know what we're doing, where we're going.

Mr. Dondero, I said to you in December, you know, I really wanted to encourage good-faith negotiations on your possible pot plan because I thought you wanted to save your baby. But the more I hear, the more I feel you're just trying to burn the house down. Okay? Maybe it's an either/or proposition with you: I'll either get my company back or I'll burn the house down. That's what it feels like. And I have no choice but to enter preliminary injunctions with this kind of behavior.

So, I'm very frustrated. I'm very frustrated. I don't know if anyone wants to say anything or we just end it on this frustrating note.

Mr. Rukavina, did you want to let your client speak, or no?

camper.

But upload your order on the motion to seal the plan. And, again, it's not going to be unsealed absent a further order of the Court. And if you all come to me next week and say, hey, we've got something in the works here, okay, I'll consider unsealing it and letting you go down a different path. But I'm not naïve. I feel like this is just more burning the house down, maybe. I don't know. I hope I'm wrong. I hope I'm wrong. But all right. So I guess we'll see you next week.

MR. POMERANTZ: Thank you, Your Honor.

MR. MORRIS: Thank you, Your Honor.

THE COURT: All right. We're adjourned.

MR. RUKAVINA: Thank you, Your Honor.

THE CLERK: All rise.

(Proceedings concluded at 6:08 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 **01/28/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

Appendix Exhibit 94

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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	*	

SUPPLEMENTAL OBJECTION TO FIFTH AMENDED PLAN OF REORGANIZATION OF HIGHLAND CAPITAL MANAGEMENT, L.P. (AS MODIFIED)

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

This Supplemental Objection is filed to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Dkt. #1808] (the "Fifth Amended Plan as Modified" or "Plan") submitted by Highland Capital Management, L.P. ("Debtor"). Although the deadline to object to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* ("Fifth Amended Plan") [Dkt. 1472] has expired, two developments have occurred which warranted the filing of this Supplemental Objection. Since The Dugaboy Investment Trust and Get Good Trust (jointly, "Objectors") filed their *Objection to Confirmation*

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of the Debtor's Fifth Amended Plan of Reorganization [Dkt. #1667], the Debtor, on January 22, 2021, modified its Fifth Amended Plan. Attached to the filing on January 22, 2021 were some Plan Supplements and other documentation in support of the Debtor's Fifth Amended Plan. While the Fifth Amended Plan as Modified changed certain terms and concepts that were in the Fifth Amended Plan, it was the filing of 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.* on January 19, 2021 [Dkt. #1772] and the presentation of a new schedule depicting what creditors would receive under the Fifth Amended Plan as Modified versus that which a creditor would receive if a Chapter 7 Trustee had been appointed that has prompted this Supplemental Objection. In fact, the Debtor has merely provided to counsel and other objectors a summary of the elements that make up the recovery projected for creditors under the Fifth Amended Plan as Modified and under a Chapter 7. The model with a listing by item (such as projected Trustee fees, U.S. Trustee fees that will be owed under the Debtor's Fifth Amended Plan as Modified, and a listing of the Debtor's assets and projected recovery for each asset) has been withheld from the Objectors and the other objecting creditors. The summary document that was provided shows the following:

a) An increase in the operating costs from a projected $18,468,000.00 (Dkt. #1473, pg. 174) to a now projected cost of $38,849,000.00. A cost increase of over 100%;

b) The projected recovery to Class 8 creditors has reduced from a recovery in November of 85.31% to a January projected recovery of 62.14%;

c) An increase in the total number of Class 8 claims from a projected $176,049.00 (Dkt. #1473, pg. 174) to a new claims pool of $313,588.00;

d) An increase in professional fees from $22,313,000.00 (Dkt. #1473, pg. 177) to $27,455,000.00; and

e) A decision by the Debtor to manage the CLOs and retain an employee staff of ten (10), as opposed to a projected employee staff of three (3) in November - triple the number of employees that were projected in November.

In addition, it is now known that Class 8 has rejected the Fifth Amended Plan and the Court must make an independent analysis that all the elements of 11 U.S.C. § 1129(a) have been satisfied in order to confirm the Plan. This analysis must take place whether or not any creditor objects to the Fifth Amended Plan. Class 8 has rejected the Fifth Amended Plan, meaning that the Absolute Priority Rule prevents confirmation as equity retains some property under the Plan and the Debtor has made no showing that it has marketed the assets of the Debtor to determine if a higher and better offer exists which would result in a greater payment to the Class 8 creditors. As the Court is aware, a competing Plan has been filed under seal. In light of the material reduction in projected returns to unsecured creditors, the significant increase in operating costs and the other developments since the Disclosure Statement has been approved, creditors should be apprised of these developments, especially because it is virtually certain that, under the Debtor's Plan, there will be years of litigation in multiple adversary proceedings, appeals, and collection activities—all adding substantial additional uncertainty and delay.

A. THE PLAN MUST BE RESOLICITED

1. The approved *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* ("Disclosure Statement") [Dkt. #1473] contained a projected recovery to Class 8 unsecured creditors of 85.31%. The Disclosure Statement did not contain a range, but, rather, a specific percentage recovery. On January 28, 2021, the Debtor

disclosed that this estimate is no longer accurate, and it revised this estimate to 62.14%. This is a material change that renders the approved Disclosure Statement is no longer accurate and, in fact, materially misleading, even if through no fault of the Debtor or anyone else.

2. The Court may confirm the Fifth Amended Plan only if the Fifth Amended Plan and its proponents comply with all the requirements of the Bankruptcy Code. *See* 11 U.S.C. § 1129(a)(1) & (2). Here, the Bankruptcy Code has not been complied with because the Disclosure Statement, on which creditors based their votes for the Plan, is no longer accurate and is, in fact, misleading, even if it once was accurate. The importance of a disclosure statement cannot be understated, as that is the principal document upon which creditors make their decision whether to vote for or against a plan. However, the disclosure statement is not fixed for all time, and changes between its approval and the confirmation hearing may mandate a re-solicitation:

> When the adequacy of information is initially determined during the presolicitation phase, the court is acting in a context in which information may be sketchy and preliminary. The court does not conduct an independent investigation and relies upon its reading of the document for apparent completeness and intelligibility. Later, at confirmation, what once appeared to be adequate information may have become plainly so inadequate and misleading as to cast doubt on the viability of the acceptance of the plan and to necessitate starting over.

In re Brotby, 303 B.R. 177, 194 (B.A.P. 9th Cir. 2003) (emphasis added) (internal quotations omitted). As explained by one court:

> Nor does the scrutiny of the accuracy of the disclosure statement end with the presolicitation hearing on the question of whether the disclosure statement contains adequate information. The accuracy of disclosure is an issue that must be addressed at the confirmation hearing where it must be demonstrated by a preponderance of the evidence that the proponent of the plan complied with the applicable provisions of title 11.

In re Michelson, 141 B.R. 715, 719 (Bankr. E.D. Cal. 1992) (emphasis added). *Accord, In re Rosenblum*, 2019 Bankr. LEXIS 2298 at *6 (Bankr. D. Nev. 2019) ("[e]ven if a disclosure

statement previously has been approved, the adequacy of disclosure may be revisited at plan confirmation"); *In re Renegade Holdings Inc.*, 2010 Bankr. LEXIS 2252 at *7 (Bankr. M.D.N.C. 2010) ("[n]otwithstanding the earlier approval of a plan proponent's disclosure statement, the requirement of section 1129(a)(2) regarding compliance with section 1125 is that the court reassess at the confirmation hearing whether the disclosure contemplated by section 1125 has been provided"). Indeed, in *In re Michelson*, the court went so far as to revoke an order of confirmation based on a materially defective disclosure statement which failed to disclose critical facts.

3. A disclosure statement must include information of a kind "that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan." 11 U.S.C. § 1125(a)(1). Perhaps the most important consideration in this analysis is the plan's projected return to creditors. Here, the Debtor has now disclosed that its original estimate of an 85% recovery has been reduced to a 62% recovery. While the Objectors are not alleging that this difference is the result of any fault on the part of the Debtor, and, in fact, appears to be simply the result of developments after the approval of that Plan's disclosure statement, the original projection is now materially misleading. A difference in recovery from 85% to 62% is something that is very material. While it is true that the Disclosure Statement contained various provisions cautioning voting creditors that the projected recovery was an estimate only and was subject to change, the fact remains that voting unsecured creditors were solicited, and likely formed their views on the Plan, based on information that is no longer accurate. At a minimum, these creditors should be informed of the recent developments, in order to consider other potential alternatives and in order to reconsider whether to vote for the Plan. In sum, creditors should have the most up-to-date and reliable information when weighing their plan options

regardless of any cautionary provision in the original disclosure statement that projections were subject to change. The significant change in operating costs places increased risks on the Debtor's meeting its revenue projections and warrants all creditors in each class reevaluating whether they want to accept the Plan or support a Plan that brings in more cash up front, reduces the market risk for the sale of the Debtor's assets and reduces the professional fees and costs.

4. Accordingly, the Plan cannot be confirmed as is and the Plan should be resolicited with an updated disclosure statement or supplement that: (i) describes the material changes in the Bankruptcy Case since the Disclosure Statement was approved, including the settlement and allowance of large claims; and (ii) discloses the Debtor's new projection of recoveries under its Plan.

B. PLAN UNFAIRLY DISCRIMINATES AGAINST CLASS 8

5. The revision to the estimated recovery for Class 8 also means that the Plan cannot be confirmed under principles of unfair discrimination. The Plan provides for a class (Class 7) of convenience unsecured creditors of $1 million—a very large threshold—which are paid 85% of their allowed claims. However, Class 8 has rejected the Plan, meaning that it must proceed on cramdown. Among other things, this requires that the Plan not "discriminate unfairly" with respect to the dissenting class. *See* 11 U.S.C. § 1129(b)(1). While originally, when the Plan estimated a recovery of 85% to Class 7, there was no unfair discrimination between Class 7 and Class 8, now that Class 8 will receive an estimated 62% while Class 7 receives 23% more, without any justification, --is *per se* unfair discrimination, for the Debtor to reasonably claim that Class 7 is truly a "convenience" class when the threshold is $1 million. *See, e.g., In re Dow Corning Corp.*, 244 B.R. 696, 702 (Bankr. E.D. Mich. 1999) (imposing rebuttable presumption of unfair discrimination where one class is paid "a materially lower percentage recovery"); *In re*

Creekside Landing Ltd., 140 B.R. 713, 716 (Bankr. M.D. Tenn. 1992). With the new projections the plan on its face unfairly discriminates

C. THE PLAN CANNOT BE CONFIRMED UNDER THE ABSOLUTE PRIORITY RULE

6. Under the Plan, holders of limited partnership interests in the Debtor are provided with "Pro Rata share[s] of the Contingent Claimant Trust Interests." Plan at pp. 23-24. These interests are contingent interests in the Claimant Trust:

> 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.

Plan at p. 7.

7. The Claimant Trust Agreement defines "Claimant Trust Beneficiaries" as including the "Holders of Allowed Class B/C Limited Partnership Interests, and Holders of Allowed Class A Limited Partnership Interests," but "only upon certification by the Claimant Trustee that the Holders of such Claims have been paid indefeasibly in full plus, to the extent applicable, post-petition interest at the federal judgment rate." *See* Docket No. 1811-2 at Exhibit "R" at p. 3. Holders of these limited partnership interests are issued "Contingent Interests" that vest only after that certification is filed. *See id*. at p. 26. After such certification, the proceeds of the monetization of the Creditor Trust Assets would flow to the holders of these limited partnership interests." *See id*. at p. 8.

8. Class 8, consisting of General Unsecured Claims, has not accepted the Plan. This brings into application the Absolute Priority Rule, which provides that, if a class of creditors has rejected the Plan, the Plan can only be confirmed if "the holder of any claim or interest that is

junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. § 1129(b)(2)((B)(ii). Simply put, the Contingent Claimant Trust Interests the Plan provides to holders of limited partnership interests in the Debtor is "property" such that the Plan cannot be confirmed because Class 8 has rejected the Plan and a junior class of interests is retaining or receiving under the Plan "property."

9. The Supreme Court, in considering the Absolute Priority Value and an argument that the retained interests had no value such that the Rule is not implicated, disagreed and held as follows:

> Respondents further argue that the absolute priority rule has no application in this case, where the property which the junior interest holders wish to retain has no value to the senior unsecured creditors. In such a case, respondents argue, the creditors are deprived of nothing if such a so-called interest continues in the possession of the reorganized debtor. Here, respondents contend, because the farm has no "going concern" value (apart from their own labor on it), any equity interest they retain in a reorganization of the farm is worthless and therefore is not "property" under 11 U. S. C. § 1129(b)(2)(B)(ii).
>
> We join with the overwhelming consensus of authority which has rejected this 'no value' theory. . . Whether the value is present or prospective, for dividends or only for purposes of control a retained equity interest is a property interest. . . And while the Code itself does not define what 'property' means as the term is used in § 1129(b), the relevant legislative history suggests that Congress' meaning was quite broad. Property includes both tangible and intangible property.

Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 207-08 (1988) (internal quotations and citations omitted).

10. It therefore does not matter that the trust interests being provided to limited partners under the Plan are contingent, or deeply subordinated, or unvested, or potentially worthless—they constituted ***some*** property under the Absolute Priority Rule: "the relevant legislative history suggests that Congress' meaning [of property] was quite broad. Property includes both tangible and intangible property." *Id.* Even if not vested, that the interests would

vest upon the satisfaction of a condition precedent is itself property. "The question should not be whether a future interest is vested or contingent. Clearly a contingent future interest is a legally cognizable interest, and thus property of the estate." *In re Edmonds*, 273 B.R. 527, 529 (Bankr. E.D. Mich. 2000). If a contingent, non-vested interest is property for purposes of section 541(a) of the Bankruptcy Code, such that it can be administered, sold, transferred, or monetized as property under a bankruptcy plan, then section 1129(b)'s use of the word "property" must also include a contingent, non-vested interest.

11. The Objectors are aware of an opinion that disagrees with the above logic. *See In re Introgen Therapeutics*, 429 B.R. 570 (Bankr. W.D. Tex. 2010). That opinion held that a contingent interest in a liquidating trust, whereby equity would not receive any distribution unless and until all creditors were paid in full, was not "property" for purposes of the Absolute Priority Rule. *Id*. at 585. That opinion reasoned as follows:

> The right to receive something imaginary is not property. The only way Class 4 will receive anything is if Class 3 in fact gets paid in full, in satisfaction of § 1129(b)(2)(B)(i), meaning the absolute priority rule would not be an issue. If Class 3 is not paid in full, Class 4's 'property interest' is not just valueless, as Creditors argue, it simply does not exist.

Id.

12. The Objectors submit that this opinion is not decided correctly and should not be followed by this Court. *Introgen Therapeutics* made a fundamental mistake of logic because it determined that something that has no value is not property. This directly conflicts with *Norwest Bank Worthington*, which commanded that whether something has value or not does not determine whether it is "property" under the Absolute Priority Rule. 485 U.S. at 207-08. Even if the value is prospective only, it is still "property." Second, the opinion ignores the language of the statute, which prohibits the junior class from receiving or retaining "any property." It cannot

be doubted that a contingent, non-vested interest in a trust is some "property." It may have no value or other benefits, and it may never have a value or any other benefits, but there is a condition precedent which, if triggered, converts it to something of value, benefit, and present interest. Whatever it is that is converted into the "property" is itself "property."

13. The opinion also fails to take into account the Supreme Court's opinion and logic in *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. Lasalle P'ship*, 526 U.S. 434 (1999). That well know opinion considered whether the Absolute Priority Rule was triggered under a plan where equity was retained. While it may be obvious that equity is "property" and that the retention of equity therefore violated the Rule, the Supreme Court's reasoning was different. Rather, the Supreme Court equated the exclusive opportunity to bid on new equity under a plan as itself "property" that was being granted or retained in violation of the Rule: "[t]his opportunity should, first of all, be treated as an item of property in its own right." *Id*. at 455. The Supreme Court reasoned as follows:

> While it may be argued that the opportunity has no market value, being significant only to old equity holders owing to their potential tax liability, such an argument avails the Debtor nothing, for several reasons. It is to avoid just such arguments that the law is settled that any otherwise cognizable property interest must be treated as sufficiently valuable to be recognized under the Bankruptcy Code. Even aside from that rule, the assumption that no one but the Debtor's partners might pay for such an opportunity would obviously support no inference that it is valueless, let alone that it should not be treated as property. And, finally, the source in the tax law of the opportunity's value to the partners implies in no way that it lacks value to others.

Id. at 455.

14. If an exclusive "opportunity" is "property" for purposes of the Absolute Priority Rule, then the "opportunity" to perhaps share in a future recovery, however remote, is also "property." Even a contingent, non-vested interest is "otherwise cognizable property," since the law recognizes such interests and even brings them into an estate as property of the estate. And

the assumption that no one may pay anything for the interest does not support a conclusion that it should not be treated as property. Indeed, it is likely that someone would pay something for that interest, including the Objectors, were it offered to them, both for economic and strategic reasons. In fact, the Debtor in its 30(b) deposition taken on Friday January 29, 2021 recognized that a possibility existed for equity to receive a distribution under the Plan if the Litigation Trust was successful in its pursuit of claims.

Conclusion

Based upon the foregoing and the reasons set forth in the previously filed Objections to the Debtor's Plan, the Court should deny confirmation.

February 1, 2021

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CERTIFICATE OF SERVICE

I do hereby certify that on the 1st day of February, 2021, a copy of the above and foregoing *Supplemental Objection To Fifth Amended Plan Of Reorganization Of Highland Capital Management, L.P. (As Modified)* 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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Appendix Exhibit 95

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

In Re:	)	**Case No. 19-34054-sgj-11**
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	Tuesday, February 2, 2021
	)	9:30 a.m. Docket
Debtor.	)	
	)	CONFIRMATION HEARING [1808]
	)	AGREED MOTION TO ASSUME [1624]

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

WEBEX APPEARANCES:

For the Debtor:	Jeffrey Nathan Pomerantz PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
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For the Debtor:	Ira D. Kharasch PACHULSKI STANG ZIEHL & JONES, LLP 10100 Santa Monica Blvd., 13th Floor Los Angeles, CA 90067-4003 (310) 277-6910
For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539

After the independent board got its bearings, it started to work on various plan alternatives. And the board received a lot of pressure from the Committee to go straight to a plan seeking to monetize assets like the one before Your Honor today. However, the board believed that before proceeding to do so and go down an asset monetization path, it should adequately diligence all alternatives, including a continuation of the current business model, a reorganization sponsored by Mr. Dondero and his affiliates, a sale of the Debtor's assets, including a sale to Mr. Dondero.

In June 2020, plan negotiations proceeded in earnest, and the Debtor started to negotiate an asset monetization plan with the Committee, while still pursuing other alternatives.

Preparation of an asset monetization plan is not typically a complicated process. However, creating the appropriate structure for a business like the Debtor's was extremely complicated, because of the contractual, regulatory, tax, and governance issues that had to be carefully considered.

At the same time the Committee negotiations were proceeding down that path, Mr. Seery continued to spend substantial time trying to negotiate a grand bargain plan with Mr. Dondero. It is not an exaggeration to say that over the last several months Mr. Seery has dedicated hundreds of hours towards a potential grand bargain plan.

And why did he do it? Because he has always believed that

a global restructuring among all parties was the best opportunity to fully and finally resolve the acrimony that continued to plague the Debtor.

Notwithstanding Mr. Seery's and the independent board's best efforts, they were not able to reach consensus on a grand bargain plan, and the Debtor filed the plan, the initial plan, on August 12th, which ultimately evolved into the plan before the Court today.

The Court conducted an initial hearing on the disclosure statement on October 27th, and then ultimately approved -- the Court approved the disclosure statement at a hearing on November 23rd.

While the Debtor continued to work towards resolving issues with the Committee with the filed plan, Mr. Dondero, beginning to finally see that the train was leaving the station, started to do whatever he could to get in the way of plan confirmation.

He objected to the Acis settlement. When his objection was overruled, he filed an appeal.

He objected to the HarbourVest settlement. When his objection was overruled, he had Dugaboy file an appeal.

He started to interfere with the Debtor's management of its CLOs, stopping trades, refusing to provide support, and threatening Mr. Seery and the Debtor's employees.

He had his Advisors and Funds that he owned and controlled

with Mr. Dondero and his counsel.
Q And in the last couple of months, has the board listened to presentations that were made by Mr. Dondero and his counsel concerning various forms of the pot plan?
A Yes. At least two or three.
Q And during this time, has the board and the Debtor communicated with the Committee concerning different iterations of the proposed pot plan?
A Yes. We've had continual discussions with the Committee regarding the various iterations of the potential grand bargain all the way through the pot plan.
Q And during this process, did the Debtor provide Mr. Dondero and his counsel with certain financial information that had been requested?
A Yes. As I said, up 'til the point where he resigned and was then ultimately, at the end of the year, removed from the office, he had access to financial information related to the Debtor and even got the information from the financial group. Subsequent to that, we've provided him with requests -- with financial information that was requested by his counsel.
Q Okay. Were your efforts at the grand bargain or the pursuit of the pot plan successful?
A No, they were not.
Q Do you have an understanding as to -- just, again, without going into -- into details about any particular proposal, do

earlier, is to maximize value, and not -- it's not based on a payment schedule, it's based upon the market opportunity. And we've estimated for our purposes here that we'll be able to meet these distribution amounts, but there's no requirement to do so.

Q Okay.

MR. MORRIS: Let's go to Page 3 of the document, please.

BY MR. MORRIS:

Q Can you just describe generally what this page reflects?

A This is a comparison of the plan analysis and what we expect to achieve under the plan and the liquidation analysis if a trustee, a Chapter 7 trustee, were to take over. And it compares those two distribution amounts based upon the assumptions on the prior page.

Q All right. Let's just look at some of the -- some of the data points on here. If we look at the plan analysis, what is -- what is projected to be available for distribution, the value that's available for distribution?

A $222.6 million.

Q Okay. So, 222? And on a claims pool that's estimated to be, for this purpose, how much?

A $313 million.

Q And what is the distribution, the projected distribution to general unsecured creditors on a percentage basis?

A On this analysis, to general unsecured creditors, it's 62.14 percent. But remember, that backs out the payment to the Class 7 creditors of 85 cents above.
Q Okay. And does this plan analysis include any value for litigation claims?
A No, it does not.
Q And is that true for all forms of the Debtor's projections?
A That's correct, yes.
Q Okay. And let's look at the right-hand column for a moment. It says, Liquidation Analysis. What does that column represent?
A That represents our estimate of what a Chapter 7 trustee could achieve if it were to take over the assets, sell them, and make distributions.
Q Okay. And let's just look at the comparable data points there. Under the liquidation analysis, as of -- the January liquidation analysis as of last week, what was projected to be available for distribution?
A A hundred and -- approximately $175 million.
Q Okay. And what was the claims pool?
A The claims pool was $326 million. Recall that that's a slightly larger claims pool because it doesn't back out the Class 7 claims.
Q Okay. The convenience class claims?

my view, the Committee's view, I believe, would be let's continue forward and we'll discuss Mr. Dondero's proposal that I know came across after opening statements this morning, you know, in due course. But I do not believe that a continuance here is necessary or appropriate.

THE COURT: All right. Mr. Taylor, that request is denied, so you may cross-examine.

MR. TAYLOR: Yes. (Pause.) I'm sorry, Your Honor. I have a couple people that are in my ear. But yes, I'm ready to proceed.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. TAYLOR:

Q Mr. Seery, I believe you can probably largely testify from your memory of the various iterations of the plan analysis versus the liquidation analysis. But to the extent that you're unable to, we can certainly pull those up.

Mr. Seery, you put forth or Highland put forth on November 24th of 2020 a plan analysis versus a liquidation analysis, correct?

A I think that's the approximate date, yes.

Q Okay. And do you recall what the plan analysis predicted the recovery to general unsecured creditors in Class 8 would be at that time?

A I believe it was in the 80s.

Q And approximately 87.44 percent?
A That sounds close, yes.
Q Okay. And then just right before -- the evening before your deposition that took place on January 29th, I believe a revised plan analysis versus a liquidation analysis was provided. Do you remember that?
A Yes.
Q Okay. And what was the predicted recovery to general unsecured creditors under that analysis?
A I believe that was --
MR. MORRIS: Object to the form of the question. I just want to make sure that we're talking about the -- and maybe I misunderstood the question -- plan versus liquidation.
THE COURT: Okay. Could you restate --
MR. TAYLOR: I said plan analysis.
THE COURT: Plan.
THE WITNESS: I believe that that initially was in the -- in the high 60s.
BY MR. TAYLOR:
Q It was --
A Might have been --
Q -- 62.14 percent; is that correct?
A Okay. Yeah. That sounds -- I'll take your representation. That's fine.
Q Okay. And going back to the November 28th liquidation

analysis, what did Highland believe that creditors in Class 8 would get under a liquidation analysis?

A I don't recall the -- if you just tell me, I'll -- I'll -- if you're reading it, I'll agree with -- because I -- from my memory.

Q 62.6 percent? Is that correct?

A That sounds about right.

Q You would agree with me, would you not, that 62.6 cents on the dollar is higher than 62.14 cents, correct?

A Yes.

Q And so at least comparing the January 28th versus -- of 2021 versus the November 24th of 2020, the liquidation analysis actually ended up being higher than the plan analysis, correct?

A Yes.

Q But there was -- there was some changes also in the plan analysis. I'm sorry. There were some subsequent changes that were done over the weekend that were provided on February 1st. Is that correct?

A Yes.

Q Okay. And what were -- give us an overview of what those changes were.

A What are -- what are you comparing? What would you like me to compare?

Q Okay. The January to February plan analysis, what were

the changes? Why did it go up from 62.6 to 71.3?

A The main changes, as we discussed earlier, and maybe the only major change, was the UBS claim amount, which went down significantly from the earlier iteration. And then there was the small change related to the RCP recovery, which was a double-count.

Q Okay. And you talked about earlier about what assumptions went into these analyses, correct?

A Yes.

Q And you said these assumptions were always done after careful consideration. Is that a correct summation of what you said?

A I think that's fair.

Q Okay.

MR. TAYLOR: Mr. Assink, could you pull up the November assumptions?

BY MR. TAYLOR:

Q I believe that's coming up, Mr. Seery. The Court.

(Pause.)

MR. TAYLOR: And go down one page, please, Mr. Assink. Roll up. The Assumption L.

BY MR. TAYLOR:

Q So, these are the November assumptions, correct, Mr. Seery?

A I believe so, yes.

at Docket Entry 1877. And Mr. Morris, you can try to get in 7O the old-fashioned way if you want to.

MR. MORRIS: Yeah, I'll deal with 7O and the very limited number of other objections at the beginning of tomorrow's hearing.

THE COURT: All right.

(Debtor's Exhibits 7F through 7Q, with the exception of 7O, are received into evidence.)

THE COURT: So we will reconvene at 9:30 Central time tomorrow. I think we're going to hear from the Aon, the D&O broker, Mr. Tauber; is that correct?

MR. MORRIS: That's right. And that should be shorter than even Mr. Dubel.

THE COURT: All right. Well, we will see you at 9:30 in the morning. We are in recess.

MR. MORRIS: Thank you so much.

THE CLERK: All rise.

(Proceedings concluded at 5:09 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 **02/04/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

Appendix Exhibit 96

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

In Re:	)	**Case No. 19-34054-sgj-11**
	)	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	)	Dallas, Texas
	)	Wednesday, February 3, 2021
	)	9:30 a.m. Docket
Debtor.	)	
	)	CONFIRMATION HEARING [1808]
	)	AGREED MOTION TO ASSUME [1624]
	)	
	)	*Continued from 02/02/2021*

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

WEBEX APPEARANCES:

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For the Official Committee of Unsecured Creditors:	Matthew A. Clemente SIDLEY AUSTIN, LLP One South Dearborn Street Chicago, IL 60603 (312) 853-7539

MR. MORRIS: Just one question.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. MORRIS:

Q Mr. Seery, do you know why the Debtor has not yet filed the 2015.3 statement?

A I have a recollection of it, yes.

Q Can you just describe that for the Court?

A When we -- when we initially filed, when the Debtor filed and it was transferred over, we started trying to get all the various rules completed. There are, as the Court is aware, at least a thousand and maybe more, more like three thousand, entities in the total corporate structure.

We pushed our internal counsel to try to get that done, and were never able to really get it completed. We did not have -- we were told we didn't have separate consolidating statements for every entity, and it would be difficult. And just in the rush of things that happened from the first quarter into the COVID into the year, we just didn't complete that filing. There was no reason for it other than we didn't get it done initially and I think it fell through the cracks.

MR. MORRIS: Nothing further, Your Honor.

THE COURT: All right. Anything further, Mr. Rukavina?

REDIRECT EXAMINATION

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 Date
Certified Electronic Court Transcriber

Appendix Exhibit 97

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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.	§	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P. AND NEXPOINT ADVISORS, L.P., Defendants.	§	Adversary Proceeding No. 21-03010-sgj

[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.

DEBTOR'S EMERGENCY MOTION FOR A MANDATORY INJUNCTION REQURING THE ADVISORS TO ADOPT AND IMPLEMENT A PLAN FOR THE TRANSITION OF SERVICES BY FEBRUARY 28, 2021

Highland Capital Management, L.P., the plaintiff in the above-captioned adversary proceeding (the "Adversary Proceeding") and the debtor and debtor-in-possession (the "Debtor" or "Highland") in the above-captioned chapter 11 case ("Bankruptcy Case"), by and through its undersigned counsel, files this emergency motion (the "Motion") seeking entry of an order directing Highland Capital Management Fund Advisors, L.P. ("HCMFA") and NexPoint Advisors, L.P. ("NPA," and together with HCMFA, the "Advisors" or "Defendants") to adopt and implement a plan for the orderly transition of services currently provided under the Shared Services Agreements[2] from the Debtor to NewCo, or any other entity of the Advisors' choosing, by February 28, 2021. In support of the Motion, the Debtor respectfully states the following:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334(b). The Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.

3. The predicates for the relief requested in the Motion are sections 105(a) and 362(a) of title 11 of the United States Code (the "Bankruptcy Code") and Rules 7065 and 7001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

[2] Capitalized terms not defined herein shall have the meanings ascribed to them in the *Declaration of Mr. James P. Seery, Jr. in Support of the 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* (the "Seery Declaration") being filed contemporaneously herewith.

RELIEF REQUESTED

4. The Debtor requests that this Court issue the proposed form of order attached as hereto as **Exhibit A** (the "Proposed Order"), pursuant to sections 105(a) and 362(a) of the Bankruptcy Code and Rules 7001 and 7065 of the Bankruptcy Rules.

5. For the reasons set forth more fully in the Debtor's *Memorandum of Law in Support of the 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* (the "Memorandum of Law") filed contemporaneously with this Motion, the Debtor seeks mandatory injunctive relief compelling Defendants to adopt and implement a transition plan by February 28, 2021 when the Debtor is expected to substantially reduce its workforce as part of the implementation of its plan of reorganization that was recently approved by the Court. Absent mandatory injunctive relief, the Debtor (together with the Funds, the Advisors, and thousands of investors) will be irreparably harmed. Emergency relief is needed to avoid this immediate and irreparable harm that will be caused to the Debtor, among others.

6. In accordance with Rule 7007-1 of the *Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas* (the "Local Rules"), contemporaneously herewith and in support of this Motion, the Debtor is filing: (a) its Memorandum of Law, (b) the Seery Declaration, and (c) the Debtor's *Motion for Expedited Hearing on Emergency Motion for a Mandatory Injunction Requiring the Advisors to Adopt and Implement a Plan for the Transition of Services by February 28, 2021* (the "Motion to Expedite").

7. Based on (i) the facts set forth in the Seery Declaration and the exhibits annexed thereto, and (ii) the arguments contained in the Memorandum of Law, the Debtor is entitled to the relief requested herein as set forth in the Proposed Order.

8. Notice of this Motion has been provided to Defendants. The Debtor submits that no other or further notice need be provided.

WHEREFORE, the Debtor respectfully requests that the Court (i) enter the Proposed Order substantially in the formed annexed hereto as **Exhibit A** granting the relief requested herein, and (ii) grant the Debtor such other and further relief as the Court may deem proper.

Dated: February 17, 2021.

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-and-

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Counsel for Highland Capital Management, L.P.

EXHIBIT A

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, vs. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P. AND NEXPOINT ADVISORS, L.P., Defendants.	§	Adversary Proceeding No. 21-03010-sgj

ORDER GRANTING DEBTOR'S EMERGENCY MOTION FOR A MANDATORY INJUNCTION REQUIRING THE ADVISORS TO IMPLEMENT A PLAN FOR THE TRANSITION OF SERVICES BY FEBRUARY 28, 2021

[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.

The parties subject to this Order are: (1) Highland Capital Management Fund Advisors, L.P. ("HCMFA") and (2) NexPoint Advisors, L.P. ("NPA," and together with HCMFA, the "Defendants").

Having considered (a) the *Debtor's Emergency Motion for a Mandatory Injunction Requiring the Advisors to Implement a Plan for the Transition of Services by February 28, 2021* [Docket No. ___] (the "Motion");[2] (b) the *Declaration of Mr. James P. Seery, Jr. in Support of the Debtor's Emergency Motion for a Mandatory Injunction Requiring the Advisors to Implement a Plan for the Transition of Services by February 28, 2021* [Docket No. ___] (the "Seery Declaration") and the exhibits annexed thereto; (c) the *Debtor's Memorandum of Law in Support of the Debtor's Emergency Motion for a Mandatory Injunction Requiring the Advisors to Implement a Plan for the Transition of Services by February 28, 2021* [Docket No. ___] (the "Memorandum of Law"); (d) the allegations and relief sought in *Plaintiff Highland Capital Management, L.P.'s Verified Original Complaint for Damages and for Declaratory and Injunctive Relief* [Docket No. 1] (the "Complaint"); and (e) all prior proceedings relating to this matter; 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 and concluded that the facts and the law are clearly in the Debtor's favor, and specifically that: (i) absent such relief, the Debtor will suffer

[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

irreparable injury, (ii) the Debtor is likely to succeed on the merits of its underlying claims for declaratory relief and breach of contract, (iii) the balance of the equities tips in the Debtor's favor, and (iv) such relief serves the public interest; 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 Defendants are directed to adopt and implement a plan for the orderly transition of services currently provided under the Shared Services Agreements from the Debtor to NewCo, or any other entity of the Advisors' choosing, by February 28, 2021.

3. All objections to the Motion are overruled in their entirety.

4. The Defendants are directed to (a) provide a copy of this Order to each of their respective officers, directors, employees, and agents, and (b) file on the docket a sworn certification attesting to each Defendant's compliance with the foregoing direction (including the manner, date, and time of compliance) within twenty-four (24) hours of the Court's filing of this Order on the docket.

5. 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

Appendix Exhibit 98

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[1] Debtor.	§	Chapter 11 Case No. 19-34054-sgj11
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., AND NEXPOINT ADVISORS, L.P., Defendants.	§	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.

PLAINTIFF HIGHLAND CAPITAL MANAGEMENT, L.P.'S VERIFIED ORIGINAL COMPLAINT FOR DAMAGES AND FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession ("Plaintiff" or the "Debtor"), by its undersigned counsel, files this *Verified Original Complaint for Damages and for Declaratory and Injunctive Relief* (the "Complaint") against defendants Highland Capital Management Fund Advisors, L.P. ("HCMFA") and NexPoint Advisors, L.P. ("NPA," and together with HCMFA, the "Defendants" or the "Advisors"), seeking damages and declaratory and injunctive relief pursuant to sections 105(a), 362, 542, and 1107 of title 11 of the United States Code (the "Bankruptcy Code") and Rules 7001(7) and 7065 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In support of its Complaint, the Debtor alleges upon knowledge of its own actions and upon information and belief as to other matters as follows:

PRELIMINARY STATEMENT[2]

1. The Advisors serve as the investment manager, either directly or indirectly, to a number of investment vehicles (collectively, the "Funds") regulated pursuant to the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940. Certain of the Funds are publicly traded and have thousands of retail investors who are at risk due to the Advisors' deleterious conduct.

2. The Advisors are owned and controlled by James Dondero. Pursuant to certain Shared Services Agreements, the Debtor has historically provided back-office and middle-office services that enable the Advisors to manage the Funds. Although the Debtor is paid for these

[2] Capitalized terms not specifically defined in this Preliminary Statement shall have the meanings ascribed to them below.

services, providing the services requires the Debtor to maintain a full staff, the cost of which has historically caused substantial net losses to the Debtor.

3. Each of the Shared Services Agreements gives either party the unilateral right to terminate the respective Shared Services Agreement by providing prior written notice. On November 30, 2020, the Debtor provided written notice of its intent to terminate the Shared Services Agreements effective as of January 31, 2021.

4. The Termination Notices could not have come as a surprise to the Advisors because the Debtor was in bankruptcy and had been pursuing an "asset monetization" plan of reorganization that would leave it with a substantially scaled-down work force since at least August 2020. With that in mind, the Debtor began developing a plan pursuant to which the shared services would be transitioned to an entity that would be created, owned, and operated by certain of the Debtor's employees who were expected to be terminated as part of the implementation of the Debtor's Plan.

5. At the same time, the Debtor continued to provide the services required under the Shared Services Agreements – despite the Advisors being in substantial arrears with an outstanding amount due to the Debtor in excess of $3 million – and otherwise continued in its attempts to transition those services in a smooth and orderly manner. Indeed, in order to give the Advisors more time to engage and complete the transition, the Debtor has extended the termination date on two occasions, with the current termination deadline being February 19, 2021.[3]

[3] Although the Shared Services Agreement will terminate on February 19, 2021, the Debtor is willing to further extend the termination dates of the Shared Services Agreements through February 28, 2021, solely to prevent catastrophic harm to the retail investors in the Funds, but the Debtor will be unable to extend the termination date any further as the Debtor is expected to reduce its workforce at the end of February and will have insufficient personnel thereafter to perform under the Shared Services Agreements.

6. Regrettably, as described in more detail below, and notwithstanding the Debtor's best efforts to aid in the transition of services, the Advisors have willfully failed and refused to adopt and effectuate a transition plan, choosing instead to spend the last months threatening the Debtor and certain of its employees and seeking to deflect responsibility for their own wrongful conduct.

7. The status quo is untenable. The Debtor has the contractual right to terminate the Shared Services Agreements and has exercised that right. Pursuant to the Debtor's Plan, there will shortly be a substantial reduction in the Debtor's work force and the Debtor will be unable to provide services to the Advisors. The Advisors' failure to work with the Debtor or to otherwise develop a transition plan of their own has put thousands of retail investors at risk.

8. The Debtor is faced with an awful choice. It can either (a) exercise its rights to terminate the Shared Services Agreements to the detriment of the Funds and their investors, and be sucked into more litigation because of Mr. Dondero's conduct, or (b) attempt to provide services to the Advisors under the Shared Services Agreements at substantial losses and risk material delays in the implementation of the Debtor's Plan.

9. Therefore, in addition to seeking damages and declaratory relief, the Debtor is filing a separate emergency motion for a mandatory injunction compelling the Advisors to adopt and implement a transition plan by February 28, 2021, when the Debtor is expected to substantially reduce its workforce. In the absence of such a mandate, the Funds (together with their thousands of investors) and the Debtor will be irreparably harmed.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and § 1334(b). This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

11. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.

12. This adversary proceeding is commenced pursuant to Bankruptcy Rules 7001 and 7065, Bankruptcy Code sections 105(a) and 362, 28 U.S.C. §§ 2201 and 2202, and applicable Delaware law.

THE PARTIES

13. 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.

14. Upon information and belief, HCMFA is a limited partnership with offices located in Dallas, Texas.

15. Upon information and belief, NPA is a limited partnership with offices located in Dallas, Texas.

CASE BACKGROUND

16. On October 16, 2019 (the "Petition Date"), 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").

17. On October 29, 2019, the U.S. Trustee in the Delaware Court appointed an Official Committee of Unsecured Creditors 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 Capital Management, L.P. and Acis Capital Management GP LLC.

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

19. The Debtor has continued to operate and manage its business as a debtor-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee or examiner has been appointed in this chapter 11 case.

20. On November 24, 2020, the Debtor filed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* [Docket No. 1472] (the "Plan").

21. On February 2 and 3, 2021, the Court conducted a confirmation hearing with respect to the Plan. [Docket No. 1808].

22. On February 8, 2021, the Court rendered an opinion in which it approved the Plan. [Docket No. 1924].

STATEMENT OF FACTS

A. The Debtor Has the Contractual Right to Terminate the Shared Services Agreements, and It Timely Exercised that Right

23. The Debtor is party to the Shared Services Agreements pursuant to which it has a contractual right of termination upon written notice.

The Debtor's Shared Services Agreement with HCMFA

24. The Debtor and HCMFA are parties to that certain *Second Amended and Restated Shared Services Agreement*, effective as of February 8, 2013 (the "HCMFA Shared Services Agreement"), a copy of which is attached hereto as **Exhibit A**.

[4] All docket numbers refer to the main docket for the Highland Bankruptcy Case maintained by this Court.

25. Pursuant to section 2.01 of the HCMFA Shared Services Agreement and Annex A affixed thereto, the Debtor provides certain services to HCMFA that enable HCMFA to manage the Funds.

26. The HCMFA Shared Services Agreement was for a one-year term, subject to automatic one-year renewals "unless sooner terminated under Section 7.02."

27. Section 7.02 of the Shared Services Agreement provides that "[e]ither 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."

28. On November 30, 2020, the Debtor provided written notice to HCMFA that it intended to terminate the HCMFA Shared Services Agreement as of January 31, 2021 (the "HCMFA Termination Notice"). A copy of the HCMFA Termination Notice is attached hereto as **Exhibit B**.

The Debtor's Shared Services Agreement with NPA

29. The Debtor and NPA are parties to that certain *Amended and Restated Shared Services Agreement*, effective as of January 1, 2018 (the "NPA Shared Services Agreement" and together with the HCMFA Shared Services Agreement, the "Shared Services Agreements"), a copy of which is attached hereto as **Exhibit C**.

30. Pursuant to Article II of the NPA Shared Services Agreement, the Debtor provides certain services to NPA that enable NPA to manage the Funds.

31. The NPA Shared Services Agreement did not have a fixed term. Instead, section 7.01 provided that "[e]ither Party may terminate this Agreement at any time upon at least thirty (30) days' written notice to the other."

32. On November 30, 2020, the Debtor provided written notice to NPA that it intended to terminate the NPA Shared Services Agreement as of January 31, 2021 (the "NPA

Termination Notice" and together with the HCMFA Termination Notice, the "Termination Notices"). A copy of the NPA Termination Notice is attached hereto as **Exhibit D**.

B. Prior to Providing the Termination Notices, the Debtor Worked on a Transition Plan, but the Advisors Failed to Engage or Pay for Services Rendered

33. On August 12, 2020, after considering its strategic options, the Debtor filed an "asset monetization" plan of reorganization pursuant to which, in general, the Debtor proposed to reduce staff, reject certain contracts, and monetize its assets consistent with maximizing value for all stakeholders. [Docket No. 944].

34. Thus, at least as of that time, all stakeholders – including the Advisors – were on notice that the Debtor intended to continue operations on a scaled-down basis with the goal being an orderly monetization of assets.[5]

35. Consistent with that intent, the Debtor began formulating a plan for the transition of services provided under the Shared Services Agreements.

36. Specifically, beginning in the summer of 2020, the Debtor attempted to negotiate for the orderly transition of services with James Dondero, the individual who owns and controls each of the Advisors.

37. The Debtor's proposal contemplated the transition of services to the Advisors from the Debtor to an entity that would be created, owned, and operated by certain of the Debtor's employees ("NewCo") who were expected to be terminated as part of the Debtor's asset monetization plan.

[5] Furthermore, on November 13, 2020, the Debtor filed its *Third Amended Plan of Reorganization of Highland Capital Management* [Docket No. 1383] (the "Third Amended Plan"). In its Third Amended Plan (and subsequent plans), the Debtor explicitly stated that it did not intend to continue providing services under the Shared Service Agreements precisely because they are money losers. Third Amended Plan, Art. IV.A ("[I]t 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.")

38. With Mr. Dondero in control, the Advisors never provided any constructive response to the Debtor's proposal. Indeed, Mr. Dondero specifically informed the Debtor that he intended to make the transition difficult for the apparent purpose of creating leverage in plan negotiations.

39. In addition to failing to engage in any process designed to provide for the orderly transition of services, the Advisors also failed to pay the Debtor for the services provided under the Shared Services Agreement.

40. Since the Petition Date, each of the Advisors has failed to meet certain of its payment obligations under the Shared Services Agreements. For the period between the Petition Date and January 31, 2021, (a) HCMFA owes the Debtor $2,121,276 for services rendered under the HCMFA Shared Services Agreement, and (b) NPA owes the Debtor $932,977 for services rendered under the NPA Shared Services Agreement. These amounts exclude amounts owed for services provided prior to the Petition Date.

41. The Debtor loses significant money providing services under the Shared Services Agreements, which is why it publicly stated its intention in the Third Amended Plan (and each subsequent amendment and modification to the Plan) not to assume or assume and assign them. While that is bad enough, the Advisors failure to pay for services previously rendered is a blatant breach of the Agreements.

C. The Debtor Offers to Extend the Termination Date to Avoid a Catastrophe and Attempts to Engage the Funds' Board to Aid in the Adoption of a Transition Plan

42. Instead of engaging in the process, the Advisors and certain of their employees were more focused on threatening the Debtor and its employees, all in a transparent effort to deflect responsibility for their own obstinate and wrongful conduct.

43. With the January 31, 2021 termination date fast approaching, and with the Advisors continuing to fail to work cooperatively on a transition plan, the Debtor took the initiative and offered to extend the termination date by two weeks (i) in order to avoid catastrophic consequences for the Funds and their investors that would result from an abrupt termination, and (ii) in the hope that the Advisors would use the extended time to finally and constructively engage.

44. Thus, on January 29, 2021, the parties executed an agreement extending the termination date to February 14, 2021 in exchange for the Advisors paying in advance for services to be rendered by the Debtor during that two-week period. A copy of the January 29, 2021, agreement is attached hereto as **Exhibit E**.

45. During the two-week period, the Debtor and its employees and professionals made every effort to bring the issue of the transition of services to a resolution. Among other things, the Debtor continued to refine the proposal for the transition of services to NewCo.

46. The Debtor also attempted to get the attention of the Funds' Boards because it was concerned that the Boards were either uninformed, not engaged, or were under the influence and control of Mr. Dondero.

47. Among other communications, James P. Seery, Jr., the Debtor's Chief Executive Officer, sent formal written communications to the Board of Directors for the Funds on January 27, 2021, February 8, 2021, and February 12, 2021.[6] Copies of Mr. Seery's letters are attached hereto as **Exhibits F, G and H,** respectively.

48. Despite the efforts of certain of the Advisors' professionals, and despite the Debtor's willingness to make all reasonable concessions on a transition agreement, Mr. Dondero

[6] Mr. Seery's formal correspondence was in addition to his informal correspondence and communications with the Funds' Board and the substantial communications between counsel to the Debtor, the Advisors, and the Funds.

and the Advisors have refused to "say yes" or to otherwise take steps to formulate a transition plan for the protection of the Funds and their investors.

49. Faced with an untenable situation, the Debtor again agreed to extend the termination date, this time to February 19, 2021. *See* **Exhibit I**.

50. Finally, on February 16, 2021, the Debtor made its last attempt to reach an agreement before being forced to take alternative actions to protect itself, the Funds, and investors, by sending the Advisors a proposed term sheet (the "Term Sheet") that provided a reasonable transition plan. A copy of the Term Sheet is attached as **Exhibit J**. The Advisors refused to agree to the terms thereunder.

51. Given that the Court will soon enter an order confirming the Debtor's Plan, and the reduction in the Debtor's work force will follow soon thereafter, the Debtor will be unable to provide services to the Advisors much longer. The Advisors' failure to agree on or formulate a transition plan is creating catastrophic risk for the Funds and their investors. The Advisors' failure to plan for a transition is also creating material risk to the Debtor.

FIRST CLAIM FOR RELIEF

(For Declaratory Relief: -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7001)

52. The Debtor repeats and realleges each of the allegations in each of the foregoing paragraphs as though fully set forth herein.

53. A bona fide, actual, present dispute exists between the Debtor and the Advisors concerning their respective rights and obligations under the Shared Services Agreements.

54. A judgment declaring the parties' respective rights and obligations will resolve their disputes.

55. Pursuant to Bankruptcy Rule 7001, the Debtor specifically seeks declarations that:

- Each of the Advisors is owned and controlled by Mr. Dondero;
- The Debtor has the contractual right to terminate the HCMFA Shared Services Agreement on 60 days' written notice;
- The Debtor properly exercised its right to terminate the HCMFA Shared Services Agreement by providing at least 60 days' written notice;
- The Debtor's obligation to provide services to HCMFA under the HCMFA Shared Services Agreement (or otherwise) will terminate on February 19, 2021;
- The Debtor has the contractual right to terminate the NPA Shared Services Agreement on 30 days' written notice;
- The Debtor properly exercised its right to terminate the NPA Shared Services Agreement by providing at least 30 days' written notice; and
- The Debtor's obligation to provide services to NPA under the NPA Shared Services Agreement (or otherwise) will terminate on February 19, 2021.

SECOND CLAIM FOR RELIEF

(Breach of Contract)

56. The Debtor repeats and realleges each of the allegations in each of the foregoing paragraphs as though fully set forth herein.

57. The Shared Services Agreements are valid and binding contracts.

58. The Debtor has fully performed all obligations under the Shared Services Agreements.

59. The Advisors have breached the Shared Services Agreements by failing to pay for certain services rendered by the Debtor to the Advisors under the Shared Services Agreements.

60. The Advisors have failed to pay the Debtor all amounts due and owing under the Shared Services Agreements despite the Debtor's demands.

61. The Advisors' breach of the Shared Services Agreements has damaged the Debtor in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF

(For Injunctive Relief -- 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 7065)

62. The Debtor repeats and realleges the allegations in each of the foregoing paragraphs as though fully set forth herein.

63. Pursuant to Bankruptcy Code section 105(a) and Bankruptcy Rule 7065, the Debtor seeks a mandatory injunction directing the Advisors to adopt and implement a plan for the orderly transition of services currently provided under the Shared Services Agreements from the Debtor to NewCo or any other entity of the Advisors' choosing.

64. Bankruptcy Code section 105(a) authorizes the Court to issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a).

65. Bankruptcy Rule 7065 incorporates by reference Rule 65 of the Federal Rules of Civil Procedure and authorizes the Court to issue injunctive relief in adversary proceedings.

66. The Debtor will succeed on the merits of its claims for (a) a declaratory judgment that it has the contractual right to terminate each of the Shared Services Agreements, that it properly exercised those rights, and that, effective February 19, 2021, it has no further legal or equitable obligation to provide any services to the Advisors; (b) damages for breach of contract; and (c) for a mandatory injunction requiring the Advisors to adopt and implement a plan for the orderly transition of shared services.

67. The Advisors' failure to adopt and implement a transition plan is untenable because – as the Advisors have known for months – the Debtor will soon be unable to provide services under the Shared Services Agreements, and such willful misconduct and gross

negligence will cause irreparable harm to the Funds and their investors and to the Debtor and its estate.

68. Given that (a) the Advisors were on notice since at least August 2020, that the Debtor was unlikely to provide services under the Shared Services Agreement for an extended period of time; (b) the Debtor has been pursuing a transition plan since the summer of 2020; (c) the Third Amended Plan filed on November 13, 2020 (and each subsequent version of the Plan), expressly stated that the Debtor would not assume or assume and assign the Shared Services Agreements; (d) the Debtor timely provided notice of termination of the Shared Services Agreements on November 30, 2020; (e) upon information and belief, the Advisors (and not the Debtor) owe contractual and other duties to the Funds, the entities most at risk; and (f) the Debtor has acted in good faith by, among other things, twice extending the anticipated termination date, the balance of the equities strongly favors the Debtor.

69. Finally, the public interest virtually requires that the Advisors be directed to adopt and implement a transition plan. In the absence of a mandatory injunction, thousands of retail investors are likely to suffer catastrophic losses, and there will likely be substantial market disruptions with unforeseeable consequences.

70. Based on the foregoing, the Debtor requests that the Court direct the Advisors to adopt and implement a plan for the orderly transition of services currently provided under the Shared Services Agreements from the Debtor to NewCo, or any other entity of the Advisors' choosing, by February 28, 2021.

PRAYER

WHEREFORE, the Debtor prays for judgment as follows:

- On the First Cause of Action, a judgment declaring that: (i) each of the Advisors is owned and controlled by Mr. Dondero; (ii) the Debtor has the contractual right to terminate the HCMFA Shared Services Agreement on 60 days' written notice; (iii) the Debtor properly exercised its right to terminate the HCMFA Shared Services Agreement by providing at least 60 days' written notice; (iv) the Debtor's obligation to provide services to HCMFA under the HCMFA Shared Services Agreement (or otherwise) will terminate on February 19, 2021; (v) the Debtor has the contractual right to terminate the NPA Shared Services Agreement on 30 days' written notice; (vi) the Debtor properly exercised its right to terminate the NPA Shared Services Agreement by providing at least 30 days' written notice; and (vii) the Debtor's obligation to provide services to NPA under the NPA Shared Services Agreement (or otherwise) will terminate on February 19, 2021.

- On the Second Cause of Action, damages in an amount to be determined at trial arising from the Advisors' breach of the Shared Services Agreements;

- On the Third Cause of Action, a mandatory injunction directing the Advisors to adopt and implement a plan for the orderly transition of services currently provided under the Shared Services Agreements from the Debtor to NewCo, or any other entity of the Advisors' choosing, by February 28, 2021; and

- For such other and further relief as this Court deems just and proper.

Dated: February 17, 2021.

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VERIFICATION

I have read the foregoing VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF and know its contents.

☐ I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☒ I am the Chief Executive Officer and Chief Restructuring Officer of Highland Capital Management, L.P., the Plaintiff in this action, and am authorized to make this verification for and on behalf of the Plaintiff, and I make this verification for that reason. I have read the foregoing document(s). I am informed and believe and on that ground allege that the matters stated in it are true.

☐ I am one of the attorneys of record for _____, a party to this action. Such party is absent from the county in which I have my office, and I make this verification for and on behalf of that party for that reason. I have read the foregoing document(s). I am informed and believe and on that ground allege that the matters stated in it are true.

I certify and declare under penalty of perjury under the laws of the United States that the foregoing is true and correct as of this 17th day of February 2021.

/s/ James P. Seery, Jr.
James P. Seery, Jr.

Appendix Exhibit 99

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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)
Debtors.	(Jointly Administered)
HIGHLAND CAPITAL MANAGEMENT, L.P.,	
Plaintiff,	
v.	Adv. Pro. No. 21-03010 (SGJ11)
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., AND NEXPOINT ADVISORS, L.P.,	
Defendants.	

OBJECTION TO MANDATORY INJUNCTION AND BRIEF IN SUPPORT THEREOF

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OBJECTION TO MANDATORY INJUNCTION AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE STACEY G.C. JERNIGAN, U.S. BANKRUPTCY JUDGE:

COME NOW NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P. ("HCMFA", and together with NexPoint, the "Advisors"), the defendants in the above styled and numbered adversary proceeding (the "Adversary Proceeding"), and file this their *Objection to Mandatory Injunction and Brief In Support Thereof* (the "Objection"), objecting to the *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* (the "Motion"), filed by Highland Capital Management, L.P. (the "Debtor"), respectfully stating as follows:

I. SUMMARY

1. The Advisors have divorced themselves from the Debtor's services and, contrary to the Debtor's unsupported allegations, they are implementing their own transition plan, which is none of the Debtor's business nor, respectfully, something over which this Court has any jurisdiction or authority. What the Debtor really wants is to force the Advisors to enter into a contract with the Debtor on its terms—something that no court can do. Continuing with its theme that Mr. Dondero just wants to "burn the house down" and that any entity associated with him is his tentacle, the Debtor now wants this Court to take jurisdiction over the internal business affairs of a non-debtor under the guise that the Advisors need this for their own benefit, something that is unprecedented. The sky is not falling, however, and all is well.

2. The truth is very simple. After weeks of extensive negotiations, during which every point save one was agreed upon, the Advisors were prepared to enter into a transition services contract with the Debtor. This would have provided the Debtor with millions of dollars in fees and several million dollars in future rents, reimbursements, payments, and other benefits. The one issue that the Debtor would not agree to was to permit Mr. Dondero to be on the premises of his

own businesses, premises which those businesses were paying for. Under no circumstances, even after the Advisors offered to build a wall and even though Mr. Dondero is under an injunction, and despite all of the other benefits of the proposed agreement and the obvious need for a fund manager and registered investment advisor to be on-site, would the Debtor even negotiate this point. It is the Debtor that has acted unreasonably, and it is the Debtor that now acts vexatiously and frivolously. The Debtor has made its decision and the Advisors have made their decision: they will separate and go their own ways, and it is not for this Court to force anything else on the Advisors.

II. THE COURT LACKS JURISDICTION

3. The Debtor asks this Court to command a non-debtor party with respect to its internal business affairs. This Court has no jurisdiction to do so.

4. This Court has four types of jurisdiction: (i) "cases under" the Bankruptcy Code; (ii) civil proceedings "arising under" the Bankruptcy Code; (iii) civil proceedings "arising in" a case under the Bankruptcy Code; and (iv) civil proceedings "related to" a case under the Bankruptcy Code. 28 U.S.C. § 1334(a). The first type of jurisdiction "refers merely to the bankruptcy petition itself." *In re Wood*, 825 F.2d 90, 92 (5th Cir. 1987). The Motion is not the petition. The second and third types of jurisdiction refer to matters arising only in a bankruptcy case: causes of action created or determined by the Bankruptcy Code, and rights not expressly created by the Bankruptcy Code, but that have no existence outside of a bankruptcy case. *Id*. at 96-97. Here, the only possible statutory basis for the Mandatory Injunction is section 105(a) of the Bankruptcy Code. It is clear, however, that section 105(a) does not create substantive rights. *See U.S. v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986). Thus, there is no "arising under" jurisdiction.

5. The Debtor has also failed to demonstrate that the Mandatory Injunction is related to its bankruptcy case. Under "related to" jurisdiction, the test is whether "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *In re Wood*, 825 F.2d at 93. The Advisors' internal business affairs have no conceivable effect on the estate (which will soon cease to exist anyway in light of the imminent entry of the Court's confirmation order). And, importantly, "any action against a third party which has an adverse effect on the debtor is insufficient to confer the requisite jurisdiction." *In re Packers' Cold Storage Inc.*, 64 B.R. 265, 268 (Bankr. C.D. Cal. 1986).

6. How the Advisors transition away from the Debtor, whether they do so successfully, or whether they do so unsuccessfully, will not increase the assets or liabilities of the estate or affect the administration of the Debtor's estate or its plan. The Debtor argues as follows:

> In the absence of a mandatory injunction, the Debtor will be forced to either (a) exercise its rights to terminate the Shared Services Agreements to the detriment of the Funds and their investors and be sucked into more litigation caused by Mr. Dondero's conduct, or (b) attempt to provide services to the Advisors under the Shared Services Agreements at substantial losses and risk material delays in the implementation of the Debtor's Plan.

Brief at pp. 12-13.

7. First, the allegation of being "sucked" into more litigation is purely hypothetical. Indeed, it is nonsensical, as the Debtor filed a lawsuit (its fourth against the Advisors) in order to allegedly avoid a lawsuit, despite all of the releases, exculpations, and gatekeeper injunctions in the Debtor's plan. A hypothetical or conjectural threatened injury is insufficient for an injunction. Indeed, it is insufficient to provide any jurisdiction under the Constitution in the first place, setting aside even the requirements of bankruptcy jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Fifth Circuit, in vacating a preliminary injunction on this basis, held that the threatened injury "must be real and immediate . . . While the risk of injury may be founded

on a likely and credible chain of events, the injury must be certainly impending." *Prestage Farms Inc. v. Board of Supervisors*, 205 F.3d 265, 267-68 (5th Cir. 2000) (internal quotations omitted). The hypothetical and unexplained concern that somehow the Debtor could suffer injury—much less irreparable injury—by the Debtor being sued if the Advisors fail to implement a transition plan does not qualify to confer any jurisdiction either under the Constitution or as affecting the estate.

8. Second, as explained below, the shared services are no longer needed. The Advisors implemented their backup plan, which plan was developed when negotiations with the Debtor broke down. The backup plan became the Advisors' plan when it became evident an agreement with the Debtor was unlikely. The Debtor cannot and will not be forced to continue providing services at a substantial alleged loss, because the Debtor will not be providing those services and the Advisors will not accept them. That was the Debtor's decision; now it must live with its decision. And how this risks "material delays in the implementation of the Debtor's Plan" is not explained and is nonsensical: coming to some transition services arrangement with the Debtor is not a condition precedent to the effectiveness of the Debtor's plan. In truth, the Debtor just wants this Court to force the Advisors to pay it millions of dollars for future services that the Advisors are under no obligation to order or to pay for, and that they will not.

9. Even if the Court has "related to" jurisdiction, that jurisdiction is not core and the Advisors do not consent to this Court's entry of a final judgment. "Controversies that do not depend on the bankruptcy laws for their existence -- suits that could proceed in another court even in the absence of bankruptcy -- are not core proceedings." *In re Wood*, 825 F.2d at 96. Furthermore, this Court lacks Constitutional authority to rule on the Mandatory Injunction as a core matter, as this issue does not "stem[] from the bankruptcy itself [n]or would necessarily be resolved in the claims allowance process." *Stern v. Marshall*, 564 U.S. 462, 499 (2011).

10. Here again, the only possible Bankruptcy Code provision is section 105(a), but the law is clear that this section does not create substantive rights. *See U.S. v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986). The Debtor cannot assert relief under section 105(a) in order to make something that is not core into a core proceeding because, otherwise, everything would become a core proceeding. *See, e.g., In re Wood*, 825 F.2d at 95 (declining to read 28 U.S.C. § 157(b)(2)(O) broadly because "otherwise, the entire range of proceedings under bankruptcy jurisdiction would fall within the scope of core proceedings"). It is also clear that section 105(a) is not jurisdictional and does not confer jurisdiction, but instead only aids the Court's exercise of jurisdiction that the Court otherwise has. *See U.S. v. Sutton*, 786 F.2d at 1307; *accord In re Packers' Cold Storage Inc.*, 64 B.R. 265, 267 (Bankr. C.D. Cal. 1986) ("section 105(a) is not a jurisdictional statute"). Even where a section 105(a) injunction is permissible, the injunction "must be consistent with the rest of the Bankruptcy Code." *In re Zale Corp.*, 62 F.3d at 746, 760 (5th Cir. 1995). Nothing about the requested Mandatory Injunction arises under any other provision of the Bankruptcy Code such that the other provision needs enforcement or protection.

11. Therefore, the Court has: (i) no Constitutional authority to consider the Mandatory Injunction; (ii) no bankruptcy jurisdiction to consider the Mandatory Injunction; and (iii) no core jurisdiction to issue the Mandatory Injunction. If anything, the Court is limited a issuing a report and recommendation to the District Court.

III. OBJECTION BASED ON ARBITRATION

12. The HCMFA Shared Services Agreement contains a broad arbitration provision providing that:

> 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.

Agreement at § 9.14. This provision expressly survives a termination of the agreement. *See id*.

13. The Mandatory Injunction does not concern the agreement's confidentiality provisions. Even if it did, the Mandatory Injunction is not a temporary restraining order or preliminary injunction: it is a final injunction. Thus, the only exception to the arbitration requirement is not met.

14. "The Federal Arbitration Act requires courts to enforce covered arbitration agreements according to their terms." *Henry v. Educ. Fin. Serv. (In re Henry)*, 944 F.2d 587, 590 (5th Cir. 2019). A bankruptcy court may refuse to enforce an arbitration provision:

> when two requirements are met. First, the proceeding must adjudicate statutory rights conferred by the Bankruptcy Code and not the debtor's prepetition legal or equitable rights. Second, bankruptcy courts may decline enforcement of arbitration agreements only if requiring arbitration would conflict with the purposes of the Bankruptcy Code.

Id. at 590-91 (internal citations omitted).

15. Here, neither element is met. The Mandatory Injunction does not concern a statutory right conferred by the Bankruptcy Code, such as the automatic stay, solicitation and countersolicitation sections, cash collateral, turnover, or any other statutory right. While the Debtor asserts section 105(a), that section does not confer substantive rights, as argued above. Second, requiring arbitration would not conflict with any purpose of the Bankruptcy Code, for the same reasons argued above with respect to subject matter jurisdiction: how the Advisors handle their internal business affairs is of no legitimate concern to the Debtor, its reorganization (in actuality, a liquidation), or its plan.

16. HCMFA therefore objects to the Mandatory Injunction based on the contractual arbitration clause and insists on the strict application of that clause (which it will be moving to compel). HCMFA also notes that the rules of the American Arbitration Association provide for emergency and injunctive relief, perhaps even more broadly than available to federal courts, meaning that the Debtor is not left without a remedy.

IV. OBJECTION BASED ON DUE PROCESS

17. The Debtor filed this Adversary Proceeding and Motion on February 17, 2021. At that time, the Debtor sought an emergency hearing, asserting as the only grounds for an emergency hearing:

> A prompt hearing is necessary because absent the relief requested in the Motion, the Debtor will be forced to either (a) terminate the Shared Services Agreements, to the detriment of the Funds and thousands and investors, all while being sucked into additional litigation, or (b) attempt to provide services to the Advisors under the Shared Services Agreement at significant losses and risk material delays in effectively implementing the Debtor's Plan. In brief, absent injunctive relief, there is substantial risk that the Debtor's estate will be harmed. It is therefore vital that the Court consider the Motion on an expedited basis.

Docket No. 5 at p. 4.

18. Based on this, and with no verification or evidence, the Court set an emergency hearing—a trial on the merits of an extraordinary mandatory injunction—just six days later, with an intervening weekend, and with other days when many key witnesses and lawyers, including the undersigned counsel, were without electricity, heat, water, or Internet.

19. These are not grounds for an emergency hearing. The Debtor is saying that it *already has* terminated the Shared Services Agreements, so its argument is factually wrong and illogical. And its concern is for the Funds. Yet it is not the Funds who seek the Mandatory Injunction. Likewise, the Debtor will not "attempt to provide services to the Advisors under the Shared Services Agreement at significant losses and risk material delays in effectively implementing the Debtor's Plan." This conclusory statement is wrong. The Debtor need not

provide the services, the Advisors do not need or want them, and the Advisors have made alternative arrangements. All that the Debtor has to do is turn over the Advisors' data and other property to the Advisors.

20. The Advisors should have had a meaningful opportunity to contest the motion for emergency hearing. However, it appears that the Court orally granted that motion—without any opportunity for the Advisors to respond—because the Debtor filed its notice of hearing right after it filed its motion for emergency hearing, although the length of time between the two cannot be ascertained from ECF. Had the Advisors had an opportunity contest an emergency hearing before the Court granted it, they would have strenuously objected.

21. The Advisors have done the best they can to contest the Mandatory Injunction on such short notice, including by deposing Mr. Seery the day before the hearing. But six days is objectively not enough, especially given the power and water shortages affecting the State and many of the individuals involved. It is not enough time for the Advisors: (i) to take document discovery; (ii) to depose Debtor agents the Advisors were negotiating with; (iii) to test the Debtor's assertions through its own internal analyses and communications; or (iv) to marshal their evidence. The length of time to prepare for a trial on the merits, on so serious an issue as the Mandatory Injunction, and with potential contempt and other ramifications, is facially and objectively insufficient under due process. *See, e.g., Dillon v. Bay City Constr. Co.*, 512 F.2d 801, 804 (5th Cir. 1975) (vacating injunction issued on 6 days' notice that injunction hearing would be consolidated with trial on the merits, and twelve days' notice overall).

22. In sum, it is extraordinary that the Court would set a final, mandatory injunction on six days' notice. A *status quo* injunction, that is one thing, but here the Debtor wants the Court to force the Advisors to conduct their internal affairs in a certain way, probably to force the Advisors to pay the Debtor millions of dollars, and to subject the Advisors to possible contempt and other

ramifications. And yes, things sometimes happen fast in bankruptcy. But here, the Debtor is asking the Court to tell a non-debtor how to run its business. The Advisors strongly object to this denial of due process.

23. The Advisors also object to the Mandatory Injunction based on due process because of the vagueness and overbreadth of the requested relief. The proposed order to the Motion requests the following:

> The Defendants are directed to adopt and implement a plan for the orderly transition of services currently provided under the Shared Services Agreements from the Debtor to NewCo, or any other entity of the Advisors' choosing, by February 28, 2021.

24. Nothing more is provided in the Debtor's other pleadings either. What does this mean? What is a "plan" for the "orderly transition of services?" What does "orderly" mean? What if the Advisors do not want any of the services, such as the facilities? What if the Advisors do not want legal services, payroll services, or other services previously provided by the Debtor? What about services that are no longer relevant? As the Fifth Circuit has summarized both the vagueness and overbreadth of an injunction:

> Analytically, the broadness of an injunction refers to the range of proscribed activity, while vagueness refers to the particularity with which the proscribed activity is described. 'Vagueness' is a question of notice, i.e., procedural due process, and 'broadness' is a matter of substantive law, an injunction is overly vague if it fails to satisfy the specificity requirements set out in Rule 65(d)(1), and it is overbroad if it is not narrowly tailored to remedy the specific action which gives rise to the order as determined by the substantive law at issue.
>
> As explained above, to comply with Rule 65(d) the district court's order granting the injunction must 'state its terms specifically' and 'describe in reasonable detail' the conduct restrained or required. The drafting standard has been described as that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed. The rule embodies the elementary due process requirement of notice. The Supreme Court has repeatedly emphasized that the specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.

Scott v. Schedler, 826 F.3d 207, 211-12 (5th Cir. 2016) (internal citations and quotations omitted).

25. The proposed Mandatory Injunction is both too vague and too broad to comply with any of the above requirements: if a federal court is to command a person to do something, under pain of contempt, sanctions, and all of the other tools available, then, at a minimum, the request and order must be precise and clear. A person should not be put into jeopardy wondering because he or she has to guess as to what the order means. Even after deposing Mr. Seery, the Debtor still has not identified what plan it wants the Advisors to implement, and what an orderly transition of services means.

V. FACTS

26. First, the Debtor alleges that the Advisors did not move quickly enough on implementing a transition. In fact, (i) communications and negotiations regarding the transition commenced in late Summer, 2020; (ii) negotiations intensified after the Debtor transmitted its termination notices; and (iii) once the Debtor transmitted its notices, the Advisors promptly commenced preparing for a backup plan if no transition services agreement was reached with the Debtor. All the while, the Debtor was assuring the Advisors and others that there would be a smooth transition of services.

27. Second, very important negotiations could not have been had before January 12, 2021, because it was only on that day that Mr. Seery authorized the Advisors to communicate with the Debtor's personnel regarding the transition. It was known that the Debtor would eventually terminate many employees the Debtor would not need, and that the Advisors would be interested in hiring those employees, but the fact of the matter was that those employees were still employees of the Debtor. Tort and contract law prohibited direct solicitation of employees and, most importantly, Mr. Dondero and the Advisors were restrained and enjoined from, among other things, "interfering" with or "impeding" the Debtor's business, including indirectly. The Advisors

were legitimately concerned that directly soliciting Debtor employees would violate these court orders. On or about January 12, 2021, Mr. Seery and the Debtor authorized the Advisors and the affected employees to communicate and negotiate directly, which opened the doors to advancing the ongoing transition negotiations towards finality.

28. Third, it is true that the Debtor extended its original termination of the Shared Services Agreements from January 31, 2021 to February 19, 2021. The Advisors have no doubt that the Debtor did so in good faith to aid the ongoing negotiations. But, the Advisors also paid the Debtor handsomely for these extensions: $570,241 for the first extension of fourteen (14) days, and $203,657 for the second extension of five (5) days through February 19, 2021, even though these amounts were inflated as the Advisors were paying for two-thirds of employees they were supposed to be paying for, even though those employees were no longer employed by the Debtor well prior to that time. In sum, while the Debtor acted reasonably with respect to these extensions, and the Advisors appreciated and still appreciate it, its reasonableness should not be construed as altruism. The Advisors *paid* for the delay; not the Debtor.

29. Fourth, and **most importantly**, the Advisors and the Debtor did work through and resolve each and every issue, save one that will be discussed below. There were many, many issues to resolve, most of them ordinary business matters, but the big ones were the following, resolved as following:

(i) Employees. The Debtor would retain the employees that it needed, and terminated employees would form "NewCo," which would then provide services to the Advisors at the Advisors' expense. Reasonable.

(ii) Lease. The Advisors would pay the Debtor 75% of lease payments and have use of the premises. Reasonable.

(iii) Third Party Services and Software. The Advisors would pay the Debtor 60% of the costs of third party services and software and have use of those things. Reasonable.

(iv) Funds Owing. On January 27, 2021—two days before the scheduled termination—the Debtor alleged that the Advisors *and others* owed more than $3 million in unpaid amounts under the agreements and demanded that these amounts be paid *by the Advisors* immediately and in full as a condition of any transition services agreement.[1] The Advisors pointed out that two-thirds of the employees that they had been paying for and were now being billed for were no longer there. The parties agreed that the Advisors would pay the full amount, with $1 million up front and the balance over fourteen months in equal payments, subject to clawback rights for the overpayments. Reasonable.

(v) Advisor Property. The Debtor would transfer to the Advisors their property, including domain names, electronic data, and the like. Reasonable.

30. This agreement would have provided millions of dollars in direct payments to the Debtor, it would have provided several million dollars more in future payments, it would have protected dozens of jobs, it would have provided benefit to the Debtor in the future in numerous tangible and intangible benefits, and it would have ensured the smoothest transition possible. However, one unresolved issue remained: whether Mr. Dondero would be permitted on the premises under the new transition services agreement.[2] The Debtor categorically rejected any negotiation on this point, stating that Mr. Dondero would interfere with the Debtor's business. In response, the Advisors offered to build a dividing wall, at their expense, and to enter into other protections, aside from the continuing injunction against Mr. Dondero, which would have protected the Debtor anyway. The Debtor would not consider any compromise on this issue and presented the Advisors with a "take it or leave it" ultimatum the afternoon of February 16, 2021—three days prior to the scheduled termination, and at a time when many of the individuals and attorneys involved were without power, heat, water, or Internet.

[1] Again, other entities, while affiliated with Mr. Dondero, owed much of the Alleged $3 million, yet the Debtor demanded that the Advisors pay these funds themselves as a condition of proceeding.

[2] The Preliminary Injunction against Mr. Dondero prohibits him from being on the premises, but the Debtor is authorized to grant permission for him to be on the premises. *See* Adversary Proceeding No. 20-03190-sgj at p. 4. Thus, the Debtor could have agreed to his presence even without relief from the Court.

31. The Advisors would not agree to this unreasonable condition. No reasonable company would agree to pay millions of dollars in rent and other fees without its president and fund manager being permitted to be on the premises. This was an unreasonable condition for three reasons.

32. First, Mr. Dondero is the president of the Advisors and other entities, and he is the fund manager for hundreds of millions of dollars, if not billions, in funds and investments. He has fiduciary duties to those whose funds and investments he manages. To prevent him from interacting in person with employees, who his companies would be paying for, and to prevent him from being on his own companies' premises, which those companies were paying for, is unprecedented in this or any other industry. Mr. Dondero has to be able to interact daily and in-person with his employees, invite clients and investors to the premises, and discharge his fiduciary duties. If the Debtor really was concerned about protecting the Advisors' and other entities' businesses, as it should since it has sued them for tens of millions of dollars, then it should and could have found a reasonable accomodation on this issue. Building a demising wall (at the Advisors' expense) separating the Debtor's space from that of the Advisors, and providing the Debtor and the Advisors secure access, ingress, and egress points, was a reasonable, efficient, and secure proposal, especially because Mr. Dondero would still have been subject to the injunction prohibiting him from communications, interference, and other actions the Debtor was concerned about.

33. Second, this was not reasonable for an obvious point: what interference? Debtor personnel have mostly not been in the office for almost one year because of the pandemic and will not be for the foreseeable future. And, if Mr. Dondero wanted to interfere, then his presence or lack thereof on partitioned premises would hardly prevent him from interfering.

34. Third, this was not reasonable because it has cost the Debtor millions of present dollars, and millions of future dollars, in lost revenue from the Advisors, while the Debtor now has a cavernous, expensive space, with expensive equipment, computers, and software, most of which it does not need for its vastly reduced "monetization" (in reality liquidation) plan. The Debtor lost all of these benefits and, according to its own allegations, jeopardized its own business and the business of the Advisors and funds because of this one, sole, issue. That is not a sound business decision and one that does not comport with the Debtor's fiduciary duties. It instead seems like a decision bore of spite.

35. The Advisors therefore made a business decision to not enter into the new contract the Debtor presented as an ultimatum, so long as Mr. Dondero would be prohibited from being on the premises, in order to protect their fundamental business interests and to ensure that they could provide proper services to their clients. With due respect, it is not for the Court to pass on the wisdom of this business decision or to review or comment on the Advisors' backup plan. Nevertheless, because the Debtor has unjustly and publicly accused the Advisors of being unprepared and negating their duties—an allegation that the Debtor has apparently also made to the SEC—the Advisors will inform the Court of their backup transition plan. Again, in doing so, they do not subject themselves to this Court's jurisdiction or to this Court's authority over their internal business affairs.

36. The Debtor ceased providing services under the Shared Services Agreements on February 19, 2021. On that date, the Advisors' employees left the premises. On and after that date, the Advisors have transitioned as follows:

(i) Accounting, Back Office, and Valuation Services. These have been assumed in-house by the Advisors' employees and outsourced in part.

(ii) Legal and Regulatory Compliance Issues. These have been performed in-house by the Advisors' employees and outsourced in part to two separate companies.

(iii) IT Services. IT services have been outsourced to a highly qualified company well acquainted with the Debtor's systems, and new e-mail, server functions, accounts, and access have been established. Industry-leading security measures have been implemented and electronic data and communications are secure.

(iv) Electronic Data. The Advisors have already copied from the Debtor's systems most of their own, non-debtor data, which has been made available and accessible to them by the new IT provider. With respect to any Advisor-owned data still stored on the Debtor's systems, the IT provider stands ready, willing, and able to finish copying the same, at a minimum of cost and burden. The Debtor has also assured the Advisors that it will continue to make this data available for copying.

(v) Third Party Software. The Advisors attempted to purchase from the Debtor, for substantial funds, the Bloomberg and OMS systems,[3] while permitting the Debtor to continue using these for free. The Debtor rejected this proposal *without counteroffer*. The Advisors already have Bloomberg access for trades and market information, so that is not a problem. With respect to the OMS system, the Advisors are separately in discussion with Bloomberg for a new contract and may also explore other OMS providers. In the meantime, the Advisors and NewCo will handle order management manually.

(vi) Employees. The Advisors are about to, and may as of the hearing, sign an agreement with the employees' NewCo, such that the same employees can do the same things they do now once the Debtor terminates them on February 28, 2021. The Debtor has confirmed that it will not stand in the way of this.

(vii) Office Space. Temporary office space has been established, while most employees work from home anyway due to the pandemic. The Advisors are in the process of leasing or sub-leasing, on a long term basis, new office space.

(viii) Hardware. The Advisors have purchased numerous computers, monitors, servers, VPN licenses, and other hardware and software for the new employees so that they can work from home on a secure basis.

37. The Advisors will not deny that the transition would have been smoother with an agreement with the Debtor or if the Debtor would have sold it various things *a la carte*.[4] But the

[3] The OMS (order management system) is a Bloomberg add-on that was custom developed for the Highland "enterprise" and that automates many of the processes involved with managing and settling trades and other market transactions. Even though title to the OMS in in the name of the Debtor, it is the Advisors who paid the large costs needed to develop the OMS and who believe that they hold the superior equitable title.

[4] Once the prospect of an overall agreement ended, the Advisors offered to purchase certain limited things, mostly software, while permitting the Debtor continuing, free access to the same. The Advisors offered to purchase this not out of necessity, but to minimize the burdens and costs that the Advisors would incur in purchasing, outsourcing, or building this independently. The Advisors do not believe that these assets are otherwise marketable

Debtor chose to condition a transition services agreement on an unacceptable condition, and it chose to not sell certain things that it hardly needs on an *a la carte* basis. In the process, the Debtor chose to forego millions of dollars in payments and benefits, and now slanders the Advisors to the Court, the public, and the SEC. In truth, the Advisors, as commercially reasonable and reputable entities, prepared and implemented their own backup transition without the Debtor and it is the Debtor, not the Advisors and any funds, who have lost out.

38. Finally, the Boards of the retail funds, at their request, have received regular and frequent updates on the status of any shared service arrangements relating to the funds throughout the course of the bankruptcy proceedings, including with respect to alternative arrangements in the event a transition of services was not able to be agreed to between the Advisers and the Debtor. Those Boards have supported the Advisors' actions, the decision to reject the Debtor's ultimatum, and the backup plan the Debtor has implemented.

VI. DISCUSSION

39. The Fifth Circuit holds that a mandatory injunction "is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party." *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976); *accord Roark v. Individuals of the Fed. Bureau of Prisons*, 558 Fed. Appx. 471, 472 (5th Cir. 2014). "[W]hen a plaintiff applies for a mandatory preliminary injunction, such relief 'should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party.'" *Exhibitors Poster Exchange, Inc. v. Nat'l Screen Service Corp.*, 441 F.2d 560, 561 (5th Cir. 1971) (*quoting Miami Beach Fed. Sav. & Loan Ass'n v. Callander*, 256 F.2d 410, 415 (5th Cir. 1958)); *Rush v. Nat'l Bd. of Med. Examiners*, 268 F. Supp. 2d 673, 678 (N.D. Tex. 2003) ("Mandatory preliminary relief which goes well beyond

or that the Debtor needs them but, even if they have a market value and are needed by the Debtor, the Advisors offered to pay for this and continue to agree to give the Debtor access.

simply maintaining the status quo pendente lite is particularly disfavored and should not be issued unless the facts and law clearly favor the moving party.")

40. Thus, a party requesting a mandatory injunction "carries the burden of showing *clear entitlement* to the relief under the facts and the law." *Justin Industries, Inc. v. Choctaw Securities, L.P.*, 747 F. Supp. 1218, 1220 (N.D. Tex. 1990) (citing *Exhibitors*; emphasis original). In other words, the party bears a "heavy burden." *Id*. at n.5. "Injunctions are extraordinary remedies that are generally not favored … and mandatory injunctions are even less favored than prohibitory injunctions since they compel a person to act rather than simply maintain the status quo." *Id*. As the District Court has held when a party seeks a mandatory injunction prior to trial, it is a "daunting burden of proof." *Arbor Bend Villas Hous. L.P. v. Tarrant County Hous. Fin. Corp.*, 2002 U.S. Dist. LEXIS 10232 at *10 (N.D. Tex. 2002) (emphasis added). As further held by the District Court:

> When a district court's order, albeit in the form of a TRO or preliminary injunction, will finally dispose of the matter in dispute, it is not sufficient for the order to be based on a likelihood of success or balance of hardships, the district court's decision must be correct (insofar as possible on what may be an incomplete record) . . . this heightened showing is also required where the issuance of the injunction would provide the movant with substantially all the relief he or she seeks and where the relief could not then be undone, even if the non-moving party later prevails at trial.

Id. at *9-*10 (internal quotation omitted; quoting case).

41. The Debtor cannot meet this "heavy burden," this "daunting burden of proof," this "rare instance," even without consideration of the serious Constitutional, jurisdictional, and arbitrability issues discussed above.

42. First, the Court cannot order the Advisors to enter into a contract that they have not agreed to enter into and that they are not willing to enter into. They are non-debtor entities. The relief requested by the Debtor is outside the power of any court to issue. And that is what implementing a "plan for the orderly transition of services" necessarily requires: contracting with

employees or NewCo, contracting with software and service providers, contracting with a landlord, etc.

43. Second, the Debtor cannot show a likelihood of success on the merits. Injunctive relief is a remedy, not a cause of action. *See Torres-Aponte v. JP Morgan Chase Bank N.A.*, 639 Fed. Appx. 272, 274 (5th Cir. 2016). In other words, one does not sue for an injunction, but rather sues for an underlying wrong and the injunction aids in the remedying or prevention of that wrong. Setting arbitration and jurisdiction aside, even if the Court assumes that the Debtor will prevail on its declaratory relief that it properly terminated the Shared Services Agreements, and on its monetary claim for unpaid fees, none of those underlying causes of action give any rise, in fact, logic, or law to a Mandatory Injunction ordering the Advisors to implement a transition plan. With respect to section 105(a), as argued throughout, it does not create a substantive remedy. This Court recently labeled an attempt to rely on section 105(a) as a "Hail Mary," wisely and correctly concluding as follows:

> A bankruptcy court's equity power can only be exercised within the confines of the Bankruptcy Code. Section 105 does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity.

In re Senior Care Ctrs. LLC, 611 B.R. 791, 799 (Bankr. N.D. Tex. 2019) (internal quotation omitted). As noted above, because the issue is a mandatory injunction, it is not enough to show a likelihood of success on the merits. The Debtor must be correct. Here, the Debtor's arguments are neither correct nor even have a likelihood of being successful.

44. Third, there is no irreparable injury to the Debtor or its estate. The Debtor complains that it may have to terminate the Shared Services Agreement, although it says that it already has, and it says that it is losing money on the agreements and is concerned about losing more money if it continues providing services under the agreements. But the Advisors do not need

to those services. The Debtor need not lose money. There is no injury there, even if money could ever form the basis of irreparable injury for a mandatory injunction, which it cannot. *See In re Mirant Corp.*, 2004 Bankr. LEXIS 2033 at *10 (Bankr. N.D. Tex. 2004). As for the Debtor's concern that it will be embroiled in litigation, that is not only too hypothetical and speculative, as outlined above with respect to jurisdiction, but is also a conclusory allegation that cannot support an injunction. *See Smithback v. Texas*, 2005 U.S. Distr. LEXIS 5858 *2 (N.D. Tex. 2005) ("Conclusory allegations are not sufficient to support a claim for injunctive relief"). And, even if the Debtor becomes embroiled in litigation notwithstanding the gatekeeper injunction in the plan, the exculpation in the plan, and all of the other protections for the debtor in the plan, then the only damages are monetary damages not qualifying as irreparable harm, especially in the context of a mandatory injunction.

45. Fourth, the balance of equities do not favor the Debtor. The Debtor is asking this Court to order a non-debtor to conduct its business in a particular way. The Advisors are not subject to this Court's jurisdiction, they are not in receivership, they have not shown themselves to be foolish with respect to the conduct of their business, and it is the Debtor who, through its unreasonable refusal to grant Mr. Dondero any access to *his own companies' premises*, has created the situation it now seeks to exploit. It is the Debtor who has acted inequitably. The Advisors are implementing their plan "b." Their retail boards and investors are not complaining. Interfering with their business risks a cascade of interference with the legitimate rights of many others that can only lead to additional litigation and harm.

46. Fifth, the public interest does not support the Mandatory Injunction. It is not the role of the courts to manage non-debtor businesses, or to tell them how to manage those businesses, when no public laws, rules, regulations, contracts, or rights are implicated.

47. Finally, the Advisors have done nothing to merit an extraordinary Mandatory Injunction, other than refusing to enter into the transition services contract the Debtor demanded. They have not failed in their transition, they have not ceased their businesses, they have not violated any duties, they have not violated any court order, they have not interfered with the Debtor, and they have done nothing other than bear the results of the Debtor's own actions; *i.e.* termination of the Shared Services Agreements and refusal to permit Mr. Dondero any access to the premises, the best they could.

48. The Advisors are implementing their transition plan. With all respect to the Court, it is not the Court's business what that plan is. While the Advisors have described their plan above, since they have to respond to the Debtor's allegations, they in no way consent to this Court's approval, disapproval, or anything else of that plan and respectfully submit that any such finding or conclusion would be made without jurisdiction and would be wholly advisory. All that the Advisors need is their historical data and electronic books and records which, as the Shared Services Agreements expressly provide, is their property. They assume that the Debtor will cooperate, and the Debtor has assured them of its cooperation.

49. In December, 2020, worried that the Debtor was unnecessarily selling CLO property, in which they had invested hundreds of millions of dollars, while the actual investors preferred a "hold" strategy, the Advisors and various fuds filed a motion to impose limited controls on the Debtor before it sold CLO property. The movants believed that they were acting in good faith, raising a legitimate concern regarding their own investments. The Court denied that motion, calling it frivolous. The Court ruled as follows:

> I agree that the Movant has wholly failed to meet its burden of proof here today to show the Court, persuade the Court that, as Mr. Morris said, I should essentially tie the hands of the Debtor as a portfolio manager here, as stated. Nothing improper has been alleged. There has been no showing of a statutory right here, or a contractual right here, on the part of the Movants.

Transcript December 16, 2021 at 63:7-13. The Court essentially ruled that the Debtor was entitled to its business judgment as to how it managed its obligations, and it had seen nothing to warrant a departure from this rule.

50. Respectfully, the same should apply here. The Advisors have made their decision, which is to "divorce" from the Debtor. It is their business decision that they have a right to make. What they do thereafter is their business and, if any court or regulator has a say in it, it is not this Court. The Debtor will present no contractual right, no statutory right, to the contrary. Just as the Court found that prior motion frivolous, even if there were legitimate concerns about what the Debtor was doing, so too should the Court find the present Motion just as frivolous as seeking to interfere in the internal business operations of a non-debtor. Indeed, this is now the fourth lawsuit filed by the Debtor against the Advisors in under two months, even as the Debtor labels the Advisors and anyone associated with Mr. Dondero to be vexatious and serial litigants.

VII. PRAYER

WHEREFORE, PREMISES CONSIDERED, the Advisors respectfully request that the Court deny the Motion and grant them such other relief as is appropriate.

RESPECTFULLY SUBMITTED this 22d day of February, 2021.

MUNSCH HARDT KOPF & HARR, P.C.

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Counsel for Highland Capital Management Fund Advisors, L.P., and NexPoint Advisors, L.P.,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on February 22, 2021, a true and correct copy of this document was served electronically by the Court's CM/ECF system on all parties entitled to such notice, including counsel for the Debtor.

/s/ *Davor Rukavina*
Davor Rukavina, Esq.

Appendix Exhibit 100

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 Court[2] 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)t* 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 filed[3] 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 TTTTT, 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 lengths 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, unrebutted 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 Therapuetics* 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 prepetition 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 Lumbe*r, 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 inunction 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 Ballots[10] – 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 Contacts 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 Issuers[12] 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)

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717)
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ZAnnable@HaywardFirm.com:

Counsel for the 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.

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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 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 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. 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 Trust[2]

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 Clamant 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 nay 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.

[Remainder of Page Intentionally Blank]

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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Counsel for the Debtor and Debtor-in-Possession

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

Appendix Exhibit 101

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	Tuesday, February 23, 2021
	9:00 a.m. Docket
Debtor.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 20-3190-sgj**
Plaintiff,	PLAINTIFF'S MOTION FOR ORDER REQUIRING JAMES DONDERO TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THE TRO [48]
v.	
JAMES D. DONDERO,	
Defendant.	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	**Adversary Proceeding 21-3010-sgj**
Plaintiff,	DEBTOR'S EMERGENCY MOTION FOR MANDATORY INJUNCTION REQUIRING THE ADVISORS TO ADOPT AND IMPLEMENT A PLAN FOR THE TRANSITION OF SERVICES BY FEBRUARY 28, 2021 [2]
v.	
HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., et al.,	
Defendants.	

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

WEBEX/TELEPHONIC APPEARANCES:

For the Debtor/Plaintiff: Jeffrey N. Pomerantz
PACHULSKI STANG ZIEHL & JONES, LLP
10100 Santa Monica Blvd.,
13th Floor
Los Angeles, CA 90067-4003
(310) 277-6910

service was fulsome, we didn't think we were getting the service that was under the agreements, and the service had dropped off.

And in particular, the -- there was -- there were conflicts involved between the Debtor and between the service providers, particularly legal and compliance services, given all that was going on. And there were a number of matters they couldn't participate on. Historically used their legal and compliance services significantly.

And that, in addition to discovering that there were a number of employees we were reimbursing for in payroll reimbursement agreements that were no longer employed by the Debtor, yet we were paying for the full services.

So, with that, we had discussions internally about if and when or how we could terminate them, and --

Q Let me stop you.

A -- termination --

Q Let me stop you. Ultimately, I take it, the Advisors never tried to terminate these shared services agreements, correct?

A That's correct.

Q Why?

A There was an order specifically that Jim or anybody related to Jim could not terminate an agreement with the Debtor. And he specifically pointed that out to us when we

discussed this, and so we knew we couldn't take action. There was also -- counsel discussed that the stay with the Court --

Q Let's not -- let's not talk about counsel. Let's not talk about counsel, --

A Sorry.

Q -- Mr. Norris. Okay. But the point is, at least as of last October, would you agree, that the notion that these agreements would be terminated by one or the other parties was known to you?

A Yeah. So, the -- we expected that at some point there would need to be a termination. I -- that was discussed. And there was a plan, and I'm sure we'll talk about it, but a plan to transition the employees and the services to a new company and to new service providers. And I think both sides had been working for quite a while to ensure there was a smooth transition, and we expected that to happen. But there would need to be a termination of that agreement -- either a transfer of that agreement or a termination to a new company that would be providing new services, or transferred those services directly to us.

Q So I'd like you to pick what word you'd like to use, but what I've called a backup plan in my objection or what Jim called a divorce plan in his testimony, how -- what shall we call this backup plan?

A All-contingency plannings. Or we'll call it backup plan.

but the Court would expect there to be a cost if it extends past February 28th. And again, the Court would consider that in a further hearing, how much cost should be imposed on the Advisors. But the advisors have represented to me through Mr. Norris it's easy, it can be accomplished easily, so therefore I would think it could happen between now and the 28th, and if it does, no cost imposed on anyone.

I will further find that the Advisors have represented and the Court therefore finds that there is an operating plan in place for the Advisors to continue to operate uninterrupted beyond today. And again, the only thing I would envision that needs to happen between today and February 28th is the access to data.

So, having made these findings, the Court believes that the request for a mandatory injunction is moot and is therefore denied.

Are there any questions? Mr. Morris, I want you to be the scrivener, and, of course, run it by Mr. Rukavina. But are there any questions or concerns about what I've just articulated?

MR. MORRIS: I just have one, Your Honor.

THE COURT: Uh-huh.

MR. MORRIS: You made reference to rejection of the contract. From our perspective, it's not rejection. We don't want to open this up to a rejection claim of any kind. It

to really say anything lest I get myself in trouble. But I thank you for your time today.

THE COURT: All right. Well, they are what they are, and I hope we're not in an argument about that down the road. But it seems like my hopes are always dashed when I want things to be worked out.

I don't want you to think my calm demeanor means I am a happy camper. I am not. I am beyond annoyed. I mean, I can't even begin to guesstimate how many wasted hours were spent on the drafting Option A, Option B. Wait. Let me pull up the exact words. Mr. Norris confirming, We withdrew Option B after the Debtor accepted it.

I mentioned fee-shifting once before in a different context, and, of course, we haven't even gotten to the motion for a show cause order declaring Mr. Dondero in contempt. I don't know if the lawyers fully appreciate how this looks. Mr. Rukavina, you said that I have formed opinions that you don't think are fair and made comments about vexatious litigation and whatnot. But while I continue, I promise you, to have an open mind, it is days like this that make me come out with statements that Mr. Dondero, repeating his own words, apparently, he's going to burn the house down if he doesn't get his baby back.

I mean, it seems so obviously transparent that he's just driving the legal fees up. It's as though he doesn't want the

creditors to get anything, is the way this looks. If he wants me to have a different impression, then he needs to start behaving differently. I mean, I can't even imagine how many hundreds of thousands of dollars of legal fees were probably spent the past two weeks on Option A, Option B, and all the different sub-agreements and whatnot. And as recently as Friday afternoon, the K&L Gates lawyer saying we have a deal, and then, oh, wait, maybe not, maybe we do, maybe we don't. And then Mr. Dondero acting like he had no clue what the K&L Gates lawyers were saying as far as we have a deal. And Mr. Norris distancing himself from having seen any of that, and I didn't have power. You know, I'm sure he had a cell phone, like the rest of us, that gets emails. I'm making a supposition. I shouldn't make that. But it just feels like sickening games.

And again, if this keeps on, if this keeps on, one day, one day, there may be an enormous attorney fee-shifting order. And, of course, I would have to find bad faith, and I wouldn't be surprised at all if I get there.

So I don't know if Mr. Dondero is listening. I suspect, if he is, he doesn't care much. But I am --

MR. DONDERO: I'm on the line, Judge.

THE COURT: Okay.

MR. DONDERO: I'm on the line.

THE COURT: I'm glad you're on the line. I cannot

overstate how very annoyed I am by hearing all these hours of testimony and to feel like none of it was necessary. None of it was necessary. Okay? There could have been a consensual deal --

MR. DONDERO: Judge, you have to pay attention -- Judge, you have to pay attention to what's going on, okay?

THE COURT: I am --

MR. DONDERO: When I was president of Highland, --

THE COURT: -- razor-sharp focused on what is going on. Okay? I read every piece of paper. I listen to every sentence of testimony. And what is going on --

MR. DONDERO: Okay. How about this, Your Honor?

THE COURT: -- is an enormous waste of parties and lawyer time and resources. People need to get their eye on the ball. Well, certain people do have their eye on the ball, but certain people do not. Okay? So we're done. You've got your divorce now. Okay? And if the operating plan is all shored up, as Mr. Norris testified, it sounds like you're in good shape. All right?

Mr. Morris, I'll look for the order from you.

MR. MORRIS: Thank you, Your Honor.

THE CLERK: All rise.

(Pause.)

THE COURT: Oh, Michael?

(Court confers with Clerk.)

THE CLERK: All rise.

(Proceedings concluded at 4:23 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 **02/24/2021**

_____ _____

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

Appendix Exhibit 102

Monthly Operating Report
ACCRUAL BASIS

CASE NAME:	Highland Capital Management
CASE NUMBER:	19-34054
JUDGE:	Stacey Jernigan

UNITED STATES BANKRUPTCY COURT

NORTHERN & EASTERN DISTRICTS OF TEXAS

REGION 6

MONTHLY OPERATING REPORT

MONTH ENDING: January (MONTH) 2021 (YEAR)

IN ACCORDANCE WITH TITLE 28, SECTION 1746, OF THE UNITED STATES CODE, I DECLARE UNDER PENALTY OF PERJURY THAT I HAVE EXAMINED THE FOLLOWING MONTHLY OPERATING REPORT (ACCRUAL BASIS-1 THROUGH ACCRUAL BASIS-7) AND THE ACCOMPANYING ATTACHMENTS AND, TO THE BEST OF MY KNOWLEDGE, THESE DOCUMENTS ARE TRUE, CORRECT, AND COMPLETE. DECLARATION OF THE PREPARER (OTHER THAN RESPONSIBLE PARTY) IS BASED ON ALL INFORMATION OF WHICH PREPARER HAS ANY KNOWLEDGE.

RESPONSIBLE PARTY:

ORIGINAL SIGNATURE OF RESPONSIBLE PARTY — Chief Restructuring Officer/ Chief Executive Officer (TITLE)

James Seery
PRINTED NAME OF RESPONSIBLE PARTY — 3-15-21 (DATE)

PREPARER:

ORIGINAL SIGNATURE OF PREPARER — Chief Financial Officer (TITLE)

David Klos
PRINTED NAME OF PREPARER — 3/15/21 (DATE)

Monthly Operating Report
ACCRUAL BASIS-1

CASE NAME:	Highland Capital Management, LP
CASE NUMBER:	19-12239-CSS

Comparative Balance Sheet [7]
(in thousands)

	10/15/2019	12/31/2020 [6]	1/31/2021
Assets			
Cash and cash equivalents	2,529	12,651	10,651
Investments, at fair value [3][8]	232,620	109,211	142,976
Equity method investees [3]	161,819	103,174	105,293
Management and incentive fee receivable	2,579	2,461	2,857
Fixed assets, net	3,754	2,594	2,518
Due from affiliates [1]	151,901	152,449	152,538
Reserve against notes recievable		(61,039)	(61,167)
Other assets	11,311	8,258	8,651
Total assets	$ 566,513	$ 329,758	$ 364,317
Liabilities and Partners' Capital			
Pre-petition accounts payable [4]	1,176	1,077	1,077
Post-petition accounts payable [4]	-	900	3,010
Secured debt:			
Frontier	5,195	5,195	5,195
Jefferies	30,328	-	-
Accrued expenses and other liabilities [4]	59,203	60,446	49,445
Accrued re-organization related fees [5]	-	5,795	8,944
Class 8 general unsecured claims [2]	73,997	73,997	267,607
Partners' capital	396,614	182,347	29,039
Total liabilities and partners' capital	$ 566,513	$ 329,758	$ 364,317

[1] Includes various notes receivable at carrying value, except note due from Hunter Mountain Investment Trust which is fully reserved against ($61M reserve). Fair value has not been determined with respect to any of the notes.

[2] Beginning 1/31/2021, accrual reflects known settlements with material general unsecured claimholders. Amounts prior to 1/31/2021 reflect uncontested portion of Redeemer claim less appplicable offsets.

[3] Mark to market gains/(losses) on investments include pricing updates for publicly traded securities and other positions with readily available market price information. Certain limited partnership interests normally marked to a NAV statement have not been updated as of period end as statements are generally available on a one-month lag.

[4] Note on accruals: expenses recorded in Accounts Payable and Accrued Expenses and Other Liabilities reflect invoices recorded through accounts payable, legal invoice accruals, and normal course operating accruals, but do not reflect estimates for other incurred, but not yet received invoices. For balance sheet dates other than the Petition Date, amounts include both pre-petition and post-petition liabilities.

[5] Beginning December 31st, 2019, Debtor accrued for post-petition re-organization fees based upon an estimate of fees incurred to date.

[6] All balances are preliminary, unaudited, and subject to further year-end closing entries pursuant to the normal year-end closing process. As a result, balances for subsequent months have and will fluctuate.

[7] Does not include Class 9 claims, for which recoveries are not currently expected.

[8] Amount as of 1/31/2021 reflects value of shares of a private fund received pursuant to a global settlement with a claimholder.

Monthly Operating Report
ACCRUAL BASIS-2

CASE NAME:	Highland Capital Management, LP
CASE NUMBER:	19-12239-CSS

Income Statement [1]
(in thousands)

	Date 10/16/19 - 10/31/19	Filing to Year Ended [4] 2019	Month ended [4] 12/31/2020	Filing to Year Ended [4] 2020	Month ended [4] 1/31/2021	Filing to date [4]
Revenue:						
Management fees	975	4,528	1,504	24,145	1,331	25,476
Shared services fees	283	1,588	605	9,070	603	9,674
Other income	99	1,582	3,022	8,395	6	8,401
Total operating revenue	1,357	7,697	5,131	41,611	1,940	43,551
Operating expenses:						
Compensation and benefits	997	1,498	3,106	22,143	(11,184) [5]	10,960
Professional services	256	64	669	3,326	135	3,461
Investment research and consulting	10	266	128	1,097	2	1,099
Marketing and advertising expense	-	370	(22)	441	-	441
Depreciation expense	82	244	76	1,168	76	1,244
Bad debt expense reserve	-	8,410	128	9,968	128	10,096
Other operating expenses	201	1,265	792	6,439	295	6,734
Total operating expenses	1,545	12,118	4,877	44,583	(10,548)	34,035
Operating income/(loss)	(188)	(4,421)	255	(2,972)	12,488	9,516
Other income/expense:						
Interest income	250	1,230	456	7,058	443	7,501
Interest expense	(107)	(286)	(22)	(740)	(22)	(762)
Reserve against notes receivable	-	(57,963)	-	(57,963)	-	(57,963)
Re-org related expenses [2]	-	(5,547)	(6,619)	(39,495)	(2,480)	(41,975)
Independent director fees	-	-	(420)	(2,607)	(210)	(2,817)
Other income/expense	32	32	(1)	(171)	(168,396) [6]	(168,567)
Total other income/expense	175	(62,534)	(6,607)	(93,919)	(170,664)	(264,583)
Net realized gains/(losses) on investments	339	618	896	(29,134)	(360)	(29,494)
Net change in unrealized gains/(losses) of investments [3]	2,654	(955)	8,073	(28,311)	4,675	(23,636)
	2,993	(337)	8,969	(57,445)	4,315	(53,130)
Net earnings/(losses) from equity method investees [3]	(20)	14,918	10,441	(63,484)	-	(63,484)
Net income/(loss)	$ 2,959	$ (52,374)	$ 13,058	$ (217,821)	$ (153,861)	$ (371,681)

(1) Note on accruals: expenses recorded in the Income Statement reflect invoices recorded through accounts payable, legal invoice accruals, and normal course operating accruals, but do not reflect estimates for other incurred, but not yet received invoices.

(2) Debtor funded various retainers totaling $790k prior to the petition date, which were entirely expensed as of the petition date.

(3) Mark to market gains/(losses) on investments include pricing updates for publicly traded securities and other positions with readily available market price information. Certain limited partnership interests normally marked to a NAV statement have not been updated as of period end as statements are generally available on a one-month lag.

(4) All balances are preliminary, unaudited, and subject to further year-end closing entries pursuant to the normal year-end closing process. As a result, operating results will change as these entries are made.

(5) Reflects the termination of the 2005 Bonus Plan.

(6) Reflects known settlements with material general unsecured claimholders.

Monthly Operating Report
ACCRUAL BASIS-3A

CASE NAME:	Highland Capital Management
CASE NUMBER:	19-34054

CASH RECEIPTS AND DISBURSEMENTS	FILING TO YEAR END 2019	QUARTER 1 2020	QUARTER 2 2020	QUARTER 3 2020	QUARTER 4 2020	JANUARY 2021
1. CASH - BEGINNING OF MONTH	$ 2,554,230	$ 9,501,409	$ 12,532,467	$ 14,993,872	$ 5,887,813	$ 12,650,505
RECEIPTS FROM OPERATIONS						
2. OTHER OPERATING RECEIPTS	$ 1,862,757	$ 1,379,338	$ 2,983,221	$ 2,259,736	$ 2,786,320	$ 452,540
3 MANAGEMENT FEES AND OTHER RELATED RECEIPTS	$ 3,156,742	$ 7,555,297	$ 6,179,437	$ 5,575,680	$ 6,972,357	$ 1,104,574
COLLECTION OF ACCOUNTS RECEIVABLE						
4 PREPETITION	$ 3,593,108	$ 76,569	$ 3,727	$ -	$ 197,173	$ -
5 POSTPETITION [1]	$ -	$ -	$ -	$ -	$ -	$ -
6 TOTAL OPERATING RECEIPTS	$ 8,612,608	$ 9,011,204	$ 9,166,385	$ 7,835,415	$ 9,955,850	$ 1,557,114
NON-OPERATING RECEIPTS						
7 THIRD PARTY FUND ACTUAL/EXPECTED DISTRIBUTIONS	$ 423,468	$ 18,992,786	$ 797,571	$ 610,254	$ 2,034,200	$ 500,842
8 DIVS, PAYDOWNS, MISC FROM INVESTMENT ASSETS	$ 1,338,069	$ 477,479	$ 74,376	$ 5,311	$ 2,989,760	$ 905
9 OTHER (ATTACH LIST)	$ 3,390,286	$ 1,407,103	$ 10,010,000	$ 8,817,099	$ 7,075,476	$ 2,759,150
10 TOTAL NON-OPERATING RECEIPTS	$ 5,151,822	$ 20,877,369	$ 10,881,947	$ 9,432,664	$ 12,099,436	$ 3,260,896
11 TOTAL RECEIPTS	$ 13,764,430	$ 29,888,573	$ 20,048,331	$ 17,268,080	$ 22,055,287	$ 4,818,010
12 TOTAL CASH AVAILABLE				$ 32,261,951	$ 27,943,100	$ 17,468,515
OPERATING DISBURSEMENTS						
13 PAYROLL, BENEFITS, AND TAXES + EXP REIMB	$ 3,776,446	$ 8,825,042	$ 4,886,314	$ 8,806,880	$ 4,280,805	$ 1,612,847
14 SINGAPORE SERVICE FEES	$ 95,118	$ 58,129	$ 2,965	$ -	$ 10,547	$ -
15 HCM LATIN AMERICA	$ 200,000	$ 100,000	$ -	$ -	$ -	$ -
16 THIRD PARTY FUND CAPITAL CALL OBLIGATION	$ 1,426,987	$ 7,812,469	$ 3,087,163	$ 979,631	$ 1,741,089	$ 909,478
17 UTILITIES	$ -	$ -	$ -	$ -	$ -	$ -
18 INSURANCE	$ -	$ 533,940	$ 376,376	$ 163,400	$ -	$ -
19 INVENTORY PURCHASES	$ -	$ -	$ -	$ -	$ -	$ -
20 VEHICLE EXPENSES	$ -	$ -	$ -	$ -	$ -	$ -
21 TRAVEL	$ -	$ -	$ -	$ -	$ -	$ -
22 ENTERTAINMENT	$ -	$ -	$ -	$ -	$ -	$ -
23 REPAIRS & MAINTENANCE	$ -	$ -	$ -	$ -	$ -	$ -
24 SUPPLIES	$ -	$ -	$ -	$ -	$ -	$ -
25 ADVERTISING	$ -	$ -	$ -	$ -	$ -	$ -
26 OTHER (ATTACH LIST)	$ 1,318,700	$ 3,283,898	$ 3,195,054	$ 3,633,331	$ 2,604,301	$ 1,386,246
27 TOTAL OPERATING DISBURSEMENTS	$ 6,817,251	$ 20,613,478	$ 11,547,870	$ 13,583,243	$ 8,636,743	$ 3,908,571
REORGANIZATION EXPENSES						
28 PROFESSIONAL FEES	$ -	$ 5,460,546	$ 5,572,032	$ 11,551,682	$ 5,775,852	$ 2,698,968
29 U.S. TRUSTEE FEES	$ -	$ 68,173	$ 167,025	$ 277,924	$ 250,000	$ -
30 OTHER (ATTACH LIST)	$ -	$ 715,317	$ 300,000	$ 961,289	$ 630,000	$ 210,000
31 TOTAL REORGANIZATION EXPENSES	$ -	$ 6,244,037	$ 6,039,057	$ 12,790,896	$ 6,655,852	$ 2,908,968
32 TOTAL DISBURSEMENTS	$ 6,817,251	$ 26,857,515	$ 17,586,927	$ 26,374,138	$ 15,292,594	$ 6,817,539
33 NET CASH FLOW	$ 6,947,179	$ 3,031,058	$ 2,461,404	$ (9,106,059)	$ 6,762,692	$ (1,999,529)
34 CASH - END OF MONTH	$ 9,501,409	$ 12,532,467	$ 14,993,872	$ 5,887,813	$ 12,650,505	$ 10,650,976

1 All postpetition receipts are included in line 3, Management Fees and Other Related Receipts.

Monthly Operating Report
ACCRUAL BASIS-3B

CASE NAME:	Highland Capital Management
CASE NUMBER:	19-34054

OPERATING RECEIPTS - OTHER

Date	Amount	Type
1/14/2021	1,406,111.92	Nexpoint Advisors LP loan payment
1/21/2021	201,994.38	HCRE loan payment
1/21/2021	463,816.71	HCRE loan payment
1/21/2021	181,227	HCMSI loan payment
1/29/2021	506,000	Ohio State Life Insurance - duplicate receipt returned 2/1/2021
	2,759,149.84	

OPERATING DISBURSMENTS - OTHER

Date	Amount	Vendor
1/4/2021	39,231	Third Party Consultant
1/4/2021	164,584	Crescent TC Investors LP
1/6/2021	6,182	Level 3 Communic
1/8/2021	10,326	Carey Olsen
1/8/2021	204	Ace Parking Lot 3749
1/8/2021	233	UPS Small Package
1/8/2021	630	CDW Direct LLC
1/8/2021	2,824	Third Party Consultant
1/8/2021	5,111	ICE Data Pricing Ref Data LLC
1/8/2021	8,901	CCH Incorporated
1/8/2021	33,760	Houlihan Lokey Financial Advisors
1/8/2021	61,082	Moody's Analytics, Inc.
1/8/2021	25.00	East West bank charge
1/11/2021	129,752	Robert Half International, Inc.
1/15/2021	300	Pitney Bowes Bank Inc- Reserve Acct
1/15/2021	6,133	Third Party Consultant
1/19/2021	121,975	STATE COMPTRLR TEXNET
1/20/2021	498	ANALYSIS ACTIVITY FOR 12/20
1/20/2021	2,168	Zayo group
1/22/2021	46,288	AAA/American Arbitration Assoc
1/22/2021	207,480	Hunton Andrews Kurth LLP Operating
1/22/2021	138	AT&T
1/22/2021	252	UPS Small Package
1/22/2021	483	Prostar Services Inc.
1/22/2021	1,209	OPTIONS PRICE REPORTING AUTHORITY
1/22/2021	1,761	Oak Cliff Office Supply & Printing
1/22/2021	2,047	NYSE Market (DE), Inc.
1/22/2021	2,168	Compass Group USA dba Canteen
1/22/2021	2,466	Thomson Reuters West
1/22/2021	2,845	Dawn US Holdings LLC
1/22/2021	4,060	Concur Technologies Inc
1/22/2021	5,885	ABM
1/22/2021	6,118	Willis Towers Watson Insurance Svcs
1/22/2021	11,693	Flexential Colorado Corp
1/22/2021	18,042	Siepe Software LLC
1/22/2021	29,758	Centroid Systems, Inc.
1/22/2021	35,200	Intex Solutions, Inc.
1/22/2021	120,412	Robert Half International, Inc.
1/25/2021	62,311	Carey Olsen
1/27/2021	2	KAUFMAN CO TAX
1/27/2021	10,066	Carey Olsen
1/27/2021	11,586	KAUFMAN CO TAX W
1/29/2021	33,955	Visa Card Payment
1/29/2021	5,047	Liberty Life Assurance Co of Boston
1/29/2021	11,000	Third Party Consultant
1/29/2021	37,615	HE Asante
1/29/2021	122,442	HE Peoria Place
	1,386,246	

REORGANIZATION EXPENSES - OTHER

Date	Amount	Description
1/4/2021	30,000	Dubel & Associates, L.L.C.
1/4/2021	150,000	J.P. Seery & Co. LLC
1/4/2021	30,000	Nelms and Associates
	210,000	

Monthly Operating Report
ACCRUAL BASIS-4

CASE NAME:	Highland Capital Management
CASE NUMBER:	19-34054

MGMT FEE RECEIVABLE AGING [2]		October [3]	November [3]	December [3]	January [3]
1.	0-30	$4,703,241	$902,434	$2,460,863	$2,857,175
2.	31-60				
3.	61-90				
4.	91+				
5.	TOTAL MGMT FEE RECEIVABLE	$ 4,703,241	$ 902,434	$ 2,460,863	$ 2,857,175
6.	AMOUNT CONSIDERED UNCOLLECTIBLE				
7.	MGMT FEE RECEIVABLE (NET)	$ 4,703,241	$ 902,434	$ 2,460,863	$ 2,857,175

AGING OF POSTPETITION TAXES AND PAYABLES — MONTH: January 2021

TAXES PAYABLE		0-30 DAYS	31-60 DAYS	61-90 DAYS	91+ DAYS	TOTAL
1.	FEDERAL					$0
2.	STATE					$0
3.	LOCAL					$0
4.	OTHER (ATTACH LIST)					$0
5.	TOTAL TAXES PAYABLE	$0	$0	$0	$0	$0
6.	ACCOUNTS PAYABLE	$816,156	$1,840,699	$4,880	$348,093	$3,009,827

STATUS OF POSTPETITION TAXES [1] — MONTH: January 2021

FEDERAL		BEGINNING TAX LIABILITY	AMOUNT WITHHELD AND/ OR ACCRUED	AMOUNT PAID	ENDING TAX LIABILITY
1.	WITHHOLDING				$0
2.	FICA-EMPLOYEE				$0
3.	FICA-EMPLOYER				$0
4.	UNEMPLOYMENT				$0
5.	INCOME				$0
6.	OTHER (ATTACH LIST)				$0
7.	TOTAL FEDERAL TAXES	$0	$0	$0	$0
STATE AND LOCAL					
8.	WITHHOLDING				$0
9.	SALES				$0
10.	EXCISE				$0
11.	UNEMPLOYMENT				$0
12.	REAL PROPERTY	$0	$0	$0	$0
13.	PERSONAL PROPERTY				$0
14.	OTHER (ATTACH LIST)				$0
15.	TOTAL STATE & LOCAL	$0	$0	$0	$0
16.	TOTAL TAXES	$0	$0	$0	$0

1 The Debtor funds all state and federal employment taxes to Paylocity, who files all required federal and state related employment reports and withholdings.
2 Aging based on when management fee is due and payable.
3 All balances are preliminary, unaudited, and subject to further year-end closing entries pursuant to the normal year-end closing process.

Monthly Operating Report
ACCRUAL BASIS-5

CASE NAME:	Highland Capital Management
CASE NUMBER:	19-34054

MONTH: January 2021

BANK RECONCILIATIONS

		Account #1	Account #2	Account #3	Account #4 [2]	Account #5	Account #6	
A.	BANK:	East West Bank	East West Bank	Maxim Group	Jefferies LLC	Nexbank	East West Bank	TOTAL
B.	ACCOUNT NUMBER:	x4686	x4693	x1885	x0932	x5891	x5848	
C.	PURPOSE (TYPE):	Operating	Insurance	Brokerage	Brokerage	CD	Prepaid Card	
1.	BALANCE PER BANK STATEMENT [1]	$ 10,265,008	$ 147,422	$ 30	$ -	$ 138,448	$ 100,068	$ 10,650,976
2.	ADD: TOTAL DEPOSITS NOT CREDITED							$ -
3.	SUBTRACT: OUTSTANDING CHECKS							$ -
4.	OTHER RECONCILING ITEMS							$ -
5.	MONTH END BALANCE PER BOOKS	$ 10,265,008	$ 147,422	$ 30	$ -	$ 138,448	$ 100,068	$ 10,650,976
6.	NUMBER OF LAST CHECK WRITTEN	100510	n/a	n/a	n/a	n/a	n/a	

INVESTMENT ACCOUNTS

	BANK, ACCOUNT NAME & NUMBER	DATE OF PURCHASE	TYPE OF INSTRUMENT	PURCHASE PRICE				CURRENT VALUE
7.								
8.								
9.								
10.								
11.	TOTAL INVESTMENTS			$0				$0

CASH

12.	CURRENCY ON HAND	$0
13.	**TOTAL CASH - END OF MONTH**	$ 10,650,976

1 Account x6342 is now closed.
2 Account x0932 does not reflect any balances held in money market funds

Monthly Operating Report
ACCRUAL BASIS-6

CASE NAME:	Highland Capital Management
CASE NUMBER:	19-34054

MONTH: January 2021

PAYMENTS TO INSIDERS AND PROFESSIONALS

INSIDERS

	NAME	TYPE OF PAYMENT	AMOUNT PAID	TOTAL PAID POST PETITION
1	Frank Waterhouse	Salary	$33,333	$493,750
2	Frank Waterhouse	Expense Reimbursement	$417	$7,405
3	Scott Ellington	Salary + Unused Vacation	$92,223	$635,973
4	Scott Ellington	Expense Reimbursement	$0	$9,327
5	James Dondero	Salary	$0	$129,972
6	James Dondero	Expense Reimbursement	$0	$16,918
7	Thomas Surgent	Salary	$33,333	$516,667
8	Thomas Surgent	Expense Reimbursement	$488	$10,908
9	Trey Parker	Salary	$0	$131,250
10	Trey Parker	Expense Reimbursement	$0	$6,212
	TOTAL PAYMENTS TO INSIDERS		$159,795	$1,958,381

PROFESSIONALS[2]

	NAME	DATE OF MONTHLY FEE APPLICATION	AMOUNT APPROVED	AMOUNT PAID	TOTAL PAID TO DATE	TOTAL INCURRED & UNPAID
1.	Kurtzman Carson Consultants LLC		75,183	75,183	788,804	239,926
2.	Sidley Austin LLP		778,408	778,408	7,997,559	849,950
3.	Young Conaway Stargatt & Taylor LLP				281,156	-
4.	FTI Consulting, Inc.		378,880	378,880	4,736,818	441,178
5.	Pachulski Stang Ziehl & Jones LLP		1,285,238	1,285,238	11,847,271	3,645,666
6	Hayward & Associates PLLC		16,465	16,465	320,772	-
7	Development Specialists, Inc.				3,077,065	756,820
8	Foley & Lardner LLP		164,795	164,795	629,088	-
9	Mercer (US) Inc.				170,284	-
10	Wilmer Cutler Pickering Hale and Dorr LLP				680,411	-
11	Meta-e Discovery LLC				525,384	-
	TOTAL PAYMENTS TO PROFESSIONALS			2,698,968	31,054,612	5,933,540

2 Does not include payments to ordinary course professionals.

POSTPETITION STATUS OF SECURED NOTES, LEASES PAYABLE AND ADEQUATE PROTECTION PAYMENTS

	NAME OF CREDITOR	SCHEDULED MONTHLY PAYMENTS DUE	AMOUNTS PAID DURING MONTH	TOTAL UNPAID POSTPETITION
1.	Crescent TC Investors LP (rent portion only)	130,364	130,364	-
2.				
3.				
4.				
5.				
6.	TOTAL	130,364	$130,364	$0

Monthly Operating Report

ACCRUAL BASIS-7

CASE NAME:	Highland Capital Management
CASE NUMBER:	19-34054

MONTH: January 2021

QUESTIONNAIRE

	YES	NO
1. HAVE ANY ASSETS BEEN SOLD OR TRANSFERRED OUTSIDE THE NORMAL COURSE OF BUSINESS THIS REPORTING PERIOD?		x
2. HAVE ANY FUNDS BEEN DISBURSED FROM ANY ACCOUNT OTHER THAN A DEBTOR IN POSSESSION ACCOUNT?		x
3. ARE ANY POSTPETITION RECEIVABLES (ACCOUNTS, NOTES, OR LOANS) DUE FROM RELATED PARTIES?	x	
4. HAVE ANY PAYMENTS BEEN MADE ON PREPETITION LIABILITIES THIS REPORTING PERIOD?		x
5. HAVE ANY POSTPETITION LOANS BEEN RECEIVED BY THE DEBTOR FROM ANY PARTY?		x
6. ARE ANY POSTPETITION PAYROLL TAXES PAST DUE?		x
7. ARE ANY POSTPETITION STATE OR FEDERAL INCOME TAXES PAST DUE?		x
8. ARE ANY POSTPETITION REAL ESTATE TAXES PAST DUE?		x
9. ARE ANY OTHER POSTPETITION TAXES PAST DUE?		x
10. ARE ANY AMOUNTS OWED TO POSTPETITION CREDITORS DELINQUENT?		x
11. HAVE ANY PREPETITION TAXES BEEN PAID DURING THE REPORTING PERIOD?		x
12. ARE ANY WAGE PAYMENTS PAST DUE?		x

IF THE ANSWER TO ANY OF THE ABOVE QUESTIONS IS "YES," PROVIDE A DETAILED EXPLANATION OF EACH ITEM. ATTACH ADDITIONAL SHEETS IF NECESSARY.

3 Debtor generates fee income and other receipts from various related parties in normal course, see cash management motion for further discussion.

INSURANCE

	YES	NO
1. ARE WORKER'S COMPENSATION, GENERAL LIABILITY AND OTHER NECESSARY INSURANCE COVERAGES IN EFFECT?	x	
2. ARE ALL PREMIUM PAYMENTS PAID CURRENT?	x	
3. PLEASE ITEMIZE POLICIES BELOW.		

IF THE ANSWER TO ANY OF THE ABOVE QUESTIONS IS "NO," OR IF ANY POLICIES HAVE BEEN CANCELLED OR NOT RENEWED DURING THIS REPORTING PERIOD, PROVIDE AN EXPLANATION BELOW. ATTACH ADDITIONAL SHEETS IF NECESSARY.

INSTALLMENT PAYMENTS

TYPE OF POLICY	CARRIER	PERIOD COVERED	PAYMENT AMOUNT & FREQUENCY

Appendix Exhibit 103

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Counsel for Movants

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.	)	
	)	

JAMES DONDERO, HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., NEXPOINT ADVISORS, L.P., THE DUGABOY INVESTMENT TRUST, THE GET GOOD TRUST, and NEXPOINT REAL ESTATE PARTNERS, LLC, F/K/A HCRE PARTNERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY'S BRIEF IN SUPPORT OF THEIR MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

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TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware limited liability company (collectively, "Movants") file this Brief in Support of their Motion to Recuse (the "Motion") Pursuant to 28 U.S.C. § 455[1] and would, in support thereof, respectfully show the Court as follows:

I. INTRODUCTION

1. Brought with reluctance, this Motion is the necessary result of the undeniable animus that the Presiding Judge (hereinafter, the "Court") has developed against James Dondero ("Mr. Dondero") and the resulting prejudicial effect of that animus on Mr. Dondero, The Dugaboy Trust, The Get Good Trust (collectively, the "Trusts") and any entity the Court deems connected to him or under his control (collectively, the "Affected Entities").[2] While the Court has presided over many issues in this bankruptcy, numerous adversary proceedings and contested matters involving Mr. Dondero and the Affected Entities remain, in which, for the reasons described herein, the Court's impartiality can be reasonably questioned.

2. Importantly, the Court has essentially acknowledged the foundation of this Motion already—that: the Court formed negative opinions of Mr. Dondero in a prior bankruptcy; those opinions have carried into *this* bankruptcy; and, despite best efforts, the Court has been unable to extricate those opinions from its mind. Moreover, the record in this bankruptcy reflects that the Court's negative opinions of Mr. Dondero have resulted in, if not actual bias against Mr. Dondero

[1] 28 U.S.C. § 455 has been made applicable to bankruptcy judges under FED. R. BANKR. P. 5004.
[2] The definition of the Affected Entities includes the entities defined as "the Advisors" and "the Retail Funds" below.

and the Affected Entities, the undeniable perception of bias against Mr. Dondero and the Affected Entities that impair the ability of Mr. Dondero (and the Affected Entities) to preserve their legal rights. Specifically, among other things, the record reflects that the Court has:

(a) repeatedly made statements demonstrating the Court's unfavorable opinions about Mr. Dondero;

(b) declared that Mr. Dondero (and, by implication, the Affected Entities and each of their licensed attorneys) are vexatious litigants based on actions taken by Mr. Dondero and the Affected Entities to: (i) defend lawsuits and motions filed against them; (ii) assert valid legal positions; and/or (iii) preserve legal rights, including on appeal;

(c) concluded that any entity the Court deems connected to or controlled by Mr. Dondero (*i.e.*, the Affected Entities) is essentially no more than a tool of Mr. Dondero, without evidence being introduced that the corporate status of these entities should be disregarded or that they constitute a single business enterprise;[3]

(d) summarily and/or preemptively disregarded the testimony of any witness who would testify in favor of Mr. Dondero or any of the Affected Entities, without evidentiary support, as "under [Mr. Dondero's] control" and, if the witness has any connection to Mr. Dondero, *per se* not credible.

3. At the end of the day, even assuming, *arguendo*, that the Court's animus toward Mr. Dondero were justified based upon the Court's experience in the *Acis* Bankruptcy, **this Motion would be no less necessary** to safeguard the impartiality that Mr. Dondero and the Affected Entities are entitled to receive as litigants in *these* bankruptcy and adversary proceedings—regardless of Mr. Dondero's history with the Court.[4] Consequently, based on the facts stated herein and the trajectory they suggest, the only way to ensure that this required impartiality (and, of equal

[3] Specifically, the evidentiary record does not reflect, *e.g.*, that: (a) the corporate formalities have been ignored for the entities; (b) their corporate property has not been kept separate and apart; or (c) Mr. Dondero uses the companies for personal purposes.

[4] Notably, the Affected Entities' investment base includes public investors beyond Mr. Dondero.

importance, the public perception of same) exists going forward is through recusal of this Court.

II. BACKGROUND

A. The risk of prejudice to Mr. Dondero in this Court has been apparent since this Bankruptcy's inception in Delaware, including by Debtor itself.

4. On October 16, 2019, the Debtor in this proceeding, Highland Capital Management, L.P. ("Highland" or "Debtor"), filed bankruptcy in Delaware (the "*Highland* Bankruptcy"). Debtor's counsel, Jeff Pomerantz, admitted that the bankruptcy was filed in Delaware in order to give Debtor, including its management, a "fresh start."[5] Shortly thereafter, however, the unsecured creditor's committee (the "UCC") moved to transfer the matter to the Northern District of Texas (the "Motion to Transfer").

5. During the December 2, 2019 hearing on the Motion to Transfer, while the UCC argued that transfer to this Court was appropriate because this Court was further along in the "learning curve" than the Delaware Bankruptcy Court due to this Courts prior presiding over the bankruptcy of *Acis Capital Management, L.P.* ("Acis") (the "*Acis* Bankruptcy"),[6] Mr. Pomerantz expressly acknowledged that the UCC's *actual* motive in seeking transfer to this Court was this Court's pre-existing negative views of Debtor's management, including Mr. Dondero:

> However -- Your Honor pointed to this at the beginning, in mentioning comments about forum-shopping -- the committee and Acis are really being disingenuous, and they have not told you the real reason that they want the case before Judge Jernigan.[7] … And it's not because she's familiar with this debtor's business, this

[5] December 3, 2019 Transcript - Motion to Transfer, at 78:21-23 [App. 0078], a true and correct copy of which is attached hereto as **Ex. 1 [APP. 0001]** and incorporated herein by reference. *See also* the Declaration of Michael J. Lang proving up exhibits 1-27 for this Motion, a true and correct copy of which is attached hereto as **Ex. 30 [APP. 2715]** and incorporated herein by reference.
[6] **Ex. 1** at 67:9-15 [App. 0067].
[7] *Id.* at 77:18-22 [App. 0077].

> debtor's assets, or this debtor's liabilities, because she generally is not. ***It is because she formed negative views regarding certain members of the debtor's management that the committee and Acis hope will carry over to this case***.[8]

6. At ***that*** time, Debtor effectively acknowledged the risk that this Court's prior opinions of Mr. Dondero would improperly impact this separate, new bankruptcy and the Court would be unable to set aside the negative views of Mr. Dondero it developed in the *Acis* Bankruptcy; thus, objectively questioning the Court's impartiality. In fact, Mr. Pomerantz specifically referred to the opinions the Court developed in the *Acis* Bankruptcy as "baggage":

> The debtor filed the case in this district because it wanted a judge to preside over this case that would look at what's going on with this debtor, with this debtor's management, this debtor's post-petition conduct, ***without the baggage of what happened in a previous case***, which contrary to what Acis and the committee says [*sic*], has very little to do with this debtor.[9]

7. The Delaware Bankruptcy Court also acknowledged that it would be improper for this Court to substitute its prior knowledge, experience, or opinions from the *Acis* Bankruptcy for evidence (or, equally, as a basis to ignore contradictory evidence in the record) in this proceeding:

> Yeah, I was going to say that's kind of an interesting argument, because actually it assumes Judge Jernigan's going to ignore the rules of evidence in making factual findings, ***because you're limited to the record before you on a specific motion***. And what fact you may have learned with regard to something a person has done, maybe that goes into questions of credibility on cross-examination or direct testimony***, but to actually base your decision on a fact that's not in the record for the specific proceeding would be improper***.[10]

8. Ultimately, the Delaware Bankruptcy Court granted the Motion to Transfer and, thus, this

[8] *Id.* at 78:3-8 (emphasis added) [App. 0078].
[9] *Id.* at 79:14-20 (emphasis added) [App. 0079].
[10] *Id.* at 90:15-24 (emphasis added) [App. 0090].

bankruptcy was assigned to this Court.

B. The Court has acknowledged that its opinions of Mr. Dondero from the *Acis* Bankruptcy have remained cemented in the mind of the Court in this proceeding.

9. Following the transfer, Debtor and the UCC entered into a compromise as to the management of Debtor (the "Compromise"), under which, among other things, Mr. Dondero, voluntarily surrendered all control of Debtor to an independent, three-person board appointed per the Compromise (the "Board").[11]

10. During the January 9, 2020 hearing on the Compromise, the Court acknowledged that it: possessed opinions regarding Mr. Dondero from the *Acis* Bankruptcy; was unable to extract those opinions from its brain; and was relying on those opinions as bases for certain rulings (*e.g.*, requiring certain language be included in its order, shown below):

> Now, there is one specific thing I want to say about the role of Mr. Dondero. When Ms. Patel got up and talked about the newest language that has been added to the term sheet, she highlighted in particular the very last sentence on Page 2 of the term sheet, the sentence reading, 'Mr. Dondero shall not cause any related entity to terminate any agreements with the Debtor.' Her statement that that was important, it really resonated with me, because, you know, as I said earlier, ***I can't extract what I learned during the Acis case, it's in my brain, and we did have many moments during the Acis case where the Chapter 11 trustee came in and credibly testified that, whether it was Mr. Dondero personally or others at Highland, they were surreptitiously liquidating funds, they were changing agreements, assigning agreements to others. They were doing things behind the scenes that were impacting the value of the Debtor in a bad way. So not only do I think that language is very important, but I am going to require that language to be put in the order***.[12]

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[11] January 9, 2020 Transcript at 14:4-11 [App. 0151], a true and correct copy of which is attached hereto as **Ex. 2 [APP. 0138]** and incorporated herein by reference. Mr. Dondero, however, remained a portfolio manager and an unpaid employee of Debtor. *Id*. *See also* **Ex. 30**.

[12] **Ex. 2** at 78:23-79:16 [App. 0215-0216] (emphasis added).

11. Later, the Court also indicated that it relied on knowledge of purported actions taken by Mr. Dondero in the *Acis* Bankruptcy as "evidence" of a presumed propensity of Mr. Dondero to engage in actions (that were allegedly taken in the *Acis* Bankruptcy) to support the required language and threat of contempt:

> And ***I'm sure most of you can read my mind why***, but I want it crystal clear that if [Mr. Dondero] violates these terms, he's violated a federal court order, and contempt will be one of the tools available to the Court.[13]

12. Notably, at this time, this bankruptcy had only been in front of this Court for approximately a month. Consequently, there was nothing in the record in front of Court to justify its specific rulings and comments related to Mr. Dondero. The Court sustained the United States Trustee's ("U.S. Trustee") attempt to use the *Acis* Bankruptcy as evidence to support the U.S. Trustee's objection to the Compromise:

> "***I have to look at what's presented***, and is this reflective of sound business judgment? Is this fair and equitable? Is it in the best interest? ***So, assuming there are tons of bad facts here reflected in the arbitration award, reflected in other evidence, bad facts that might justify a trustee***, a Chapter 11 trustee, is this nevertheless, ***what's proposed today***, a reasonable compromise of, you know, the trustee arguments from the Committee could make or, you know, is this a reasonable framework for going forward? … ***I can assume there are terrible facts out there that might justify a trustee, but I'm looking at what's proposed***."[14]

13. Nonetheless, just a short time later, the Court confirmed that, based on its knowledge from the *Acis* Bankruptcy, it would require confirmed that it would require the above-referenced language directed at Mr. Dondero in its order based.

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[13] *Id*. at 80:3-6 [App. 0217] (emphasis added).
[14] *Id*. at 52:10-25 [App. 0189] (emphasis added).

C. The Court's (and Debtor's) actions in this proceeding have demonstrated the Court has a perceptible bias against Mr. Dondero.

1. The February 19, 2020 Application to Employ Hearing

14. The Court has demonstrated a predisposition against Mr. Dondero, including, for example, through its rulings discounting the testimony of demonstrably independent witnesses who testified in support of outcomes that could possibly benefit Mr. Dondero as testimony that is engineered by Mr. Dondero.

15. For example, on February 19, 2020, the Court held a hearing on Debtor's application to retain the law firm Foley Gardere to pursue appeals of the *Acis* involuntary petition and the *Acis* confirmation order (the "Application to Employ") on behalf of Neutra Ltd. (which is a company owned by Mr. Dondero and which succeeded to the ownership of Acis). Importantly, during this hearing, former Bankruptcy Judge Russell Nelms, **one of the three independent directors appointed to Debtor's Board**, testified that, in the Board's business judgment, the Application to Employ was considered by the independent directors, and they concluded that it was in the Debtor's best interest.[15]

16. Despite this testimony, the Court displayed a predisposition to contest positions that could possibly benefit Mr. Dondero on the pre-determined basis that any person sharing an opinion with Mr. Dondero (including, apparently, a member of the independent Board) was somehow being unduly influenced by him:

[15] *See* February 19, 2020 Transcript at 62:6-17 [App. 0290] (emphasis added), a true and correct copy of which is attached hereto as **Ex. 3 [APP. 0229]** and incorporated herein by reference; *see also* **Ex. 30**.

> … ***But I'm concerned that Dondero*** or certain in-house counsel has -- you know, they're smart, they're persuasive -- that -- what are the words I want to look for -- they have ***exercised their powers of persuasion*** or whatever to make the Board and the professionals think that there is some valid prospect of benefit to Highland with these appeals, ***when it's really all about Neutra, HCLOF, and Mr. Dondero***. ***That's what I believe***.
>
> I mean, this is awkward, right, because you want to defer to the debtor-in-possession, ***but I have this long history***, and I can think through the scenarios. …And I know, you know, there are multiple ways it might play out, but I cannot believe there is a chance in the world there is economic benefit to Highland if these things get reversed. Economic benefit to Neutra: Yeah, maybe. Economic benefit to HCLOF: Well, they'll get what they want. You know, whether it's an economic benefit, I don't know. But benefit to Highland? ***I just don't think the evidence has been there to convince me it's reasonable business judgment for Highland to pay the legal fees associated with the appeal***.[16]

17. From here, unsurprisingly, Debtor began to leverage the Court's predisposition against Mr. Dondero (*i.e.*, what Debtor had previously described as the Court's "baggage") for Debtor's own benefit. This played out in a variety of ways.[17]

2. The December 2020 Restriction Motion

18. As the Court is aware, Debtor on the one hand, and Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (the "Advisors"),[18] on the other hand, previously

[16] **Ex. 3** at 177:7-178:3 [App. 0405-0406].
[17] *See also* March 4, 2020 Transcript at 34:6-35:18 [App. 1544-1545]; 50:14-52:15 [APP. 1560-1562]; 58:17-23 [APP. 1568], a true and correct copy of which is attached hereto as **Ex. 15 [APP. 1511]** and incorporated herein by reference; *see also* **Ex. 30**.
[18] Each Advisor is registered with the U.S. Securities and Exchange Commission ("SEC") as an investment advisor under the Investment Advisers Act of 1940, as amended. Each of the Advisors advises several funds, including the Retail Funds. Each of the Retail Funds is a registered investment company or business development company under the Investment Company Act of 1940 (as amended, the "1940 Act"). Each Retail Fund is overseen by a majority independent board of trustees subject to 1940 Act requirements. Those respective boards reviewed and approved, among other things, major contracts including the advisory agreement with the applicable Advisor for the respective Retail Fund. The Retail Funds do not have employees and rely on their respective Advisors, acting pursuant to an advisory agreement, to provide the services necessary for their operations.

shared office space, and the Advisors each paid for resources and services, including in-house legal services, pursuant to shared services agreements that each of the Advisors separately entered into with Debtor.

19. As the Court is also aware, Debtor manages more than $1 billion in assets owned by collateralized loan obligation investment vehicles ("CLOs") pursuant to certain Portfolio Management Agreements. Approximately $140 million of that amount is owned by Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. (collectively, the "Retail Funds"). Although the Portfolio Management Agreements vary, they generally impose a duty on Debtor, when acting as portfolio manager, to maximize the value of the CLOs' assets for the benefit of the CLOs' noteholders and preference shareholders, such as the Retail Funds.

20. For most of 2020, Debtor's plan with respect to the CLOs was to reject the Portfolio Management Agreements. However, in approximately October 2020, Debtor's plan changed, and Debtor wanted to assume the Portfolio Management Agreements (*i.e.*, continue managing the assets). However, Debtor's new plan also contemplated releasing all Debtor's employees and liquidating all of Debtor's assets over a two-year period. In the Advisors' and the Retail Funds' opinion, this was incompatible with the CLOs' needs (which required an investment staff) and the belief that the CLOs had more upside. Moreover, Debtor began to liquidate certain assets of the CLOs.

21. Mr. Dondero, who, as stated above, continued to be a portfolio manager and unpaid employee of Debtor, and James Seery ("Mr. Seery"), one member Debtor's independent Board, disagreed on whether or not to liquidate the CLOs assets. Importantly, the CLOs were ***not assets of Debtor's estate*** but debt and preference equity is owned by third parties (*e.g.*, the Retail Funds,

which indirectly own $140 million of same).

22. The Advisors (on behalf of the Retail Funds and pursuant to their obligations under their respective advisory agreements) and the Retail Funds believed that Debtor's decision to liquidate underlying assets held by the CLOs did not maximize the value of the investments for the investors to whom the Advisors and the Retail Funds owed a fiduciary duty. As a result, the Advisors and the Retail Funds raised these concerns with Mr. Seery (Debtor's interim CEO) and requested that Debtor not liquidate the CLOs until the Plan confirmation (which, at that time, was scheduled for early January 2021). Debtor, a/k/a portfolio manager, declined.

23. Consequently, on December 8, 2020, pursuant to 11 U.S.C. §§105, 363, and 1107, the Advisors and the Retail Funds (not Mr. Dondero) raised these concerns in a motion that requested the Court exercise its equitable discretion to maintain the status quo and stop Debtor from liquidating the CLOs for 30 days (the "Restriction Motion").[19] The Restriction Motion was necessary to legally preserve the legal issue arising from the Advisors' and the Retail Funds' belief that this action by Debtor was contrary to the best interest of their investors.

24. On December 16, 2020, the Court held a hearing on the Restriction Motion and denied same.[20] Rather than simply denying the motion, the Court chastised counsel for the Advisors and the Retail Funds for filing the Restriction Motion (*i.e.*, for advocating a position in good faith that their clients firmly believed in).

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[19] Dkt. 1522, a true and correct copy of which is attached hereto as **Ex. 4 [APP. 0417]** and incorporated herein by reference; *see also* **Ex. 30**.

[20] *See* the December 16, 2020 Transcript, a true and correct copy of which is attached hereto as **Ex. 5 [APP. 0443]** and incorporated herein by reference. *Id.* at 63:5-13 [App. 0505]. *See also* **Ex. 30**.

25. Going further, the Court stated that it was "dumbfounded" by the Restriction Motion and that it agreed with Debtor's accusation that Mr. Dondero was behind the Restriction Motion, despite the fact that the Restriction Motion was filed by separate and distinct legal entities. The Court focused on Mr. Dondero's role with the Advisors to conclude that the Restriction Motion was brought for an improper purpose, despite the fact that the only evidence before the court was that the decision was made by senior management in consultation with the board of trustees and counsel.[21] Thus, the Court implicitly concluded that the Retail Funds (some of which are publicly-traded, highly-regulated entities) cannot independently decide to pursue action they deem in their best interest.

26. The Court further declared the Restriction Motion frivolous, "almost Rule 11 frivolous," and as having no statutory or contractual basis.[22] As stated above, these comments were made by the Court regarding a motion that: (a) was filed in good faith by fiduciaries seeking to protect the investments of investors; and (b) cited statutory authority which indisputably provided the Court with the discretion to grant the requested relief therein. While the Court had every right to deny the Restriction Motion, the Court additionally condemned Mr. Dondero, demonstrating that it could not set aside its animus towards Mr. Dondero to consider the separate entities involved and the actual issues being raised.

27. In December of 2020, due to the Court's denial of the Restriction Motion, K&L Gates, as

[21] **Ex. 5** at 63:14-25 [App. 0505].
[22] *Id*. at 64:1-7 [App. 0506]. The statutory basis for the relief requested was section 363(c)(1) or 1108 of the Bankruptcy Code, which generally provides that a debtor-in-possession may engage in its ordinary course of business, "unless the court orders otherwise." That was all that was being asked.

counsel for the Advisors and the Retail Funds, exchanged correspondence with counsel for Debtor (the "K&L Gates Letters").[23] The K&L Gates Letters were sent for the following reasons: to reiterate the Advisors' and the Retail Funds' objection to the Debtor's handing of the Retail Funds' investments; to request, again, that Debtor not liquidate the CLOs; to reserve any rights that the Advisors and the Retail Funds might have against Debtor for failure to maximize the value of the investment as required under the Portfolio Management Agreements; and to notify Debtor that the Retail Funds, ***subject to applicable bankruptcy law*** (which would include the stay existing by reason of section 362(a) of the Bankruptcy Code and the Compromise) and the underlying agreements, intended to initiate the procedure to remove Debtor as fund manager of the CLOs.

28. On January 6, 2021, Debtor filed a complaint for declaratory and injunctive relief against the Advisors and the Retail Funds,[24] claiming that: (a) the Advisors' purported refusal to book certain trades, which Debtor had, in actuality, already executed outside of the Advisors' process, interfered with Debtor's business and, thus, tortiously interfered with the prior sales; and (b) the K&L Gates Letters (*i.e.*, correspondence between counsel) violated the automatic stay.[25] Debtor's overall theme in the complaint was, because Mr. Dondero allegedly controlled the Retail Funds

[23] True and correct copies of the K&L Gates Letters are attached to the Declaration of James Seery [ECF 4] in the Adversary styled *Highland Capital Mgmt. v. Highland Capital Management Fund Advisors, L.P., et al*. Adversary No. 21-03000-sgj, courtesy copies of which are attached hereto as **Ex. 18 [APP. 1777]** and incorporated herein by reference. *See also* **Ex. 30**.

[24] *Highland Capital Mgmt. v. Highland Capital Management Fund Advisors, L.P., et al*. Adversary No. 21-03000-sgj, a true and correct copy of which is attached hereto as **Ex. 6 [APP. 0509]** and incorporated herein by reference. *See also* **Ex. 30**.

[25] *See*, Dkt. 6, a true and correct copy of which is attached hereto as **Ex. 17 [APP. 1759]** and incorporated herein by reference. *See also* **Ex. 30**.This is one of many instances where the Debtor asked for and received expedited consideration, relief not afforded to Mr. Dondero or the Affected Entities.

(he does not), the Court should presume that Mr. Dondero (rather than the independent board and its independent counsel for the Retail Funds) caused the acts complained of by Debtor (thus enabling the Court to extend the prohibitions it imposed on Mr. Dondero to the Advisors and the Retail Funds). As a result, Debtor sought to enjoin the Advisors and the Retail Funds from, among other things, exercising any contractual rights that they may have had to remove Debtor as portfolio manager (which Debtor was then seeking to assume, and ultimately did assume, under its plan) if the injunction were not granted.

29. On January 26, 2021, the Court commenced the preliminary injunction hearing on the matter (the "Injunction Hearing").[26] The issue in the Injunction Hearing was whether the Advisors and the Retail Funds tortiously interfered with the Portfolio Management Agreements by: (1) hindering the Debtor's ability to sell certain CLO assets, (2) threatening to initiate the process for removing the Debtor as the portfolio manager of the CLOs, and (3) otherwise attempting to influence and interfere with the Debtor's decisions concerning the purchase or sale of any assets on behalf of the CLOs.[27]

30. To obtain such an injunction, Debtor was required to, among other things, prove a substantial likelihood of success on the merits of its tortious interference claim and irreparable harm. However, during the Injunction Hearing, it should have become abundantly clear that there was no need or basis for an injunction, due, in large part, to the Debtor's concession that it did not

[26] A true and correct copy of the January 26, 2021 Transcript is attached hereto as **Ex. 7 [APP. 0528]** and incorporated herein by reference; *see also* **Ex. 30**.
[27] *See* Dkt. 1 in Adversary Proceeding No. 21-03000-sgj at ¶ 58.

have a substantial likelihood of success on the merits via its acknowledgment that the alleged acts of interference did not actually interfere with any contract. In addition:

31. ***First***, Mr. Seery admitted that none of the alleged actions caused Debtor to breach any contract with a third party.[28] Moreover, Debtor could not assert a direct breach of contract claim because: (a) there is no claim for contemplating a prospective breach; and (b) the Advisors and the Retail Funds had no contractual obligation to settle the trade.

32. ***Second,*** with respect to "hindering Debtor's ability to sell certain CLO assets," Mr. Seery admitted that every trade that he attempted to initiate in December closed.[29] In fact, the trades at issue were executed ***before*** Debtor even approached the Advisors, and the only thing that the Advisors did not do in connection with the trades was make a ledger entry booking the sale (which was due to the fact that Debtor had executed the trades outside of the historically-used system).[30] Moreover, Debtor itself had numerous authorized traders whose job was to settle Debtor's trades. Importantly, the Advisors had no obligation, contractual or otherwise, to perform any service for Debtor.

33. ***Third***, with respect to K&L Gates Letters' contemplation of future action "to initiate the process for removing the Debtor as portfolio manager:" (a) Debtor admitted that the K&L Gates Letters merely stated that the Advisors and the Retail Funds were "contemplating taking steps to terminate the CLO Agreements;"[31] (b) no steps would be taken without seeking relief from the

[28] *See* **Ex. 7** at 180:12-17 [App. 0707].
[29] *Id.* at 173:16-19 [App. 0700]; 174:1-3 [App. 0701]; 174:8-175:5 [App. 0701-0702].
[30] *Id* at 173:16-19 [App. 0700]; 175:1-5 [App. 0702]; 219:17-22 [App. 0746]; 220:9-17 [App. 0747].
[31] *Id.* at 103:21-23 [App. 0630].

stay;[32] (c) no action was taken to lift the stay;[33] and (d) no action was taken to remove Debtor as the portfolio manager.[34] Moreover, while the Debtor disputed whether the Advisors' and the Retail Funds' right to terminate Debtor had been triggered, it never undisputed that the Advisors and the Retail Funds, as preferred shareholders, were third party beneficiaries under the Portfolio Management Agreements that, in certain instances, expressly provided them with a right to terminate the Portfolio Manager.[35] Generally, one cannot tortiously interfere by exercising one's own contractual rights.[36]

34. ***Fourth***, while Debtor (no doubt in response to the Court's comments in the January 9, 2020 hearing regarding contempt) claimed that Mr. Dondero caused these issues, the Retail Funds have an independent board of trustees (Mr. Dondero is not a board member).[37] The evidence in the record showed that the decision to send the K&L Gates Letters was made by and in consultation with two national law firms, K&L Gates and Blank Rome.[38] Consequently, Debtor's motion was

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[32] *Id*. at 180:8-11 [App. 0707].
[33] *Id.* 132:24-133:1 [App. 0659-0660]; 165:25-166:3 [App. 0692-0693].
[34] *Id.* 178:25-179:6 [App. 0705-0706]; 180:1-7 [App. 0707].
[35] *See* examples of Servicing Agreements at section 14 [APP. 2381-2382 and APP. 2416-2417 respectively], true and correct copies of which are attached hereto as **Exs. 24 and 25 [APP. 2366 and APP. 2402, respectively]** and incorporated herein by reference; *see also* the February 2, 2021 Transcript of Hearing at 54:6-56:12 [APP. 2124-2126] (authenticating Exs. 24 and 25), a true and correct copy of which is attached hereto as **Ex. 23 [APP. 2071]** and incorporated herein by reference; *see also* the chart of holdings of preference shares in CLOs (showing Movants are preferred shareholders), a true and correct copy of which is attached hereto as **Ex. 27 [APP. 2698]** and incorporated herein by reference; *see also* the February 3, 2021 Transcript of Hearing at 53:1-22 [APP. 2493] (authenticating Ex. 27), a true and correct copy of which is attached hereto as **Ex. 26 [APP. 2441]** and incorporated herein by reference. *See also* **Ex. 30**.
[36] *See, e.g., Wilkerson v. Univ. of N. Texas By & Through Bd. of Regents*, 878 F.3d 147, 161 (5th Cir. 2017) (To win, Wilkerson would have to prove that his employer interfered with his employment contract—a legal impossibility, as "one cannot tortiously interfere with one's own contract.").
[37] One fund is comprised of five individuals, four of whom satisfy the stringent independence requirements mandated by the SEC and the New York Stock Exchange. Two of the funds have four board members, three of which are independents.
[38] *See* **Ex. 7** at 208: 13-22 [App. 0735]; *see also* January 8, 2021 Transcript at 119:6-120:12 [App. 0903-0904];126:7-

unnecessary and unwarranted.

35. Nonetheless, during the Injunction Hearing, the Court again turned its focus to Mr. Dondero (rather than the impropriety and groundlessness of Debtor's motion), warning him that the January 9, 2020 order (described above) prohibited him from causing any related entity to terminate an agreement with Debtor. Importantly, the Court made the implied finding that Mr. Dondero caused the Retail Funds to send the K&L Gates Letters despite the fact that it had, in a hearing just a week earlier, ***sustained*** Debtor's objections to Mr. Dondero being asked about why the K&L Gates Letters were sent ***on the grounds that: (a) Mr. Dondero lacked personal knowledge;*** (b) any answer would be hearsay; and (c) because the K&L Gates Letters (executed by K&L Gates, not Mr. Dondero) speak for themselves.[39] **In other words, the Court had to "go behind the letter" (which was sent by K&L Gates) in order to threaten Mr. Dondero with sanctions after the Court's ruling sustaining the objection that the letters speak for themselves**. Going further, the Court concluded that it was "leaning" toward finding ***Mr. Dondero*** in contempt and shifting the "whole bundle of attorney's fees" to Mr. Dondero as a result of this unwarranted motion filed by **Debtor**.[40]

3. The January 2021 Examiner Motion

36. Separately, on January 14, 2021, two trusts settled by Mr. Dondero, The Dugaboy Investment Trust and The Get Good Trust (collectively, the "Trusts"), requested the Court exercise

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16 [App. 0910], a true and correct copy of which is attached herein as **Ex. 8 [APP. 0785]** and incorporated herein by reference. *See also* **Ex. 30**.

[39] **Ex. 8** at 119:6-122:25 [App. 0903-0906]. Otherwise, Mr. Dondero should have been given the opportunity to answer the question, which the Court denied.

[40] **Ex. 7** at 251:24-252:5 [App. 0778-0779].

its discretion to direct the appointment of a neutral third-party examiner pursuant to 11 U.S.C. § 1104(c) as a less costly means to resolve various issues that had arisen in this bankruptcy (the "Examiner Motion").[41] Notably, The Dugaboy Investment Trust also has significant holdings in the CLOs.

37. The Examiner Motion was made in connection with the issues raised by the Advisors and the Retail Funds in the Restriction Motion, various objections to the proposed Plan raised by the Advisors and the Retail Funds and the U.S. Trustee (discussed below), and concerns expressed **by the Court** about costs and expenses. Moreover, when the Trusts made the Examiner Motion, they believed that the motion would cause delay or a continuance of the confirmation hearing on the Plan (defined below).[42] Notably, despite the Trusts' request, the Court elected not to set that motion for hearing on an "emergency" basis and, instead, set it for hearing long *after* the date for confirmation, rendering it moot.

4. The February 2021 Confirmation Hearing

38. On February 2 and 3, 2021, the Court held a hearing on *Debtor's Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [docket no. 1808], as further modified (the "Plan"). At that hearing, the Advisors and the Retail Funds, pursuant to their rights under the Portfolio Management Agreements, objected to provisions in the Plan that would eliminate or alter their legal and contractual claims against Debtor (the "Objections").

[41] *See* the January 14, 2021 Motion to Appoint Examiner, a true and correct copy of which is attached hereto as **Ex. 22 [APP. 2057]** and incorporated herein by reference. *See also* **Ex. 30**.
[42] *See* ECF 1752.

Additionally, Dondero, the Advisors, and the Retail Funds objected to, among other things, the Plan's significant release and exculpation provisions for the management of Debtor—including the Independent Directors, Debtor's professionals, the Committee, professionals retained by the Committee, *etc*.—and the Plan's "gatekeeper" provision that prohibited lawsuits against any exculpated party without prior permission from the Court.

39. On February 8, 2021, the Court announced its oral ruling regarding the Plan,[43] in which the Court did not rely solely on evidence in the record in front of it but also referred extensively to proceedings in the ***Acis Bankruptcy***.[44] In its ruling, the Court summarily rejected ***all*** of the Objections, decreeing them as bad faith: "[T]he Court questions the good faith of the [the Advisors and the Retail Funds]. In fact, the 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."[45]

40. The Court stated no basis for its "belief," but concluded that the other entities objecting to the Plan were "controlled by" Mr. Dondero:[46]

> To be clear, the Court has allowed all of 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 Court questions their good faith. Specifically on that latter point, the Court considers them all to be marching pursuant to the orders of Mr. Dondero.[47]

41. To support its conclusion, the Court disregarded witness testimony on the grounds that the

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[43] *See* the February 8, 2021 Transcript, a true and correct copy of which is attached hereto as **Ex. 9 [APP. 0990]** and incorporated herein by reference. *See also* **Ex. 30**.
[44] **Ex. 9** at 15:15-16:5 [App. 1004-1005].
[45] *Id.* at 20:17-20 [App. 1009] (emphasis added).
[46] *Id.* at 20:13-15 [App. 1009].
[47] *Id.* at 22:15-21 [App. 1011].

witness had previously been engaged with Debtor:

> …While the evidence presented was that they have independent board members that run these companies, the Court was not convinced of their independence from Mr. Dondero.[48] None of the so-called independent board members of these entities have ever testified before the Court. Moreover, they have all been engaged with the Highland complex for many years.
>
> The witness who testified on these Objectors' behalves at confirmation, Mr. Jason Post, their chief compliance officer, resigned from Highland after more than twelve years in October 2020, at the same time that Mr. Dondero resigned or was terminated by Highland. And a prior witness recently for these entities whose testimony was made part of the record at the confirmation hearing essentially testified that Mr. Dondero controlled these entities. [49]
>
> Finally, various NexBank entities objected to the Plan. The Court does not believe they have liquidated claims. Mr. Dondero appears to be in control of these entities as well. [50]

42. The Court then went on to question the good faith basis for the Objections based upon the perceived limited economic interest, despite the fact that each Objector had standing to object, irrespective of the size of their economic interest.[51] Indisputably, a Court must presume that anything filed by a licensed attorney, who is bound by ethical obligations, is filed in good faith unless proved otherwise. Therefore, insinuating a lack of good faith in light of this presumption suggests bias, especially when bad faith was not alleged by another party.

43. Next, even though it had "not been asked to declare Mr. Dondero and his affiliated entities

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[48] *Id.* at 21:22-24 [App. 1010].
[49] Notably, Jason Post resigned from Debtor and was hired by NPA because NPA and Debtor had to separate compliance programs, which was previously jointly administered. This decision was discussed with and approved by Thomas Surgent and Mr. Seery.
[50] *Id.* at 22:12-14 [App. 1011].
[51] *Id.* [App. 1011]

as vexatious litigants *per se*,"[52] the Court summarily decreed that Mr. Dondero and other Affected Entities were "vexatious litigants"[53] in its ruling and held that objected to "gatekeeper provision "appears necessary and reasonable in light of the ***litigiousness of Mr. Dondero*** and his ***controlled entities*** that has been described at length herein."[54]

44. In addition to **not** tied to evidence in the record from this bankruptcy, this finding of vexatious litigation does not meet the requirements set forth by the Court itself. To enjoin future filings due to vexatious litigation, the bankruptcy court must consider the circumstances of the case, including four factors: (a) the party's history of litigation; in particular, whether ***he has filed*** vexatious, harassing, or duplicative lawsuits; (b) whether the party had a good faith basis for ***pursuing the litigation***, or perhaps intended to harass; (c) the extent of the burden on the courts and other parties resulting from the party's filings; and (d) the adequacy of alternatives.[55] Here, the factors did not weigh in favor of a vexatious litigation finding, much less even being considered.

45. ***First***, the "litigiousness" described in the Court's ruling were: (a) efforts taken by Mr. Dondero and other entities in the bankruptcy to defend against injunctions filed against them; (b) legitimate objections or responses to certain provisions in the Plan and other motions, made to preserve rights on appeal; and/or (c) lawsuits in which Mr. Dondero or other entities ***had been sued*** and were defending themselves (which, notably, Debtor—after Mr. Dondero relinquished

[52] *Id*. at 46:20-22 [App. 1035].
[53] *Id.* at 46:20-25 [App. 1035].
[54] *Id.*at 45-47 [App. 1034-1036] (emphasis added).
[55] *Id.* at 46:6-15 [App. 1035] (emphasis added).

control of same—asserted were not frivolous or vexatious in various disclosures):

(a) *Acis Action*, in which Debtor filed a 65-page objection that it described as having "numerous basis" and in which USB filed an objection;[56]

(b) *UBS Action*, in which Debtor filed an objection to the claim and stated that it had, "meritorious defenses to most, if not all, of the UBS Claim …", [ECF 928] and in which the Redeemer Committee of the Crusader Funds also objected;[57]

(c) *Daugherty Action*, in which Debtor asserted that the Daugherty Claim lacked merit;[58] and

(d) *HarbourVest Action*, in which Debtor "vigorously defen[ded]" the HarbourVest Claims on numerous grounds.[59]

Notably, neither Mr. Dondero nor any of the Affected Entities were parties to these lawsuits.

46. ***Second***, the record actually reflects little, if any, litigation and motion practice initiated by Mr. Dondero, individually, as referenced in the charts attached to this Motion as Exhibits 28 and 29.[60]

47. ***Third***, the Objections were made in good faith.[61] In fact, the U.S. Trustee, whose "good faith basis" was not questioned and who was not labeled a "disruptor," asserted the some of the same objections to the exact same provisions. This demonstrates that, in fact, the record actually shows that the independent boards of the Advisors and the Retail Funds appropriately exercised their right to object to the Plan to preserve various contractual, due process, and appellate rights.

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[56] *See* ECF 891.
[57] *See* ECF 895.
[58] *See* ECF 895.
[59] *See* Dkt. 1384.
[60] *See* Chart regarding this bankruptcy proceeding, a true and correct copy of which is attached hereto as **Ex. 28 [APP. 2700]** and incorporated herein by reference; *see also* Chart regarding the injunction proceeding, a true and correct copy of which is attached hereto as **Ex. 29 [APP. 2713]** and incorporated herein by reference; *see also* **Ex. 30**.
[61] **Ex. 9** at 23:8-11[App. 1012].

48. ***Fourth***, the Court failed to address the fourth prong of the test to support a vexatious litigant finding and conducted no analysis or consideration of the burden on the Courts or any purported plaintiff or the adequacy of any alternative to the pre-suit injunction.

49. Consequently, nothing in this the record supports a finding that Mr. Dondero is a vexatious litigant or that any of the Advisors' or the Retail Funds' independent board members would disregard their fiduciary duties simply to benefit Mr. Dondero.

50. ***Fifth***, as demonstrated herein, the record reflects that the parties are being judged by two different sets of rules that disadvantage Mr. Dondero and the Affected Entities while favoring others. While, for example, as stated above, the Court referred to the Restriction Motion as "almost Rule 11 frivolous," it has not applied the same level of scrutiny to the pleadings filed and positions taken by Debtor or other parties. This is illustrated by the mandatory injunction filed by Debtor in February 2021 seeking the limited relief of mandating the Advisors and the Retail Funds to express a transition plan after Debtor indisputably terminated the shared services agreements (indicating that it would not be providing services going forward).[62] Despite the fact that the Advisors and the Retails Funds did not contest the termination and had no obligation to share their transition plan with Debtor following its termination of the shared services agreement, and Debtor's termination of the shared services agreement posed no harm to Debtor. As a result, there was no need for the filing the mandatory injunction—much less a seven-hour evidentiary hearing on the issue.[63]

[62] *See* the Mandatory Injunction, a true and correct copy of which is attached hereto as **Ex. 19 [APP. 1792]** and incorporated herein by reference; *see also* **Ex. 30**.
[63] *See* the February 23, 2021 Transcript on Hearing for Mandatory Injunction, a true and correct copy of which is attached hereto as **Ex. 21 [APP. 1818]** and incorporated herein by reference; *see also* **Ex. 30**.

Nevertheless, the Court, who ruled Debtor's mandatory injunction moot, went beyond the pleadings and relief requested by Debtor **to issue findings of fact adverse to Mr. Dondero**[64] and, the again, specifically blamed Mr. Dondero.[65]

5. Other Issues Demonstrating Bias.

51. In addition to the examples above, the Court's inability to rule impartially as a result of its preconceived opinion of Mr. Dondero has manifested itself in other ways throughout this case.

52. ***First***, the Court has admitted to relying upon extrajudicial information from an article that referenced "Mr. Dondero or Highland affiliates" receiving PPP loans as a basis for the Court to direct Debtor's counsel in this bankruptcy to investigate the loans and report back to it.[66] Neither Mr. Dondero nor the so-called "Highland affiliates" referred to in the article were the property of or governed by Debtor. In fact, the PPP loans had ***nothing*** to do with the Debtor.[67]

53. ***Second***, the Court's bias against Mr. Dondero has prejudiced the legal rights of separate and distinct legal entities simply because such entities have a connection to Mr. Dondero. Specifically, with respect to the Retail Funds, regardless of whether Mr. Dondero purportedly

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[64] *See* the order on the Mandatory Injunction, a true and correct copy of which is attached hereto as **Ex. 20 [App. 1813]** at pp. 3-5 [APP. 1815-1817] and incorporated herein by reference; *see also* **Ex. 30**.
[65] *See* **Ex. 21** at 232:3-234:19 [APP. 2049-2051].
[66] *See* July 8, 2020 Transcript at 42:10-24 [App. 1082] ("THE COURT: Okay. All right. Two more questions. And this one has been a bit of a tough one for me to decide whether I should broach this topic or not. You know, ***I read the newspapers, the financial papers, just like everyone else, and I saw a headline that I wished almost I wouldn't have seen, and it was a headline about Dondero or Highland affiliates*** getting three PPP loans. ***And, you know, I'm only supposed to consider evidence I hear in the courtroom, right, or things I hear in the courtroom, but I've got this extrajudicial knowledge right now thanks to just keeping up on current events. I decided I needed to ask about this***. What can you tell me about this, Mr. Pomerantz? I mean, I assumed, from less-than-clear reporting, that it wasn't Highland Capital Management, LP, but I'd like to hear anything you can report about this."), a true and correct copy of which is attached hereto as **Ex. 10 [APP. 1041]** and incorporated herein by reference; *see also* **Ex. 30**.
[67] *See* July 14, 2020 Transcript at 53:17-59:3 [App. 1429-1435], a true and correct copy of which is attached hereto as **Ex. 14 [APP. 1377]** and incorporated herein by reference; *see also* **Ex. 30**.

controlled the entities at issue, the record does not reflect that any decision at issue was made other than by a vote of the independent board of trustees (which does not include Mr. Dondero).

54. Likewise, CLO Holdco, which is a wholly owned subsidiary of a charitable Doner Advised Fund ("DAF") established by Mr. Dondero, has an independent trustee who is a licensed attorney, Grant Scott. CLO Holdco moved to have $2.5 million in funds that indisputably belonged to CLO Holdco released from the registry of the Court. There were no objections to the liquidation at issue. There were no objections that bona fide investors, like CLO Holdco, should not receive their portion of the funds received from the liquidation. The Court admitted that CLO Holdco's lawyer made "perfect arguments" regarding the potential legal issues and whether "holding the money in the registry of the Court that a non-debtor asserts is its property, is that tantamount to a prejudgment remedy?"[68] Despite these "perfect" arguments and the lack of objection, the Court, again concluded that Mr. Dondero was behind the CLO Holdco filing and, therefore, questioned the "good faith" basis,[69] even though the Court had, prior to that time, expressly stated that the parties reserved all rights to file motions requesting the funds be disbursed to them.[70]

55. The Court gave the UCC 90 days to file a complaint asserting a legal basis to the funds,[71] but held that, it could not continue to withhold the funds from CLO Holdco unless the UCC proved an injunction was required to permit the Court to keep the funds (which would be unlikely because

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[68] *See* June 30, 2020 Transcript at 85:17-22 [App. 1236], a true and correct copy of which is attached hereto as **Ex. 12 [APP. 1152]** and incorporated herein by reference; *see also* **Ex. 30**.
[69] **Ex. 12** at 82:3-11 [App. 1233]; 85:4-16 [App. 1236].
[70] *See* **Ex. 15** at 49:22-25[App. 1559].
[71] **Ex. 12** at 88:1-11 [App. 1239]; *see also* July 21, 2020 Transcript 97:13-23 [App. 1348], a true and correct copy of which is attached hereto as **Ex. 13 [APP. 1252]** and incorporated herein by reference; *see also* **Ex. 30**.

the UCC would be seeking quantifiable, monetary damages). After multiple extensions, the UCC ultimately filed an adversary, but never sought injunctive relief. Still, the Court has not released the funds to CLO Holdco and has relieved the UCC of its burden to establish the elements for injunctive relief.[72]

56. ***Third***, and possibly most concerning, the Court has admitted to forming conclusions about Mr. Dondero prior to even seeing evidence. Specifically, in a September 2020 hearing in the *Acis* Bankruptcy, an issue arose regarding a lawsuit that certain DAFs and other entities filed against Acis (and other non-Acis or Debtor entities) concerning a post-confirmation dispute. That lawsuit was not pending in this Court or anywhere in the Northern District of Texas; nevertheless, **the Court, after admitting to having not seen the lawsuit, declared it vexatious**:

> It's just ridiculous, for lack of a better term, that Dondero and his entities would be doing some of the things it sounds like they're doing: Suing Moody's, for crying out loud, for not downgrading the Acis CLOs. ***If Mr. Dondero doesn't think that is so transparently vexatious litigation, yeah, I'm going out there and saying that. I haven't seen it, but, come on.***[73]

57. It is the Court's admission that, "I haven't seen it," paired with the finding of the Court that the suit was "transparently vexatious litigation" that illustrates, perhaps most clearly, the increasing need for this Motion.[74]

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[72] Needless to say, the Affected Entities and every entity that the Court believes has any affiliation with Mr. Dondero is gun-shy about filing any pleading out of fear of "sanctions" or accusations of "bad faith." Conversely, the UCC, which has not alleged any basis for the Court retaining the $2.5 million, has not been chastised or otherwise threatened.
[73] *See* September 23, 2020 Transcript at 51:10-16 [APP. 1149], a true and correct copy of which is attached hereto as **Ex. 11 [APP. 1099]** and incorporated herein by reference; *see also* **Ex. 30**.
[74] Notably, the claims against Moody's relating to its ratings concerning the CLOs were the same issues raised in various lawsuits against Moody's following the 2008 crash. The action asserting the claims was initiated by DAF, an independent charity originally funded by Highland Capital. As a primary investor in the ACIS Collateralized Loan Obligations (CLO), the DAF lost almost 80% of its investment in ACIS CLOs as Josh Terry and sub-advisor Bridage circumvented CLO indenture covenants and materially increased the risk in the portfolio. Recently, JP Morgan

D. Recusal is necessary in light of the pending and future issues and proceedings.

58. Importantly, there are numerous adversary proceedings currently pending before this Court that involve Mr. Dondero, individually, or one or more of the Affected Entities (collectively, the "Adversary Proceedings").[75]

59. The claims in the Adversary Proceedings include various tort and breach of contract claims, claw-back claims, and *alter ego* claims seeking to hold Mr. Dondero and the Affected Entities liable for any recovery ordered as to other entities. In addition, the UCC has indicated that there are more suits to come, and Debtor specifically reserved claims against over five-hundred "Dondero related-entities and current or former employees who will be branded with the "Dondero disciple" moniker. Naturally, each of the Adversary Proceedings will require Mr. Dondero and the Affected Entities to take legal positions and defend themselves—actions that this Court has indicated that is predisposed to considering vexatious (and has already threatened large fee shifting awards on preliminary injunction matters, even where a defendant has technically prevailed), even, as stated above, in a situation where the Court had never seen the facts, the claims or the legal

highlighted ACIS 3-6 as the worst performing 1094 deals outstanding in 2019 through 2020. This action sought relief from the trustee (US Bank) for failing to properly administer the indenture and from Moody's for failing to update or suspend ratings given the breaches described above.

[75] The Adversary Proceedings include: *Highland Capital Management L.P. v. NexPoint Advisors, L.P. et. al*., Adversary Proceeding No. 21-03000; *Highland Capital Management, L.P. v. Nexpoint Advisors, L.P.*, Adversary No. 21-03005,; *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P.*; Adversary No. 21-03004; *Highland Capital Management, L.P. v. Highland Capital Management Services, Inc.*; Adversary No. 21-03006, in the United States Bankruptcy Court for the Northern District of Texas; *Highland Capital Management, L.P. v. HCRE Partners, LLC (N/K/A Nexpoint Real Estate Partners, LLC*, Adversary No. 21-03007; *Highland Capital Management, L.P. v. HCRE Partners, LLC (N/K/A Nexpoint Real Estate Partners, LLC*, Adversary No. 21-03007; *Highland Capital Management, L.P. v. Highland Capital Management Fund Advisors, L.P., et al.*; Adversary No. 21-03010; *Highland Capital Management, L.P. v. James Dondero*; Adversary No. 21-03003; and *Official Committee of Unsecured Creditors v. CLO HOLDCO, LTD, et al.*; Adversary No. 20-03195.

theories; or where the Court has not admonished another party for the same position or a similar assertion of its rights.

60. For the reasons stated above, the Court has demonstrated what appears to be a high degree of antagonism toward Mr. Dondero and the Affected Entities that has grown to such a point that a reasonable question as to the Court's impartiality has arisen and must be resolved. As a result, Movants respectfully request the Court recuse itself from the Adversary Proceedings.

III. ARGUMENTS & AUTHORITY

61. Section 28 U.S.C. § 455 requires a judge to be recused if the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding,"[76] and when the court's "impartiality might reasonably be questioned."[77] These provisions afford separate, though overlapping, grounds for recusal.[78]

62. Under section 455(a), recusal is required whenever a judge's partiality might reasonably be questioned, ***even if the judge does not have actual personal bias or prejudice***.[79] The test under § 455(a) is ***not*** whether the judge believes he or she is capable of impartiality[80] and ***not*** whether the judge actually has a bias (or actually knows of grounds requiring recusal).[81] Instead, the test is whether the "'average person on the street who knows all the relevant facts of a case'" might

[76] 28 U.S.C. § 455 (b)(1).
[77] 28 U.S.C. § 455 (a).
[78] *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003).
[79] *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 n. 8 (1988); *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003).
[80] *Burke v. Regalado*, 935 F.3d 960, 1054 (10th Cir. 2019) (citations omitted).
[81] *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 805 (2001)).

reasonably question the judge's impartiality.[82] As Congress recognized when enacting section 455, litigants "ought not have to face a judge where there is a reasonable question of impartiality."[83] At its core, this statutory provision is "designed to promote public confidence in the impartiality of the judicial process."[84]

63. The words "prejudice" and "bias" mean a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because: (a) it is undeserved; (b) it rests upon knowledge that the holder of the opinion ought not to possess; or (c) it is excessive in degree.[85]

64. Despite holding that "judicial rulings alone *almost* never constitute a valid basis for a bias or partiality motion," the Supreme Court has also recognized that predispositions developed during the course of a trial will sometimes suffice.[86]

65. Moreover, while the presence of an extrajudicial source is a factor in favor of finding either an appearance of partiality under section 455(a) or bias or prejudice under section 455(b)(1),[87] an extrajudicial source for a judge's opinion about a case or a party is not necessary for recusal.[88] In addition, while, ordinarily, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion," they "***may do so*** if they reveal an opinion that derives from an

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[82] *In re Kansas Pub. Employees Retirement Sys.*, 85 F.3d 1353, 1358 (8th Cir.1996).
[83] H. Rep. No. 1453, 93d Cong., 2d Sess. 1 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355.
[84] *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988) (quoting H.R.Rep. No. 1453, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6351, 6354–55); *Liljeberg*, 486 U.S. at 859–60.
[85] *Liteky v. United States*, 510 U.S. 540, 550 (1994).
[86] *Liteky v. United States*, 510 U.S. 540, 554 (1994) (emphasis added).
[87] *Bell v. Johnson*, 404 F.3d 997, 1004 (6th Cir. 2005) (citations omitted).
[88] *Liteky v. United States*, 510 U.S. 540, 554-55 (1994).

extrajudicial source; and ***they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible***."[89]

66. Mr. Dondero and all other non-debtors, like every litigant, are entitled to a full and fair opportunity to make their case in an impartial forum—regardless of their history with that forum.[90] Beyond that, "fundamental to the judiciary is the public's confidence in the impartiality of our judges and the proceedings over which they preside."[91] "[J]ustice must satisfy the appearance of justice."[92] Notably, the Fifth Circuit has held that "***[i]f the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal.***"[93]

67. Here, the facts detailed above, and incorporated herein, including but not limited to specifically paragraphs 1-60, show that the Court's conduct in this bankruptcy would lead an objective observer to reasonably question the Court's impartiality. By way of summary, the Court has:

(a) admitted that the negative opinions about Mr. Dondero formed during the *Acis* case cannot be excised from the Court's mind;

(b) made repeated reference to proceedings in the *Acis* case to justify findings made in this case that are not otherwise supported by *this* record and repeated negative statements about Mr. Dondero in connection with the Court's rulings;

(c) repeatedly threatened sanctions on and questioned the good-faith basis Mr. Dondero and the Affected Entities, for (i) defending lawsuits and motions; (ii) asserting valid legal positions; and/or (iii) preserving their rights, including in the exact same manner in which others are permitted to do so (e.g., the U.S. Trustee's objections to the Plan),

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[89] *Liteky v. United States*, 510 U.S. 540, 555 (1994) (citation omitted) (emphasis added).
[90] *Miller v. Sam Houston State University*, 986 F.3d 880, 893 (5th Cir. 2021) (citing *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995)).
[91] *Id.*
[92] *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).
[93] *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir. 1997) (emphasis added).

even declaring Mr. Dondero and the Affected Entities as behind "vexatious" litigation the Court admits it has not actually seen; and

(d) Disregarded the presumption that related corporations of separation have institutional independence and concluded, without supporting evidence from this proceeding, that any entity the Court deems connected to or controlled by Mr. Dondero (i.e., including the highly regulated Affected Entities, which are governed by independent boards) is essentially *no more than* a tool of Mr. Dondero and that Mr. Dondero is the ultimate decision-maker behind all the motions they file and actions they take in this proceeding; [94] and

(e) disregarded the testimony of any witness with a connection to Mr. Dondero as per se less credible, which includes attorneys and persons who owe fiduciary duties and ethical obligations.[95]

68. This Motion is not being filed because of prior adverse rulings; or because of any predispositions formed by the Court based upon ***facts or evidence*** introduced in the course of the current proceeding; or because of ordinary admonishments from a court to a litigant. Instead, this Motion is being filed because the facts and circumstances, including the non-exhaustive examples described above, reveal a deep-seeded antagonism toward Mr. Dondero and the Affected Entities that goes enough beyond "normal" admonishment as to render fair judgment and impartiality toward Mr. Dondero (and the required perception of same) impossible.

69. Importantly, this Court will sit as both judge and jury in the various Adversary Proceedings

[94] **Ex. 7** at 254:4-25 [App. 0781].
[95] *See, e.g.*, ECF 1943 at p. 19 ("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."); *see also*, **Ex. 8**, The January 8, 2021 Transcript, at 175:8-176:25 [App. 0959-0960].

(and any additional ones that are filed) and contested matters in the future, and the Court has demonstrated a willingness to retain jurisdiction whenever possible.[96] In doing so, the Court must, but appears unable to despite best efforts, set aside any prejudice or bias against Mr. Dondero in those proceedings. As demonstrated above, the Court is predisposed against Mr. Dondero (on issues that have not yet been tried and evidence that has never been entered in any proceeding in this bankruptcy) and has already disregarded the corporate separateness between Mr. Dondero and entities—which Mr. Dondero does not control—that are defendants in the Adversary Proceedings.

70. Practically and importantly, the Court's predisposition against Mr. Dondero (and the Affected Entities), including its prior declarations of vexatiousness (and threats of sanctions) and its questioning of counsels' good faith in taking legally-supported positions, indisputably threaten the ability of counsel for Mr. Dondero (and the Affected Entities or any entity or person that is perceived to be associated or aligned with Mr. Dondero) to put forward any claim or defense or seek certain relief. In effect, counsel is now forced to choose between: (a) raising an issue to preserve it for appeal and risk sanctions; (b) waiving raising a valid issue to avoid sanctions and, thereby, committing malpractice; or (c) withdrawing from its representation.

71. "It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."[97] As described herein, the cumulative weight of both prejudicial comments and peremptory rulings by the Court demonstrate that the Court appears to have developed a personal bias or prejudice

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[96] *See, e.g.*, **Ex. 11** at 50:4-52:7 [App. 1148-1150].

[97] *Caperton v. A.T. Massey Coal Co*., 556 U.S. 868, 877 (2009) (internal quotation marks and citation omitted); see also *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam) ("Trial before 'an unbiased judge' is essential to due process.") (quoting *Bloom v. Illinois*, 391 U.S. 194, 205 (1968)).

concerning Mr. Dondero (and various entities that the Court has deemed "under his control") that now render the Court unable to be impartial and render fair judgment related to Mr. Dondero. At a minimum, that is the perception that has been created.[98]

72. As a result, the Court should recuse itself from the Adversary Proceedings, any contested matter involving Mr. Dondero or any of the Affected Entities from acting as the "gatekeeper" in determining whether any future claim by Mr. Dondero (or any of the Affected Entities) is valid.

IV. PRAYER

FOR THE FOREGOING REASONS, Movants respectfully request that the Court recuse itself from the Adversary Proceedings and any future contested matters involving Movants or any entity connected to Mr. Dondero; and grant Movants all other further relief, at law or equity, to which they are justly entitled.

[98] *Liteky v. United States*, 510 U.S. 540, 551 (1994).

Dated: March 18, 2021

Respectfully submitted,

CRAWFORD, WISHNEW & LANG PLLC

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 18, 2021, a true and correct copy of the above and foregoing document was served on all parties of record via the Court's e-filing system.

/s/ Michael J. Lang
Michael J. Lang

Appendix Exhibit 104

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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.	§	
	§	

DEBTOR'S MOTION TO DISQUALIFY WICK PHILLIPS GOULD & MARTIN, LLP AS COUNSEL TO HCRE PARTNERS, LLC AND FOR RELATED RELIEF

Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor" or "Highland") in the above-captioned chapter 11 case (the "Bankruptcy Case"), by and through its undersigned counsel, files this motion (the "Motion") seeking entry of an order: (i) directing the disqualification of Wick Phillips Gould & Martin, LLP ("Wick Phillips") as counsel to HCRE

[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.

Partners, LLC ("HCRE") in connection with the prosecution of HCRE's Claim;[2] (ii) directing Wick Phillips to immediately turnover to the Debtor all files and records relating to the LLC Agreement, the Loan Agreement, and the Restated LLC Agreement; and (iii) directing HCRE to (a) reimburse the Debtor all costs and fees incurred in making this Motion, including reasonable attorneys' fees; (b) engage substitute counsel in connection with the prosecution of HCRE's Claim within fourteen (14) days of the entry of this Order; and (c) disclose all communications it (or anyone purporting to act on its behalf, including Wick Phillips) has had with Mark Patrick and Paul Broaddus concerning HCRE's Claim. In support of the Motion, the Debtor respectfully states the following:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334(b). The Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.

3. The predicate for the relief requested in the Motion is section 105(a) of title 11 of the United States Code (the "Bankruptcy Code").

RELIEF REQUESTED

4. The Debtor requests that this Court enter the proposed form of order attached hereto as **Exhibit A** (the "Proposed Order") pursuant to section 105(a) of the Bankruptcy Code.

5. For the reasons set forth more fully in the Debtor's Memorandum of Law filed contemporaneously with this Motion, the Debtor seeks (i) disqualification of Wick Phillips as counsel to HCRE in connection with the prosecution of HCRE's Claim and (ii) related relief.

[2] Capitalized terms not otherwise defined in this Motion have the meanings ascribed to them in the *Debtor's Memorandum of Law in Support of Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* (the "Memorandum of Law") being filed contemporaneously herewith.

6. Wick Phillips' continued representation of HCRE constitutes a direct conflict of interest. While the full scope of Wick Phillips' prior representation is unclear, there can be no credible dispute that a substantial relationship exists between Wick Phillips' current representation of HCRE in connection with the prosecution of HCRE's claim and its prior representation of the Debtor. Wick Phillips' representation of HCRE thus threatens its duty of loyalty and confidentiality to the Debtor. Applicable ethical rules proscribed by (i) the American Bar Association's Model Rules of Professional Conduct (the "ABA Model Rules"), (ii) the Texas Disciplinary Rules of Professional Conduct (the "Texas Rules"), and (iii) the local rules of the deciding court require disqualification of Wick Phillips.

7. In accordance with Rule 7007-1 of the *Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas* (the "Local Rules"), contemporaneously herewith and in support of this Motion, the Debtor is filing its: (i) Memorandum of Law, and (ii) *Declaration of John A. Morris Submitted in Support of the Debtor's Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* (the "Morris Declaration").

8. Based on (i) the facts and arguments set forth in the Memorandum of Law and (ii) the exhibits attached to the Morris Declaration, the Debtor is entitled to the relief requested herein as set forth in the Proposed Order.

9. Notice of this Motion has been provided to Wick Phillips, individually and in its capacity as counsel to HCRE. The Debtor submits that no other or further notice need be provided.

WHEREFORE, the Debtor respectfully requests that the Court (i) enter the Proposed Order substantially in the form annexed hereto as **Exhibit A** granting the relief requested herein, and (ii) grant the Debtor such other and further relief as the Court may deem proper.

Dated: April 14, 2021.

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-and-

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Counsel for Highland Capital Management, L.P.

EXHIBIT A

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 GRANTING MOTION TO DISQUALIFY WICK PHILLIPS GOULD & MARTIN, LLP AS COUNSEL TO HCRE PARTNERS, LLC AND FOR RELATED RELIEF

This matter having come before the Court on the *Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* (the "Motion")[2] filed by Highland Capital Management, L.P. (the "Debtor" or "HCMLP"); and this Court having considered: (i) the Motion, (ii) the exhibits attached to the *Declaration of John A. Morris Submitted in Support of the Debtor's Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel*

[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 in this Order shall have the meaning ascribed to them in the Motion.

to HCRE Partners, LLC and for Related Relief (the "Morris Declaration") submitted in support of the Motion, and (iii) the *Debtor's Memorandum of Law in Support of Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* (the "Memorandum of Law"),

it is hereby **FOUND AND ORDERED** that:

1. The Motion is **GRANTED**.

2. Wick Phillips is disqualified from serving as counsel to HCRE in connection with the prosecution of HCRE's Claim;

3. Wick Phillips is directed to immediately turnover to the Debtor all files and records relating to the LLC Agreement, the Loan Agreement, and the Restated LLC Agreement;

4. HCRE is directed to reimburse the Debtor all costs and fees incurred in making this Motion, including reasonable attorneys' fees;

5. HCRE is directed to engage substitute counsel in connection with the prosecution of HCRE's Claim within fourteen (14) days of the entry of this Order;

6. HCRE is directed to disclose all communications it (or anyone purporting to act on its behalf, including Wick Phillips) has had with Mark Patrick and Paul Broaddus concerning HCRE's Claim;

7. The Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

###End of Order###

Appendix Exhibit 105

PACHULSKI STANG ZIEHL & JONES LLP
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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.	§	

DECLARATION OF ROBERT J. FEINSTEIN IN SUPPORT OF DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH UBS SECURITIES LLC AND UBS AG, LONDON BRANCH AND AUTHORIZING ACTIONS CONSISTENT THEREWITH

[1] The last four digits of the Debtor's taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

I, Robert J. Feinstein, declare as follows:

1. I am an attorney with the law firm of Pachulski Stang Ziehl & Jones LLP, counsel to Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor") in the above-captioned chapter 11 case (the "Bankruptcy Case"). I submit this declaration in support of the *Debtor's Motion for Entry of an Order Approving Settlement with UBS Securities LLC and UBS AG, London Branch and Authorizing Actions Consistent Therewith*, filed concurrently herewith. This declaration is based on my personal knowledge of the facts set forth herein and my review of the documents identified below.

2. Attached as **Exhibit 1** is a true and correct copy of the Settlement Agreement executed as of March 30, 2021, by the Debtor, Highland Credit Opportunities CDO, L.P. (n/k/a Highland Multi Strategy Credit Fund, L.P.), Strand Advisors, Inc., and UBS Securities LLC, and UBS AG, London Branch.

3. Attached as **Exhibit 2** is a true and correct copy, without exhibits, of Claim No. 190 filed by UBS Securities LLC in the Bankruptcy Case.

4. Attached as **Exhibit 3** is a true and correct copy, without exhibits, of Claim No. 191 filed by UBS AG, London Branch in the Bankruptcy Case.

5. Attached as **Exhibit 4** is a true and correct excerpt from the transcript of the November 20, 2020 hearing in the Bankruptcy Case [Dkt. 1482] setting forth the Court's ruling on *UBS's Motion for Temporary Allowance of Claims for Voting Purposes Pursuant to Federal Rule of Bankruptcy Procedure 3018* [Dkt. No. 1338].

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 15, 2021, in New York, New York.

/s/ Robert J. Feinstein
Robert J. Feinstein

Exhibit 1

Settlement Agreement

EXECUTION VERSION

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into as of March 30, 2021, by and among (i) Highland Capital Management, L.P. ("HCMLP" or the "Debtor"), (ii) Highland Credit Opportunities CDO, L.P. (n/k/a Highland Multi Strategy Credit Fund, L.P.) ("Multi-Strat," and together with its general partner and its direct and indirect wholly-owned subsidiaries, the "MSCF Parties"), (iii) Strand Advisors, Inc. ("Strand"), and (iv) UBS Securities LLC and UBS AG London Branch (collectively, "UBS").

Each of HCMLP, the MSCF Parties, Strand, and UBS are sometimes referred to herein collectively as the "Parties" and individually as a "Party."

R E C I T A L S

WHEREAS, in 2007, UBS entered into certain contracts with HCMLP and two funds managed by HCMLP—Highland CDO Opportunity Master Fund, L.P. ("CDO Fund") and Highland Special Opportunities Holding Company ("SOHC," and together with CDO Fund, the "Funds") related to a securitization transaction (the "Knox Agreement");

WHEREAS, in 2008, the parties to the Knox Agreement restructured the Knox Agreement;

WHEREAS, UBS terminated the Knox Agreement and, on February 24, 2009, UBS filed a complaint in the Supreme Court of the State of New York, County of New York (the "State Court") against HCMLP and the Funds seeking to recover damages related to the Knox Agreement, in an action captioned *UBS Securities LLC, et al. v. Highland Capital Management, L.P., et al.*, Index No. 650097/2009 (N.Y. Sup. Ct.) (the "2009 Action");

WHEREAS, UBS's lone claim against HCMLP in the 2009 Action for indemnification was dismissed in early 2010, and thereafter UBS amended its complaint in the 2009 Action to add five new defendants, Highland Financial Partners, L.P. ("HFP"), Highland Credit Strategies Master Funds, L.P. ("Credit-Strat"), Highland Crusader Offshore Partners, L.P. ("Crusader"), Multi-Strat, and Strand, and to add new claims for fraudulent inducement, fraudulent conveyance, tortious interference with contract, alter ego, and general partner liability;

WHEREAS, UBS filed a new, separate action against HCMLP on June 28, 2010, for, *inter alia*, fraudulent conveyance and breach of the implied covenant of good faith and fair dealing, captioned *UBS Securities LLC, et al. v. Highland Capital Management, L.P.*, Index No. 650752/2010 (N.Y. Sup. Ct.) (the "2010 Action");

WHEREAS, in November 2010, the State Court consolidated the 2009 Action and the 2010 Action (hereafter referred to as the "State Court Action"), and on May 11, 2011, UBS filed a Second Amended Complaint in the 2009 Action;

WHEREAS, in 2015, UBS entered into settlement agreements with Crusader and Credit-Strat, and thereafter UBS filed notices with the State Court in the State Court Action dismissing its claims against Crusader and Credit-Strat;

WHEREAS, the State Court bifurcated claims asserted in the State Court Action for purposes of trial, with the Phase I bench trial deciding UBS's breach of contract claims against the Funds and HCMLP's counterclaims against UBS;

WHEREAS, on August 7, 2017, the Funds, along with Highland CDO Opportunity Fund, Ltd., Highland CDO Holding Company, Highland Financial Corp., and HFP, purportedly sold assets with a purported collective fair market value of $105,647,679 (the "Transferred Assets") and purported face value of over $300,000,000 to Sentinel Reinsurance, Ltd. ("Sentinel") pursuant to a purported asset purchase agreement (the "Purchase Agreement");

WHEREAS, Sentinel treated the Transferred Assets as payment for a $25,000,000 premium on a document entitled "Legal Liability Insurance Policy" (the "Insurance Policy");

WHEREAS, the Insurance Policy purports to provide coverage to the Funds for up to $100,000,000 for any legal liability resulting from the State Court Action (the "Insurance Proceeds");

WHEREAS, one of the Transferred Assets CDO Fund transferred to Sentinel was CDO Fund's limited partnership interests in Multi-Strat (the "CDOF Interests");

WHEREAS, Sentinel had also received from HCMLP limited partnership interests in Multi-Strat for certain cash consideration (together with the CDOF Interests, the "MSCF Interests");

WHEREAS, the existence of the Purchase Agreement and Insurance Policy were unknown to Strand's independent directors and the Debtor's bankruptcy advisors prior to late January 2021;

WHEREAS, in early February 2021, the Debtor disclosed the existence of the Purchase Agreement and Insurance Policy to UBS;

WHEREAS, prior to such disclosure, the Purchase Agreement and Insurance Policy were unknown to UBS;

WHEREAS, on November 14, 2019, following the Phase I trial, the State Court issued its decision determining that the Funds breached the Knox Agreement on December 5, 2008 and dismissing HCMLP's counterclaims;

WHEREAS, Sentinel purportedly redeemed the MSCF Interests in November 2019 and the redeemed MSCF Interests are currently valued at approximately $32,823,423.50 (the "Sentinel Redemption");

WHEREAS, on February 10, 2020, the State Court entered a Phase I trial judgment against the Funds in the amount of $1,039,957,799.44 as of January 22, 2020 (the "Phase I Judgment");

WHEREAS, Phase II of the trial of the State Court Action, includes, *inter alia*, UBS's claim for breach of implied covenant of good faith and fair dealing against HCMLP, UBS's

fraudulent transfer claims against HCMLP, HFP, and Multi-Strat, and UBS's general partner claim against Strand;

WHEREAS, on October 16, 2019, HCMLP filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Case"). The Bankruptcy Case was transferred to the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") on December 4, 2019;

WHEREAS, Phase II of the trial of the State Court Action was automatically stayed as to HCMLP by HCMLP's bankruptcy filing;

WHEREAS, on May 11, 2020, UBS, Multi-Strat, Highland Credit Opportunities CDO, Ltd., and Highland Credit Opportunities CDO Asset Holdings, L.P. (collectively, the "May Settlement Parties"), entered into a Settlement Agreement (the "May Settlement") pursuant to which the May Settlement Parties agreed to the allocation of the proceeds of certain sales of assets held by Multi-Strat, including escrowing a portion of such funds, and restrictions on Multi-Strat's actions;

WHEREAS, on June 26, 2020, UBS timely filed two substantively identical claims in the Bankruptcy Case: (i) Claim No. 190 filed by UBS Securities LLC; and (ii) Claim No. 191 filed by UBS AG London Branch (hereinafter collectively referred to as the "UBS Claim"). The UBS Claim asserts a general unsecured claim against HCMLP for $1,039,957,799.40;

WHEREAS, on August 3, 2020, the Bankruptcy Court entered an *Order Directing Mediation* [Docket No. 912] pursuant to which HCMLP, UBS, and several other parties were directed to mediate their Bankruptcy Case disputes before two experienced third-party mediators, Retired Judge Allan Gropper and Sylvia Mayer (together, the "Mediators"). HCMLP and UBS formally met with the Mediators together and separately on numerous occasions, including on August 27, September 2, 3, and 4, and December 17, 2020, and had numerous other informal discussions outside of the presence of the Mediators, in an attempt to resolve the UBS Claim;

WHEREAS, on August 7, 2020, HCMLP filed an objection to the UBS Claim [Docket No. 928]. Also on August 7, 2020, the Redeemer Committee of the Highland Crusader Fund, and Crusader, Highland Crusader Fund, L.P., Highland Crusader Fund, Ltd., and Highland Crusader Fund II, Ltd. (collectively, the "Redeemer Committee"), objected to the UBS Claim [Docket No. 933]. On September 25, 2020, UBS filed its response to these objections [Docket No. 1105];

WHEREAS, on October 16, 2020, HCMLP and the Redeemer Committee each moved for partial summary judgment on the UBS Claim [Docket Nos. 1180 and 1183, respectively], and on November 6, 2020, UBS opposed these motions [Docket No. 1337];

WHEREAS, by Order dated December 9, 2020, the Bankruptcy Court granted, as set forth therein, the motions for partial summary judgment filed by HCMLP and the Redeemer Committee and denied UBS's request for leave to file an amended proof of claim [Docket No. 1526];

WHEREAS, on November 6, 2020, UBS filed *UBS's Motion for Temporary Allowance of Claims for Voting Purposes Pursuant to Federal Rule of Bankruptcy Procedure 3018* [Docket No. 1338] (the "3018 Motion"), and on November 16, 2020, HCMLP and the Redeemer Committee each opposed the 3018 Motion [Docket Nos. 1404 and 1409, respectively];

WHEREAS, by Order dated December 8, 2020, the Bankruptcy Court granted the 3018 Motion and allowed the UBS Claim, on a temporary basis and for voting purposes only, in the amount of $94,761,076 [Docket No. 1518];

WHEREAS, on January 22, 2021, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P. (As Modified)* [Docket No. 1808] (as amended, and as may be further amended, supplemented, or otherwise modified, the "Plan");

WHEREAS, on March 29, 2021, the Debtor caused CDO Fund to make a claim on the Insurance Policy to collect the Insurance Proceeds pursuant to the Phase I Judgment;

WHEREAS, on March 29, 2021, UBS filed an adversary proceeding seeking injunctive relief and a motion for a temporary restraining order and preliminary injunction to, among other things, enjoin the Debtor from allowing Multi-Strat to distribute the Sentinel Redemption to Sentinel or any transferee of Sentinel (the "Multi-Strat Proceeding"), which relief the Debtor, in its capacity as Multi-Strat's investment manager and general partner, does not oppose;

WHEREAS, the Parties wish to enter into this Agreement to settle all claims and disputes between and among them, to the extent and on the terms and conditions set forth herein, and to exchange the mutual releases set forth herein, without any admission of fault, liability, or wrongdoing on the part of any Party; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to Federal Rule of Bankruptcy Procedure 9019 ("Rule 9019") and section 363 of the Bankruptcy Code;

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

A G R E E M E N T

1. Settlement of Claims. In full and complete satisfaction of the UBS Released Claims (as defined below):

(a) The UBS Claim will be allowed as (i) a single, general unsecured claim in the amount of $65,000,000 against HCMLP, which shall be treated as a Class 8 General Unsecured Claim under the Plan;[1] and (ii) a single, subordinated unsecured claim in the amount of $60,000,000 against HCMLP, which shall be treated as a Class 9 Subordinated General Unsecured Claim under the Plan.

[1] Capitalized terms used but not defined herein shall have the meanings attributed to them in the Plan.

(b) Multi-Strat will pay UBS the sum of $18,500,000 (the "Multi-Strat Payment") as follows: (i) within two (2) business days after the Order Date, the May Settlement Parties will submit a Joint Release Instruction (as defined in the May Settlement) for the release of the amounts held in the Escrow Account (as defined in the May Settlement) to be paid to UBS in partial satisfaction of the Multi-Strat Payment on the date that is ten (10) business days following the Order Date; and (ii) Multi-Strat will pay UBS the remainder of the Multi-Strat Payment in immediately available funds on the date that is ten (10) business days following the Order Date, provided that, for the avoidance of doubt, the amounts held in the Escrow Account will not be paid to UBS until and unless the remainder of the Multi-Strat Payment is made.

(c) Subject to applicable law, HCMLP will use reasonable efforts to (i) cause CDO Fund to pay the Insurance Proceeds in full to UBS as soon as practicable, but no later than within 5 business days of CDO Fund actually receiving the Insurance Proceeds from or on behalf of Sentinel; (ii) if Sentinel refuses to pay the Insurance Proceeds, take legal action reasonably designed to recover the Insurance Proceeds or the MSCF Interests or to return the Transferred Assets to the Funds to satisfy the Phase I Judgment and in addition shall provide reasonable assistance to UBS in connection with any legal action UBS takes to recover the Insurance Proceeds or to return the Transferred Assets to the Funds to satisfy the Phase I Judgment or obtain rights to the MSCF interests, including but not limited to the redemption payments in connection with the MSCF Interests; (iii) cooperate with UBS and participate (as applicable) in the investigation or prosecution of claims or requests for injunctive relief against the Funds, Multi-Strat, Sentinel, James Dondero, Isaac Leventon, Scott Ellington, Andrew Dean, Christopher Walter, Jean Paul Sevilla, Matthew DiOrio, Katie Irving, and/or any other current or former employee or director of the Funds or Sentinel and/or any other former employee or former director of any of the HCMLP Parties that is believed to be involved with the Purchase Agreement, Insurance Policy, Transferred Assets, the transfer of the MSCF Interests, or any potentially fraudulent transfer of assets from the Funds to Sentinel, excluding the individuals listed on the schedule provided to UBS on March 25, 2021 (the "HCMLP Excluded Employees"); (iv) as soon as reasonably practicable, provide UBS with all business and trustee contacts at the Funds, HFP, Greenbriar CLO Ltd., Greenbriar CLO Corp., Aberdeen Loan Funding Ltd, Eastland CLO Ltd, Grayson CLO Ltd, Valhalla CLO Ltd, and Governance Re Ltd, if any, that are actually known by the Debtor after reasonable inquiry; (v) as soon as reasonably practicable, provide UBS with a copy of the governing documents, prospectuses, and indenture agreements for the Funds, HFP, Greenbriar CLO Ltd., Greenbriar CLO Corp., Aberdeen Loan Funding Ltd, Eastland CLO Ltd, Grayson CLO Ltd, Valhalla CLO Ltd, and Governance Re Ltd, as applicable, that are in the Debtor's actual possession, custody, or control, (vi) as soon as reasonably practicable, provide, to the extent possible, any CUSIP numbers of the securities of the Funds, HFP, Greenbriar CLO Ltd., Greenbriar CLO Corp., Aberdeen Loan Funding Ltd, Eastland CLO Ltd, Grayson CLO Ltd, Valhalla CLO Ltd, and Governance Re Ltd., as applicable, including information regarding the location and amount of any cash related to those entities' holdings, in each case only to the extent actually known by the Debtor after reasonable inquiry; (vii) cooperate with UBS to assign or convey any such assets described in Section 1(c)(vi) or any other assets owned or controlled by the Funds and/or HFP, including for avoidance of doubt any additional assets currently unknown to the Debtor that the Debtor discovers in the future after the Agreement Effective Date; (viii) respond as promptly as reasonably possible to requests by UBS for access to relevant documents and approve as promptly as reasonably possible requests for access to relevant documents from third parties as needed with respect to the Transferred Assets, the Purchase Agreement, the Insurance Policy, the

MSCF Interests and any other assets currently or formerly held by the Funds or HFP, including without limitation the requests listed in **Appendix A** (provided, however, that the provision of any such documents or access will be subject to the common interest privilege and will not constitute a waiver of any attorney-client or other privilege in favor of HCMLP) that are in the Debtor's actual possession, custody, or control; (ix) preserve all documents in HCMLP's possession, custody, or control regarding or relating to the Purchase Agreement, the Insurance Policy, the MSCF Interests, or any transfer of assets from the Funds to Sentinel, including but not limited to the documents requested in Appendix A, from 2016 to present, and issue a litigation hold to all individuals deemed reasonably necessary regarding the same; and (x) otherwise use reasonable efforts to assist UBS to collect its Phase I Judgment against the Funds and HFP and assets the Funds and/or HFP may own, or have a claim to under applicable law ahead of all other creditors of the Funds and HFP; provided, however, that, from and after the date hereof, HCMLP shall not be required to incur any out-of-pocket fees or expenses, including, but not limited to, those fees and expenses for outside consultants and professionals (the "Reimbursable Expenses"), in connection with any provision of this Section 1(c) in excess of $3,000,000 (the "Expense Cap"), and provided further that, for every dollar UBS recovers from the Funds (other than the assets related to Greenbriar CLO Ltd. or Greenbriar CLO Corp.), Sentinel, Multi-Strat (other than the amounts set forth in Section 1(b) hereof), or any other person or entity described in Section 1(c)(iii) in connection with any claims UBS has that arise out of or relate to the Phase I Judgment, the Purchase Agreement, the Insurance Policy, the Transferred Assets, the MSCF Interests, or the Insurance Proceeds (the "UBS Recovery"), UBS will reimburse HCMLP ten percent of the UBS Recovery for the Reimbursable Expenses incurred by HCMLP, subject to: (1) the occurrence of the Agreement Effective Date and (2) UBS's receipt and review of invoices and time records (which may be redacted as reasonably necessary) for outside consultants and professionals in connection with such efforts described in this Section 1(c), up to but not exceeding the Expense Cap after any disputes regarding the Reimbursable Expenses have been resolved pursuant to procedures to be agreed upon, or absent an agreement, in a manner directed by the Bankruptcy Court; and provided further that in any proceeding over the reasonableness of the Reimbursable Expenses, the losing party shall be obligated to pay the reasonable fees and expenses of the prevailing party; and provided further that any litigation in which HCMLP is a co-plaintiff with UBS or a plaintiff pursuing claims on behalf of or for UBS's benefit pursuant to this Section 1(c) shall be conducted in consultation with UBS, including but not limited to the selection of necessary outside consultants and professionals to assist in such litigation; and provided further that UBS shall have the right to approve HCMLP's selection of outside consultants and professionals to assist in any litigation in which HCMLP is a co-plaintiff with UBS or a plaintiff pursuing claims on behalf of or for UBS's benefit pursuant to this Section 1(c).

(d) Redeemer Appeal.

(i) On the Agreement Effective Date, provided that neither the Redeemer Committee nor any entities acting on its behalf or with any assistance from or coordination with the Redeemer Committee have objected to this Agreement or the 9019 Motion (as defined below), UBS shall withdraw with prejudice its appeal of the *Order Approving Debtor's Settlement with (A) the Redeemer Committee of the Highland Crusader Fund (Claim No. 72) and (B) the Highland Crusader Funds (Claim No. 81), and Authorizing Actions Consistent Therewith* [Docket No. 1273] (the "Redeemer Appeal"); and

(ii) The Parties have stipulated to extend the deadline for the filing of any briefs in the Redeemer Appeal to June 30, 2021 and will agree to such further extensions as necessary to facilitate this Settlement Agreement.

(e) As of the Agreement Effective Date, the restrictions and obligations set forth in the May Settlement, other than those in Section 7 thereof, shall be extinguished in their entirety and be of no further force or effect.

(f) On the Agreement Effective Date, the Debtor shall instruct the claims agent in the Bankruptcy Case to adjust the claims register in accordance with this Agreement.

(g) On the Agreement Effective Date, any claim the Debtor may have against Sentinel or any other party, and any recovery related thereto, with respect to the MSCF Interests shall be automatically transferred to UBS, without any further action required by the Debtor. For the avoidance of doubt, the Debtor shall retain any and all other claims it may have against Sentinel or any other party, and the recovery related thereto, unrelated to the MSCF Interests.

2. Definitions.

(a) "Agreement Effective Date" shall mean the date the full amount of the Multi-Strat Payment defined in Section 1(b) above, including without limitation the amounts held in the Escrow Account (as defined in the May Settlement), is actually paid to UBS.

(b) "HCMLP Parties" shall mean (a) HCMLP, in its individual capacity; (b) HCMLP, as manager of Multi-Strat; and (c) Strand.

(c) "Order Date" shall mean the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019 and section 363 of the Bankruptcy Code.

(d) "UBS Parties" shall mean UBS Securities LLC and UBS AG London Branch.

3. Releases.

(a) UBS Releases. Upon the occurrence of the Agreement Effective Date, and to the maximum extent permitted by law, each of the UBS Parties hereby forever, finally, fully, unconditionally, irrevocably, and completely releases, relieves, acquits, remises, exonerates, forever discharges, and covenants never to sue (A) the HCMLP Parties and each of their current and former advisors, attorneys, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (each in their capacities as such), except as expressly set forth below, and (B) the MSCF Parties and each of their current and former advisors, attorneys, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (each in their capacities as such), except as expressly set forth below, for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorneys' 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, or statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those that have been or could have been alleged or asserted in the State Court Action or the Bankruptcy Case (collectively, the "UBS Released Claims"), provided, however, that notwithstanding anything to the contrary herein, such releases shall not apply to (1) the obligations of the HCMLP Parties and MSCF Parties under this Agreement, including without limitation the allowance of or distributions on account of the UBS Claim or the settlement terms described in Sections 1(a)-(g) above; (2) the Funds or HFP, including for any liability with respect to the prosecution, enforcement, collection, or defense of the Phase I Judgment, Purchase Agreement, and/or Insurance Policy, or such prosecution, enforcement, collection, or defense of the Phase I Judgment, Purchase Agreement, and/or Insurance Policy by UBS; (3) James Dondero or Mark Okada, or any entities, including without limitation Hunter Mountain Investment Trust, Dugaboy Investment Trust, and NexBank, SSB, owned or controlled by either of them, other than the HCMLP Parties and MSCF Parties (but for the avoidance of doubt, such releases of the HCMLP Parties and MSCF Parties shall be solely with respect to such entities and shall not extend in any way to James Dondero or Mark Okada in their individual capacity or in any other capacity, including but not limited to as an investor, officer, trustee, or director in the HCMLP Parties or MSCF Parties); (4) Sentinel or its subsidiaries, parents, affiliates, successors, designees, assigns, employees, or directors, including James Dondero, Isaac Leventon, Scott Ellington, Andrew Dean, Christopher Walter, Jean Paul Sevilla, Matthew DiOrio, Katie Irving, and/or any other current or former employee or director of the Funds or Sentinel and/or any other former employee or former director of any of the HCMLP Parties that is believed to be involved with the Purchase Agreement, Insurance Policy, MSCF Interests, or Transferred Assets, including for any liability with respect to the prosecution, enforcement, collection, or defense of the Phase I Judgment, Purchase Agreement, the MSCF Interests, any potentially fraudulent transfer of assets from the Funds to Sentinel and/or Insurance Policy, excluding the HCMLP Excluded Employees; (5) the economic rights or interests of UBS in its capacity as an investor, directly or indirectly (including in its capacity as an investment manager and/or investment advisor), in any HCMLP-affiliated entity, including without limitation in the Redeemer Committee and Credit Strat, and/or in such entities' past, present or future subsidiaries and feeders funds (the "UBS Unrelated Investments"); and (6) any actions taken by UBS against any person or entity, including any HCMLP Party or MSCF Party, to enjoin a distribution on the Sentinel Redemption or the transfer of any assets currently held by or within the control of CDO Fund to Sentinel or a subsequent transferee or to seek to compel any action that only such person or entity has standing to pursue or authorize in order to permit UBS to recover the Insurance Proceeds, Transferred Assets, the Phase I Judgment or any recovery against HFP; provided, however, that, from and after the date hereof, any out-of-pocket fees or expenses incurred by HCMLP in connection with this Section 3(a)(6) will be considered Reimbursable Expenses and shall be subject to, and applied against, the Expense Cap as if they were incurred by HCMLP pursuant to Section 1(c) subject to the occurrence of the Agreement Effective Date and after any disputes regarding such Reimbursable Expenses have been resolved in the manner described in Section 1(c).

(b) **HCMLP Release.** Upon the occurrence of the Agreement Effective Date, and to the maximum extent permitted by law, each of the HCMLP Parties hereby forever, finally, fully, unconditionally, irrevocably, and completely releases, relieves, acquits, remises, exonerates, forever discharges, and covenants never to sue any of the UBS Parties and each of

their current and former advisors, attorneys, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (each in their capacities as such), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorneys' 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, or statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those that have been or could have been alleged or asserted in the State Court Action or the Bankruptcy Case (collectively, the "HCMLP Released Claims"), provided, however, that notwithstanding anything to the contrary herein, such releases shall not apply to the obligations of the UBS Parties under this Agreement or Section 7 of the May Settlement; and (b) the obligations of the UBS Parties in connection with the UBS Unrelated Investments.

(c) **Multi-Strat Release.** Upon the occurrence of the Agreement Effective Date, and to the maximum extent permitted by law, each of the MSCF Parties hereby forever, finally, fully, unconditionally, irrevocably, and completely releases, relieves, acquits, remises, exonerates, forever discharges, and covenants never to sue any of the UBS Parties and each of their current and former advisors, attorneys, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (each in their capacities as such), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorneys' 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, or statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those that have been or could have been alleged or asserted in the State Court Action or the Bankruptcy Case (collectively, the "Multi-Strat Released Claims"), provided, however, that notwithstanding anything to the contrary herein, such releases shall not apply to the obligations of the UBS Parties under this Agreement or Section 7 of the May Settlement.

4. No Third Party Beneficiaries. Except for the parties released by this Agreement, no other person or entity shall be deemed a third-party beneficiary of this Agreement.

5. UBS Covenant Not to Sue. Subject to the occurrence of the Agreement Effective date, if UBS ever controls any HCMLP-affiliated defendant in the State Court Action by virtue of the prosecution, enforcement, or collection of the Phase I Judgment (collectively, the "Controlled State Court Defendants"), UBS covenants on behalf of itself and the Controlled State Court Defendants, if any, that neither UBS nor the Controlled State Court Defendants will assert or pursue any claims that any Controlled State Court Defendant has or may have against any of the HCMLP Parties; provided, however, that nothing shall prohibit UBS or a Controlled State Court Defendant from taking any of the actions set forth in Section 3(a)(1)-(6); provided further, however, if and to the extent UBS receives any distribution from any Controlled State Court Defendant that is derived from a claim by a Controlled State Court Defendant against the Debtor, subject to the exceptions set forth in Section 3(a), which distribution is directly

attributable to any property the Controlled State Court Defendant receives from the Debtor and separate and distinct from property owned or controlled by CDO Fund, SOHC, or Multi-Strat, then such recovery shall be credited against all amounts due from the Debtor's estate on account of the UBS Claim allowed pursuant to Section 1(a) of this Agreement, or if such claim has been paid in full, shall be promptly turned over to the Debtor or its successors or assigns.

6. Agreement Subject to Bankruptcy Court Approval.

(a) The force and effect of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement and the releases herein by the Bankruptcy Court. The Parties agree to use reasonable efforts to have this Agreement expeditiously approved by the Bankruptcy Court by cooperating in the preparation and prosecution of a mutually agreeable motion and proposed order (the "9019 Motion") to be filed by the Debtor no later than five business days after execution of this Agreement by all Parties unless an extension is agreed to by both parties.

7. Representations and Warranties.

(a) Each UBS Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the UBS Released Claims and has not sold, transferred, or assigned any UBS Released Claim to any other person or entity, and (ii) no person or entity other than such UBS Party has been, is, or will be authorized to bring, pursue, or enforce any UBS Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) such UBS Party.

(b) Each HCMLP Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HCMLP Released Claims and has not sold, transferred, or assigned any HCMLP Released Claim to any other person or entity, and (ii) no person or entity other than such HCMLP Party has been, is, or will be authorized to bring, pursue, or enforce any HCMLP Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) such HCMLP Party.

(c) Each MSCF Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the Multi-Strat Released Claims and has not sold, transferred, or assigned any Multi-Strat Released Claim to any other person or entity, and (ii) no person or entity other than such MSCF Party has been, is, or will be authorized to bring, pursue, or enforce any Multi-Strat Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) such MSCF Party.

8. **No Admission of Liability**. The Parties acknowledge that there is a bona fide dispute with respect to the UBS Claim. Nothing in this Agreement shall be construed, expressly or by implication, as an admission of liability, fault, or wrongdoing by HCMLP, the MSCF Parties, Strand, UBS, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of HCMLP, the MSCF Parties, Strand, UBS, or any other person.

9. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their representatives, successors, and assigns.

10. **Notice**. Each notice and other communication hereunder shall be in writing and will, unless otherwise subsequently directed in writing, be delivered by email and overnight delivery, as set forth below, and will be deemed to have been given on the date following such mailing.

HCMLP Parties or the MSCF Parties

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: General Counsel
Telephone No.: 972-628-4100
E-mail: notices@HighlandCapital.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
E-mail: jpomerantz@pszjlaw.com

UBS

UBS Securities LLC
UBS AG London Branch
Attention: Elizabeth Kozlowski, Executive Director and Counsel
1285 Avenue of the Americas
New York, NY 10019
Telephone No.: 212-713-9007
E-mail: elizabeth.kozlowski@ubs.com

UBS Securities LLC
UBS AG London Branch
Attention: John Lantz, Executive Director
1285 Avenue of the Americas
New York, NY 10019

Telephone No.: 212-713-1371
E-mail: john.lantz@ubs.com

with a copy (which shall not constitute notice) to:

Latham & Watkins LLP
Attention: Andrew Clubok
Sarah Tomkowiak
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004-1304
Telephone No.: 202-637-3323
Email: andrew.clubok@lw.com
sarah.tomkowiak@lw.com

11. Advice of Counsel. Each of the Parties represents that such Party has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

12. Entire Agreement. This Agreement contains the entire agreement and understanding concerning the subject matter of this Agreement, and supersedes and replaces all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation, or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation, or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

13. No Party Deemed Drafter. The Parties acknowledge that the terms of this Agreement are contractual and are the result of arm's-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

14. Future Cooperation. The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

15. Counterparts. This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement.

Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

16. **Governing Law; Venue; Attorneys' Fees and Costs**. The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of New York without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Borough of Manhattan, New York, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: _____
Name: James P. Seery, Jr.
Its: Authorized Signatory

HIGHLAND MULTI STRATEGY CREDIT FUND, L.P. (f/k/a Highland Credit Opportunities CDO, L.P.)

By: _____
Name: James P. Seery, Jr
Its: Authorized Signatory

HIGHLAND CREDIT OPPORTUNITIES CDO, Ltd.

By: _____
Name: James P. Seery, Jr
Its: Authorized Signatory

HIGHLAND CREDIT OPPORTUNITIES CDO ASSET HOLDINGS, L.P.

By: _____
Name: James P. Seery, Jr
Its: Authorized Signatory

STRAND ADVISORS, INC.

By: _____
Name: James P. Seery, Jr.
Its: Authorized Signatory

EXECUTION VERSION

UBS SECURITIES LLC

By: _____
Name: John Lantz
Its: Authorized Signatory

By: _____
Name: Elizabeth Kozlowski
Its: Authorized Signatory

UBS AG LONDON BRANCH

By: _____
Name: William Chandler
Its: Authorized Signatory

By: _____
Name: Elizabeth Kozlowski
Its: Authorized Signatory

APPENDIX A

- The search parameters (custodians, date ranges, search terms) used to locate the documents produced to UBS on February 27, 2021 (and any additional parameters used for the previous requests from UBS);
- Identity of counsel to, and trustees of, CDO Fund or SOHC;
- Current or last effective investment manager agreements for CDO Fund and SOHC, including any management fee schedule, and any documentation regarding the termination of those agreements;
- The tax returns for the CDO Fund and SOHC from 2017-present;
- Communications between any employees of Sentinel (or its affiliates) and any employees of the HCMLP Parties, CDO Fund, SOHC, or any of Dondero, Leventon, or Ellington from 2017-present;
- Documents or communications regarding or relating to the Purchase Agreement, Insurance Policy, or June 30, 2018 Memorandum entitled "Tax Consequences of Sentinel Acquisition of HFP/CDO Opportunity Assets" (the "Tax Memo"), including without limitation (i) amendments to these documents, (ii) transfer of assets pursuant to these documents, (iii) board minutes or resolutions regarding or relating to these documents, (iv) claims made on the Insurance Policy; (v) communications with the IRS regarding the asset transfer pursuant to these documents; and (vi) any similar asset purchase agreements, capital transfer agreements, or similar agreements;
- Documents or communications regarding or relating to the value of any assets transferred pursuant to the Insurance Policy or Purchase Agreement, including without limitation those assets listed in Schedule A to the Purchase Agreement, from 2017 to present, including documentation supporting the $105,647,679 value of those assets as listed in the Tax Memo;
- Documents showing the organizational structure of Sentinel and its affiliated entities, including information on Dondero's relationship to Sentinel;
- Any factual information provided by current or former employees of the HCMLP Parties, CDO Fund, SOHC, or Sentinel regarding or relating to the Purchase Agreement, Insurance Policy, Tax Memo, and/or transfer of assets pursuant to those documents;
- Debtor's settlement agreements with Ellington and Leventon;
- Copies of all prior and future Monthly Reports and Valuation Reports (as defined in the Indenture, dated as of December 20, 2007, among Greenbriar CLO Ltd., Greenbriar CLO Corp., and State Street Bank and Trust Company); and
- Identity of any creditors of CDO Fund, SOHC, or HFP and amount of debts owed to those creditors by CDO Fund, SOHC, or HFP, including without limitation any debts owed to the Debtor.

Exhibit 2

Proof of Claim No. 190

Fill in this information to identify the case:

Debtor Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas (State)

Case number 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**
   UBS Securities LLC
   Name of the current creditor (the person or entity to be paid for this claim)
   Other names the creditor used with the debtor

2. **Has this claim been acquired from someone else?**
   ☑ No
   ☐ Yes. From whom?

3. **Where should notices and payments to the creditor be sent?**
   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

   Where should notices to the creditor be sent?
   UBS Securities LLC
   Attn: Suzanne Forster
   1285 Avenue of the Americas
   New York, New York 10019

   Contact phone 2127133432
   Contact email suzanne.forster@ubs.com

   Where should payments to the creditor be sent? (if different)
   Contact phone
   Contact email

   (see summary page for notice party information)
   Uniform claim identifier for electronic payments in chapter 13 (if you use one):

4. **Does this claim amend one already filed?**
   ☑ No
   ☐ Yes. Claim number on court claims registry (if known) Filed on MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**
   ☐ No
   ☑ Yes. Who made the earlier filing? UBS AG, London Branch - this is a joint litigation claim.

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Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**

☑ No

☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ___ ___ ___ ___

7. **How much is the claim?** $ 1,039,957,799.40 . **Does this amount include interest or other charges?**

☐ No

☑ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

Limit disclosing information that is entitled to privacy, such as health care information.

Litigation - See attached addendum

9. **Is all or part of the claim secured?**

☑ No

☐ Yes. The claim is secured by a lien on property.

Nature or property:

☐ Real estate: If the claim is secured by the debtor's principle residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.

☐ Motor vehicle

☐ Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: $_____

Amount of the claim that is secured: $_____

Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amount should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: $_____

Annual Interest Rate (when case was filed)_____%

☐ Fixed

☐ Variable

10. **Is this claim based on a lease?**

☑ No

☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**

☑ No

☐ Yes. Identify the property: _____

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12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☑ No

☐ Yes. *Check all that apply:*

	Amount entitled to priority
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$
☐ Up to $3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$
☐ Wages, salaries, or commissions (up to $13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$
☐ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. **Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?**

☑ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

$

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☑ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 06/26/2020
MM / DD / YYYY

/s/Asif Attarwala
Signature

Print the name of the person who is completing and signing this claim:

Name: Asif Attarwala
First name Middle name Last name

Title: Associate

Company: Latham and Watkins LLP
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address: 330 North Wabash Ave., Suite 2800, Chicago, IL, 60611

Contact phone 3128767667 Email asif.attarwala@lw.com

1934054200626000000000002

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor:
19-34054 - Highland Capital Management, L.P.
District:
Northern District of Texas, Dallas Division

Creditor:
UBS Securities LLC
Attn: Suzanne Forster
1285 Avenue of the Americas

New York, New York, 10019

Phone:
2127133432
Phone 2:
Fax:
Email:
suzanne.forster@ubs.com

Has Supporting Documentation:
Yes, supporting documentation successfully uploaded
Related Document Statement:

Has Related Claim:
Yes
Related Claim Filed By:
UBS AG, London Branch - this is a joint litigation claim. See attached addendum

Filing Party:
Authorized agent

Disbursement/Notice Parties:
Latham and Watkins LLP
Andrew Clubok
555 Eleventh Street, NW

Washington, D.C., 2004-1304

Phone:
2026373323
Phone 2:
Fax:
E-mail:
andrew.clubok@lw.com

Other Names Used with Debtor:

Amends Claim:
No
Acquired Claim:
No

Basis of Claim:
Litigation - See attached addendum

Last 4 Digits:
No

Uniform Claim Identifier:

Total Amount of Claim:
1,039,957,799.40

Includes Interest or Charges:
Yes

Has Priority Claim:
No

Priority Under:

Has Secured Claim:
No
Amount of 503(b)(9):
No
Based on Lease:
No
Subject to Right of Setoff:
No

Nature of Secured Amount:
Value of Property:
Annual Interest Rate:
Arrearage Amount:
Basis for Perfection:
Amount Unsecured:

Submitted By:
Asif Attarwala on 26-Jun-2020 5:10:38 p.m. Eastern Time
Title:
Associate
Company:
Latham and Watkins LLP

Optional Signature Address:

Asif Attarwala
330 North Wabash Ave.
Suite 2800

Chicago, IL, 60611

Telephone Number:
3128767667
Email:
asif.attarwala@lw.com

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 (SGJ)
Debtor.	)	

ADDENDUM TO PROOF OF CLAIM FILED BY
UBS AG, LONDON BRANCH

1. UBS Securities LLC hereby submits this addendum to its proof of claim (together, the "**Proof of Claim**") against Highland Capital Management, L.P. (the "**Debtor**") in the above-captioned chapter 11 case (the "**Chapter 11 Case**").

2. UBS Securities LLC and UBS AG, London Branch (together, the "**Claimant**" or "**UBS**") each have claims against the Debtor and each is filing a proof of claim in this Chapter 11 Case. Because their claims arise from the same set of factual events, including the same failed transaction, misconduct involving the Debtor and its affiliates, and subsequent litigation, the UBS claims overlap and their proof of claim forms and addendums are substantially the same.

3. This addendum is attached to, incorporated into, and constitutes an integral part of Claimant's Proof of Claim against the Debtor. Claimant files this Proof of Claim under compulsion of the *Order (I) Establishing Bar Dates for Filing Claims and (II) Approving the Form and Manner of Notice Thereof* [Docket No. 488], as extended by the *Joint Stipulation and Order Extending Bar Date* [Docket No. 547] and modified by the *Order Denying UBS's Motion for Relief*

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

from the Automatic Stay to Proceed with State Court Action [Docket No. 765], solely for the purpose of asserting Claimant's claims against the Debtor, as more particularly described and subject to any limitations set forth below.

Factual Background

A. The Knox Transaction

2. Claimant's claims arise out of a failed transaction dating back thirteen years ago and the state court action (the "**State Court Action**") that followed between Claimant, the Debtor, Highland CDO Opportunity Master Fund, L.P. ("**CDO Fund**") and Highland Special Opportunities Holding Company ("**SOHC**") (together with CDO Fund, the "**Fund Counterparties**," and the Fund Parties and the Debtor collectively, "**Highland**"), among other parties.[2]

3. In early 2007, Claimant and Highland agreed to pursue a complex form of securitization transaction known as a "CLO Squared" (the "**Knox Transaction**"). (Ex. B, Decision at 2.) The purpose of the Knox Transaction was to acquire and securitize a series of collateralized loan obligation ("**CLO**") securities and credit default swap ("**CDS**") assets (the "**Knox Assets**"). To that end, the Debtor agreed to be the "Servicer" of the Knox Transaction, and as such was responsible for identifying the specific CLO and CDS assets to be securitized. Claimant agreed to finance the acquisition of the CLO and CDS assets identified by Highland. Claimant would then hold, or "warehouse," the assets until the securitization was completed (the "**Knox Warehouse**"). Under this arrangement, Claimant financed the acquisition of $818 million in Knox Assets. (*Id.*)

[2] The procedural history of the State Court Action is incorporated by reference, but is voluminous. The operative Second Amended Complaint and Phase I Decision and Order are attached as **Exhibit A** and **Exhibit B**, respectively. Additional pleadings and orders can be found on the State Court docket for Index No. 650097/2009 or by contacting Claimant's counsel. Claimant reserves the right to file a copy of additional pleadings or orders with this Court.

4. The parties' first attempt at the Knox Transaction was not completed successfully and the relevant agreements expired in August 2007 without the contemplated securitization having occurred. (*Id.* at 3.) Rather than end their relationship, however, Highland and Claimant continued to consider the possibility of pursuing the contemplated securitization in 2008 under restructured versions of the prior agreements. Highland and Claimant always understood that—if the securitization were not successful—the Fund Counterparties would be obligated to pay Claimant for 100% of the losses on any CLO or CDS assets that been acquired and warehoused for the securitization. In order to convince Claimant to agree to enter restructured versions of those agreements and to finance the acquisition of the CLO and CDS assets, Highland assured Claimant that the Fund Counterparties had sufficient assets to cover any losses. It did so by providing Claimant with false, incomplete, and otherwise misleading information concerning the Fund Counterparties' finances and assets. (Ex. A, Compl. ¶¶ 47-61.)

5. In addition, Claimant specifically conditioned its agreement to enter the restructured agreements on the Fund Counterparties' ability to post an additional $70 million in cash and securities as collateral (the "**Initial Restructuring Collateral**"), in which Claimant would hold a security interest. (*Id.* ¶¶ 56-59; Ex. B, Decision at 3.) Highland assembled $70 million in such Initial Restructuring Collateral. But what Highland did not tell Claimant—and what is now clear was omitted on purpose—was that the Fund Counterparties did not own all of the Initial Restructuring Collateral they were expected to post. Instead, to meet this obligation, the Debtor exercised its control over other Highland affiliates, transferring and redirecting assets from such other entities that it controlled to assemble the Initial Restructuring Collateral. (Ex. A, Compl. ¶¶ 56-59.)

6. Similarly, while negotiating the restructured transaction, Highland provided Claimant with financial reports and statements that contained materially false and misleading information and omissions concerning the financial condition of the Fund Counterparties. (*Id.* ¶¶ 47-52.) The Debtor itself had prepared these financial statements and knew they contained material misstatements. (*Id.* ¶¶ 48-50, 54.) Among other things, Highland misrepresented the amount of cash held by CDO Fund. (*Id.* ¶ 52.) Highland also failed to disclose that many of the assets on the Fund Counterparties' financial statements already had been encumbered. (*Id.* ¶¶ 51, 53.) These misrepresentations not only evince a specific intent by Highland to induce Claimant into entering the restructured agreements, but a longstanding willingness to prevent Claimant from ever recovering the amounts owed under the parties' proposed agreements in the event the Knox Assets suffered any losses. In addition, these events show the Debtor's singular control over—and ability to move—assets from one Highland affiliate to another at will.

7. Based on Highland's material misstatements and omissions, Claimant agreed to pursue the restructured transaction and once more attempt the securitization, and the parties executed three new written agreements: an Engagement Letter, a Cash Warehouse Agreement, and a Synthetic Warehouse Agreement (collectively, the "**Warehouse Agreements**"). (*See* Ex. B, Decision at 3.) The Engagement Letter was executed by Claimant and the Debtor; the Fund Counterparties were not parties to the Engagement Letter. (Ex. A, Compl. ¶ 62.) The Cash Warehouse and Synthetic Warehouse Agreements were executed by Claimant and the Debtor, along with the Fund Counterparties. (*Id.* ¶¶ 64-65.)

8. As described above, Claimant agreed to finance the acquisition of the CLO and CDS assets that the parties planned to securitize. In so doing, the key risk Claimant faced was the possibility that the Knox Assets would lose value while securitization was pending. To address

this risk, Claimant and the Debtor agreed in the Engagement Letter that the Fund Counterparties would bear this risk. Notably, at the time, the Debtor was the Investment Manager to the Fund Counterparties under agreements that gave the Debtor total control over those entities. (Ex. A, Compl. ¶¶ 24, 26.)

9. The Warehouse Agreements reiterated that the Fund Counterparties (as controlled by the Debtor) would bear the risk, specifying that if the Knox Assets lost value while securitization was pending, the Fund Counterparties "will in aggregate bear 100% of the risk" for the Knox Assets—with CDO Fund bearing 51% of any losses and SOHC bearing the remaining 49%.

10. To further protect Claimant in the event that the Knox Assets lost value, the Warehouse Agreements provided for recurring measurements of mark-to-market losses on all assets in the Knox Warehouse and required the Fund Counterparties to post collateral in the event the Knox Assets lost a set amount of value. Specifically, the parties agreed that the Fund Counterparties would post an additional $10 million in collateral for each $100 million in losses to the overall value of the Knox Assets. (Ex. B, Decision at 4.)

11. In September and October 2008, amid the global economic recession, the value of the Knox Assets dropped by $100 million, twice. Thus, Claimant twice exercised its contractual right to demand additional collateral. And twice Highland posted the required collateral. (*Id.*) Although the Warehouse Agreements specified that it was the Fund Counterparties who would post collateral, the Debtor moved assets around from other entities it controlled to make the first two collateral calls (without disclosing this practice to Claimant). (Ex. A, Compl. ¶ 79.) On or about November 7, 2008, Claimant issued a third margin call, because the value of the Knox Assets suffered additional losses of $200 million (bringing the aggregate losses to over $400 million).

(Ex. B, Decision at 4.) This time, Highland refused to provide the additional collateral required under the Warehouse Agreements.

12. Highland's default on Claimant's third margin call triggered a termination event under the Warehouse Agreements. (*Id.*) On December 5, 2008, Claimant gave Highland formal notice of default and demanded the Fund Counterparties pay Claimant for 100% of the losses incurred on the Knox Assets—which had, by then, grown to over $520 million.

13. There is no question that the Debtor knew the Fund Counterparties were liable for the losses under the Warehouse Agreements. Indeed, the Highland officer who executed the Warehouse Agreements admitted under oath that, "as of the end of the year 2008," Highland knew that the Fund Counterparties owed Claimant "hundreds of millions of dollars in connection with the Knox Warehouse Agreements." (Travers Dep. at 261:8-20).) But rather than paying Claimant what it was owed, the Debtor, with Mr. Dondero at the helm, "devised a strategy to delay the resolution of that obligation [to pay Claimant] for as long as possible." (*Id.*) To that end, Highland devised and subsequently deployed a multifaceted strategy—one that would last for many years thereafter—to intentionally frustrate and prevent Claimant from recovering any of the amounts that both the Debtor and the Fund Counterparties knew were rightfully owed to Claimant under the Warehouse Agreements.

14. First, the Debtor directed the Fund Counterparties to withhold any payment to Claimant—a position that the Fund Counterparties maintained (again, under the specific direction of the Debtor) for more than a decade. (*See id.*) The Debtor did so not only with the specific knowledge that the Fund Counterparties owed hundreds of millions of dollars to Claimant for the losses on the Knox Assets, but with the knowledge that Claimant would come seeking payment

for such losses and, in particular, to look toward any and all collateral owned by the Fund Counterparties as one source of payment. As one of Highland's officers stated an internal email to Mr. Dondero in an internal email dated January 16, 2009: "[UBS] is going to be calling [] today asking for all additional collateral that cdo and sohc have left to cover the obligation left by the knox transaction." But rather than turning over the collateral in question to Claimant or, at the very least, securing such assets so that they could be used to pay Claimant, the Debtor directed the Fund Counterparties to withhold such assets and payments from Claimant: "[T]hey can see us in court for their additional collateral." True to that promise, even after Claimant filed suit and laid out the amounts due under the contracts, the Debtor forced the Fund Counterparties to launch an affirmative, multi-year campaign—one which would consume much of the cash and assets belonging to the Fund Counterparties themselves—to stave off any payment from the Fund Counterparties to force Claimant to try to recover such claims through litigation and, once in litigation, devising knowingly baseless defenses and arguments for the Fund Counterparties to assert in such litigation.

15. On top of directing the Fund Counterparties to withhold payment and force Claimant to litigate for amounts the Debtor already knew they rightfully owed to Claimant, the Debtor undertook a litany of other actions to ensure that, even if Claimant were successful in the litigation it had been forced to initiate against the Fund Counterparties, it would not be able to collect any judgment arising out of the litigation. Such actions included, but were not limited to, a series of fraudulent transfers out of, and away from, an alter ego of SOHC, Highland Financial Partners, L.P. ("**HFP**"). (Ex. A, Compl. ¶ 109.) These internal transfers of funds—all overseen by James Dondero, the Debtor's founder and president—were designed to prevent Claimant from ever collecting the millions of dollars it was owed under the Warehouse Agreements.

16. In addition to such fraudulent transfers, the Debtor also took steps after the lawsuit was filed to ensure that no additional value would be transferred ***to*** the Fund Counterparties—deliberately taking steps to keep both SOHC and CDO Fund undercapitalized. Not only did the Debtor prevent additional value from being transferred to the Fund Counterparties, it is clear that the Debtor also failed to ensure that the Fund Counterparties retained assets that could be used to pay any such judgment. Quite to the contrary, it is now clear that any and all assets of any value that once belonged to the Fund Counterparties have, in one way or another, been transferred away, drained, or otherwise wasted by the Fund Counterparties, the Debtor itself, or the Debtor's affiliates—all at the Debtor's direction. Indeed, in a recent filing before this Court, the Debtor recently disclosed that both of the Fund Counterparties are completely "insolvent." (Docket No. 687 at 1.) This means that—separate and apart from the transfers of assets out of, and away from, HFP that occurred in 2009—the Debtor has directed, or otherwise permitted, the Fund Counterparties to engage in acts that have left these once marque investment funds with literally ***no*** assets that can be used to pay Claimant. All such actions and omissions by the Debtor were performed with either the specific intent to prevent or frustrate Claimant's ability to recover the amounts owed under the Warehouse Agreements, or a wanton and reckless disregard of Claimant's rights to those amounts. Such actions and omissions constitute breaches of the Debtor's duty of good faith and fair dealing under the Warehouse Agreements.

B. The State Court Action and the Debtor's Efforts to Avoid Paying Claimant

17. On February 24, 2009, Claimant filed a complaint in the Supreme Court of the State of New York (the "**State Court**") against the Debtor and the Fund Counterparties. With knowledge of Claimant's lawsuit, the Debtor exercised its control over the Fund Counterparties to ensure they would not meet their obligations and to impede Claimant's ability to recover the

amounts owed by those entities. (*Id.* ¶¶ 112, 114.) Rather than paying Claimant what it was owed, and as discussed above, the Debtor orchestrated an extensive multi-part strategy to delay resolution of Claimant's claims for as long as possible. As a result, the Debtor further interfered with Claimant's contractual rights, thereby breaching the covenants of good faith and fair dealing inherent in the Warehouse Agreements. (*Id.*)

18. By this time, the Fund Counterparties and SOHC's alter ego, HFP, had become insolvent, although they still owned significant assets. (*Id.* ¶ 108.) Nonetheless, the Debtor failed to act in good faith to cause HFP to satisfy the debts, as much as possible, then owed to Claimant. Instead, the Debtor caused HFP to make additional improper and fraudulent asset transfers, deliberately kept the Fund Counterparties undercapitalized, and allowed all assets of any value to be drained from the Fund Counterparties—acts which not only impaired Claimant's ability to recover anything from the Fund Counterparties, but precluded it altogether. (*Id.* ¶ 111.) In March 2009, conscious that Claimant had commenced an action against Highland a few weeks earlier, and in breach of their continuing duty of good faith and fair dealing, and with actual fraudulent intent, the Debtor and HFP caused asset transfers of millions of dollars of assets to the Debtor, Highland Credit Strategies Master Fund, L.P., Highland Crusader Offshore Partners, L.P., and Highland Credit Opportunities CDO, L.P. (now Highland Multi Strategy Credit Fund, L.P.) (collectively, the "**Affiliated Transferee Defendants**"), among others, thereby further reducing Highland's abilities to meet their obligations to Claimant. (*Id.* ¶¶ 111, 113.) The Debtor and its principals exercised domination over the Fund Counterparties to improperly transfer substantial assets from the Fund Counterparties and HFP for their own personal gain, i.e., solely and improperly to protect and enhance the value of the Debtor and its principals by wrongful and improper means. In the

process, the Debtor and its principals made it impossible for the Fund Counterparties to pay Claimant the losses that they and the Debtor had agreed they would pay under the Warehouse Agreements. (*Id.* ¶¶ 112-114.)

19. As Claimant learned about Highland's conduct through discovery, Claimant amended its complaint to assert additional claims and name additional Highland entities, including HFP, the Affiliated Transferee Defendants, and Strand Advisors, Inc. As amended and stated in its Second Amended Complaint (attached hereto as Exhibit A) in the State Court Action, filed on May 11, 2011, Claimant's claims include breach of contract claims directly against the Fund Counterparties, as well as claims for fraudulent inducement, breach of the duty of good faith and fair dealing, fraudulent conveyance, tortious interference, and declaratory judgments for alter ego liability against HFP and general partner liability against Strand Advisors, Inc. The Debtor subsequently brought counterclaims against Claimant for breach of contract and unjust enrichment. (*See* Ex. B, Decision at 35-37.)

20. The procedural history of the State Court Action is complex. The Debtor and its affiliates and Claimant filed, and the State Court ruled on, four sets of motions to dismiss. The Debtor and its affiliates then filed two sets of summary judgment motions, which led to a series of complex rulings by the State Court in 2017. The parties filed various interlocutory appeals of the State Court's rulings on the motions to dismiss and for summary judgment. Those appeals were heard by the Appellate Division for the First Judicial Department in the County of New York, with the Appellate Division issuing five decisions over this suit's protracted history (some of which are still subject to further appellate rights).

21. Also included in the Appellate Division's decisions was an order arising from an appeal of the State Court's ruling on Claimant's motion to restrain Defendants Highland Credit

Strategies Master Fund, L.P. and Highland Crusader Partners, L.P. from disposing of property received through the fraudulent transfers orchestrated by the Debtor. Claimant showed it had a likelihood of success on the merits of its fraudulent transfer claims, and the Appellate Division enjoined both Highland entities from disposing of their assets. Ultimately, these injunctions resulted in partial settlements between Claimant and Highland Credit Strategies Master Fund, L.P. and Highland Crusader Partners, L.P.

22. By early 2018, more than nine years after Claimant first filed suit, the parties were finally ready to proceed to trial. Due to a jury waiver clause in the Warehouse Agreements, however, and after related pre-trial briefing, the State Court bifurcated Claimant's claims into two distinct phases for trial: Phase I, consisting of a bench trial on Claimant's claims against the Fund Counterparties for breach of the Cash Warehouse and Synthetic Warehouse Agreements, as well as the Debtor's counterclaims; and Phase II, consisting of a jury trial on Claimant's remaining claims against all remaining Highland entities, including the Debtor.[3] (Ex. B, Decision at 2 n.1, 38.)

23. The State Court presided over a thirteen-day bench trial for Phase I from July 9 through July 27, 2018. (*Id.* at 1.) On November 14, 2019, the State Court entered a Decision and Order on Phase I (attached hereto as Exhibit B), ruling in favor of Claimant on almost every issue presented in Phase I. In particular, the court found the Fund Counterparties liable to Claimant for breach of the Cash Warehouse and Synthetic Warehouse Agreements, found no liability on the part of Claimant for either of the Debtor's counterclaims, and rejected almost every one of the Debtor's offset arguments with the only remaining issue (affecting approximately $70,500,000) to

[3] Remaining claims are to be tried to a jury, with the court deciding liability as to the breach of the implied covenant of good faith and fair dealing claim and the jury deciding all remaining issues.

be determined after Phase II. (*Id.* at 39.) An Entry of Judgment on Phase I was entered on February 10, 2020. Under that Phase I final judgment, Claimant is entitled to $1,039,957,799.44, consisting of $519,374,149.00 in damages and $520,583,650.44 in pre-judgment interest as of January 22, 2020, with additional interest of $128,065 having accrued daily until the Entry of Judgment.

24. The next step in the State Court Action is Phase II of the trial, where Claimant's remaining claims against not only the Debtor, but also against other Highland affiliates are to be tried to a jury, with the court deciding liability as to the breach of the implied covenant of good faith and fair dealing claim and the jury deciding all remaining claims. (*Id.* at 2 n.1, 38.) The claims to be tried in Phase II include claims for breach of the implied covenant of good faith and fair dealing, fraudulent conveyances, and alter-ego liability. The specific amounts the two non-Debtor affiliates owe to Claimant for their breach of the Warehouse Agreements are now set forth and embodied in the final $1 billion judgment from Phase I. And Claimant has stated claims against the Debtor—which was also a party to the same contract and exercised complete control over the two liable affiliates—under which Claimant is entitled to damages that are at least as much as the Phase I judgment amount. Claimant will seek damages for the Debtor's various breaches of the implied covenant as well as its specific role in the fraudulent transfer scheme, and pre-judgment interest and attorneys' fees where available. In addition, Claimant will seek punitive damages against the Debtor for its role in orchestrating the extended efforts to prevent Claimant from collecting the amounts owed under the Warehouse Agreements.

25. Currently, Phase II of the State Court Action is stayed against the Debtor by the automatic stay imposed pursuant to section 362 of the Bankruptcy Code when the Debtor commenced this Chapter 11 Case.

26. Claimant hereby asserts a claim, pending litigation of Phase II, for damages arising from the Debtor's breach of the implied covenant of good faith and fair dealing, its specific role in directing the fraudulent transfers of assets involving HFP, additional interest, further damages (including punitive damages), and attorneys' fees that may be awarded by any court at the conclusion of Phase II.

Reservation of Rights

27. Claimant does not waive or release, and expressly reserves, all rights and remedies at law or in equity that it has or may have against the Debtor, the Fund Counterparties, Strand Advisors, Inc., other non-Debtor Highland Defendants, or any other Debtor affiliate, subsidiary, person, or entity.

28. Claimant expressly reserves all of its rights to assert any additional claims, defenses, remedies, and causes of action, including without limitation, claims for fraudulent inducement, breach of contract, tortious interference with contractual relations, fraudulent conveyances, or alter ego recovery. Claimant further reserves all rights to amend, modify, supplement, reclassify, or otherwise revise its Proof of Claim at any time and in any respect, including, without limitation, as necessary or appropriate to amend, quantify or correct amounts, to provide additional detail regarding the claims set forth herein, to assert additional grounds for any of the claims, to seek reconsideration under section 502(j) of the Bankruptcy Code or otherwise of any disallowance of any amounts claimed hereunder, or to reflect any and all additional claims of whatever kind or nature that Claimant has or may have against the Debtor.

29. To the extent any payment to Claimant based on this Proof of Claim, or any portion thereof, is clawed back from Claimant, avoided, or set aside, for any reason whatsoever, or Claimant is required to disgorge any such payment, or any portion thereof, Claimant hereby reserves its rights to amend this Proof of Claim accordingly.

30. The execution and filing of this Proof of Claim is not intended as, nor should it be construed as or deemed to be any of the following: (i) a waiver of the right to seek withdrawal of the reference, or to otherwise challenge the jurisdiction of this Court, with respect to the subject matter of the claims asserted herein, any objection or other proceeding commenced with respect thereto, or any other action or proceeding commenced in this Chapter 11 Case against or otherwise involving Claimant; (ii) an admission that any matter is a core matter for purposes of 28 U.S.C. § 157(b) or is a matter as to which this Court can enter a final order or judgment consistent with Article III of the United States Constitution; (iii) a waiver of the right to *de novo* review by the district court of any order or judgment for which this Court, absent Claimant's consent, lacks authority to enter a final order or judgment; (iv) a consent to the entry by this Court of a final order or judgment with respect to the claims asserted herein or any other matter; (v) a waiver of Claimant's right to a jury trial against the Debtor, as applicable, or waiver of Claimant's right to a jury trial against any of the non-Debtor Defendants; (vi) a waiver or release of the claims or rights of Claimant against any other entity or person that may be liable for all or any part of the claims or any matters related to the claims asserted herein; (vii) a waiver of any rights and remedies Claimant has or may have under the Cash Warehouse and Synthetic Warehouse Agreements, Engagement Letter, or any other contract, whether mentioned in this Proof of Claim or not; (viii) a waiver of Claimant's contractual right to seek to have these or any other claims settled by binding arbitration; (ix) a waiver of any right related to the confirmation of any plan of reorganization proposed in this

Chapter 11 Case, or any other insolvency-related proceeding that may be commenced, either in the United States or abroad, by or against the Debtor, or any non-Debtor affiliate; (x) a waiver or agreement granting any party relief; or (xi) an election of remedies.

31. Neither this Proof of Claim nor any of its contents shall be deemed or construed as an acknowledgment or admission of any liability or obligation on the part of Claimant. Claimant specifically reserves all of its defenses and rights, procedural and substantive, including, without limitation, its rights with respect to any claim that may be asserted against Claimant by the Debtor, the Fund Counterparties, or any affiliate of the Debtor, and its rights to enforce the Cash Warehouse or Synthetic Warehouse Agreements, Engagement Letter, or any other contract.

Right of Setoff and Recoupment

32. Claimant reserves all rights of setoff and recoupment that it may have. To the extent the Debtor or any non-Debtor affiliate asserts any claim against Claimant, Claimant shall have a secured claim to the extent of its right of setoff under section 553 of the Bankruptcy Code or right of recoupment against such claim with respect to the claims asserted herein and any amendments thereto.

Notice

33. Copies of all notices and communications concerning this Proof of Claim should be sent to:

UBS Securities LLC
1285 Avenue of the Americas
New York, NY 10019
Attn: Suzanne Forster
Telephone: (212) 713-3432
Email: suzanne.forster@ubs.com

With a copy to:

John Lantz
UBS Securities LLC
1285 Avenue of the Americas
New York, NY 10019
Telephone: (212) 713-1371
Email: john.lantz@ubs.com

Andrew Clubok
Sarah Tomkowiak
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, District of Columbia 20004
Telephone: (202) 637-2200
Email: andrew.clubok@lw.com
sarah.tomkowiak@lw.com

Jeffrey E. Bjork
Kimberly A. Posin
LATHAM & WATKINS LLP
355 South Grand Avenue, Ste. 100
Los Angeles, California 90071
Telephone: (213) 485-1234
Email: jeff.bjork@lw.com
kim.posin@lw.com

Asif Attarwala
LATHAM & WATKINS LLP
330 N. Wabash Avenue, Ste. 2800
Chicago, Illinois 60611
Telephone: (312) 876-7700
Email: asif.attarwala@lw.com

Exhibit 3

Proof of Claim No. 191

Fill in this information to identify the case:

Debtor: Highland Capital Management, L.P.

United States Bankruptcy Court for the: Northern District of Texas (State)

Case number: 19-34054

Official Form 410
Proof of Claim

04/19

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) **that you received.**

Part 1: Identify the Claim

1. **Who is the current creditor?**
   UBS AG, London Branch
   Name of the current creditor (the person or entity to be paid for this claim)
   Other names the creditor used with the debtor: _____

2. **Has this claim been acquired from someone else?**
   ☑ No
   ☐ Yes. From whom? _____

3. **Where should notices and payments to the creditor be sent?**
   Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)

Where should notices to the creditor be sent?	**Where should payments to the creditor be sent?** (if different)
See summary page	
Contact phone 212-713-3432	Contact phone _____
Contact email suzanne.forster@ubs.com	Contact email _____

(see summary page for notice party information)

Uniform claim identifier for electronic payments in chapter 13 (if you use one):

_ _

4. **Does this claim amend one already filed?**
   ☑ No
   ☐ Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY

5. **Do you know if anyone else has filed a proof of claim for this claim?**
   ☐ No
   ☑ Yes. Who made the earlier filing? UBS Securities LLC - this is a joint litigation claim, see

1934054200626000000000003

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. **Do you have any number you use to identify the debtor?**

☑ No

☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ___ ___ ___ ___

7. **How much is the claim?** $ 1,039,957,799.40 . **Does this amount include interest or other charges?**

☐ No

☑ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. **What is the basis of the claim?**

Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

Limit disclosing information that is entitled to privacy, such as health care information.

Litigation - See attached addendum

9. **Is all or part of the claim secured?**

☑ No

☐ Yes. The claim is secured by a lien on property.

Nature or property:

☐ Real estate: If the claim is secured by the debtor's principle residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.

☐ Motor vehicle

☐ Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property: $_____

Amount of the claim that is secured: $_____

Amount of the claim that is unsecured: $_____ (The sum of the secured and unsecured amount should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition: $_____

Annual Interest Rate (when case was filed)_____%

☐ Fixed

☐ Variable

10. **Is this claim based on a lease?**

☑ No

☐ Yes. **Amount necessary to cure any default as of the date of the petition.** $_____

11. **Is this claim subject to a right of setoff?**

☑ No

☐ Yes. Identify the property: _____

1934054200626000000000003

12. **Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?**

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☑ No

☐ Yes. *Check all that apply:*

	Amount entitled to priority
☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	$
☐ Up to $3,025* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).	$
☐ Wages, salaries, or commissions (up to $13,650*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).	$
☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).	$
☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).	$
☐ Other. Specify subsection of 11 U.S.C. § 507(a)(__) that applies.	$

* Amounts are subject to adjustment on 4/01/22 and every 3 years after that for cases begun on or after the date of adjustment.

13. **Is all or part of the claim pursuant to 11 U.S.C. § 503(b)(9)?**

☑ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

$

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to $500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☑ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 06/26/2020
MM / DD / YYYY

/s/Asif Attarwala
Signature

Print the name of the person who is completing and signing this claim:

Name: Asif Attarwala
First name Middle name Last name

Title: Associate

Company: Latham and Watkins LLP
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address: 330 North Wabash Ave., Suite 2800, Chicago, IL, 60611

Contact phone 312-876-7667 Email asif.attarwala@lw.com

1934054200626000000000003

For phone assistance: Domestic (877) 573-3984 | International (310) 751-1829

Debtor:
19-34054 - Highland Capital Management, L.P.
District:
Northern District of Texas, Dallas Division

Creditor:
UBS AG, London Branch
UBS Securities LLC, Attn: Suzanne Forster
1285 Avenue of the Americas

New York, New York, 10019

Phone:
212-713-3432
Phone 2:

Fax:

Email:
suzanne.forster@ubs.com

Has Supporting Documentation:
Yes, supporting documentation successfully uploaded
Related Document Statement:

Has Related Claim:
Yes
Related Claim Filed By:
UBS Securities LLC - this is a joint litigation claim, see attached addendum

Filing Party:
Authorized agent

Disbursement/Notice Parties:
Latham and Watkins LLP
Andrew Clubok
555 Eleventh Street, NW

Washington, D.C., 2004-1304

Phone:
2026373323
Phone 2:

Fax:

E-mail:
andrew.clubok@lw.com

Other Names Used with Debtor:

Amends Claim:
No
Acquired Claim:
No

Basis of Claim:
Litigation - See attached addendum

Last 4 Digits:
No

Uniform Claim Identifier:

Total Amount of Claim:
1,039,957,799.40

Includes Interest or Charges:
Yes

Has Priority Claim:
No

Priority Under:

Has Secured Claim:
No

Amount of 503(b)(9):
No

Based on Lease:
No

Subject to Right of Setoff:
No

Nature of Secured Amount:

Value of Property:

Annual Interest Rate:

Arrearage Amount:

Basis for Perfection:

Amount Unsecured:

Submitted By:
Asif Attarwala on 26-Jun-2020 5:17:47 p.m. Eastern Time
Title:
Associate
Company:
Latham and Watkins LLP

Optional Signature Address:

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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]	)	Case No. 19-34054-sgj11 (SGJ)
Debtor.	)	

ADDENDUM TO PROOF OF CLAIM FILED BY
UBS AG, LONDON BRANCH

1. UBS AG, London Branch hereby submits this addendum to its proof of claim (together, the "**Proof of Claim**") against Highland Capital Management, L.P. (the "**Debtor**") in the above-captioned chapter 11 case (the "**Chapter 11 Case**").

2. UBS AG, London Branch and UBS Securities LLC (together, the "**Claimant**" or "**UBS**") each have claims against the Debtor and each is filing a proof of claim in this Chapter 11 Case. Because their claims arise from the same set of factual events, including the same failed transaction, misconduct involving the Debtor and its affiliates, and subsequent litigation, the UBS claims overlap and their proof of claim forms and addendums are substantially the same.

3. This addendum is attached to, incorporated into, and constitutes an integral part of Claimant's Proof of Claim against the Debtor. Claimant files this Proof of Claim under compulsion of the *Order (I) Establishing Bar Dates for Filing Claims and (II) Approving the Form and Manner of Notice Thereof* [Docket No. 488], as extended by the *Joint Stipulation and Order Extending Bar Date* [Docket No. 547] and modified by the *Order Denying UBS's Motion for Relief*

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

from the Automatic Stay to Proceed with State Court Action [Docket No. 765], solely for the purpose of asserting Claimant's claims against the Debtor, as more particularly described and subject to any limitations set forth below.

Factual Background

A. The Knox Transaction

2. Claimant's claims arise out of a failed transaction dating back thirteen years ago and the state court action (the "**State Court Action**") that followed between Claimant, the Debtor, Highland CDO Opportunity Master Fund, L.P. ("**CDO Fund**") and Highland Special Opportunities Holding Company ("**SOHC**") (together with CDO Fund, the "**Fund Counterparties**," and the Fund Parties and the Debtor collectively, "**Highland**"), among other parties.[2]

3. In early 2007, Claimant and Highland agreed to pursue a complex form of securitization transaction known as a "CLO Squared" (the "**Knox Transaction**"). (Ex. B, Decision at 2.) The purpose of the Knox Transaction was to acquire and securitize a series of collateralized loan obligation ("**CLO**") securities and credit default swap ("**CDS**") assets (the "**Knox Assets**"). To that end, the Debtor agreed to be the "Servicer" of the Knox Transaction, and as such was responsible for identifying the specific CLO and CDS assets to be securitized. Claimant agreed to finance the acquisition of the CLO and CDS assets identified by Highland. Claimant would then hold, or "warehouse," the assets until the securitization was completed (the "**Knox Warehouse**"). Under this arrangement, Claimant financed the acquisition of $818 million in Knox Assets. (*Id.*)

[2] The procedural history of the State Court Action is incorporated by reference, but is voluminous. The operative Second Amended Complaint and Phase I Decision and Order are attached as **Exhibit A** and **Exhibit B**, respectively. Additional pleadings and orders can be found on the State Court docket for Index No. 650097/2009 or by contacting Claimant's counsel. Claimant reserves the right to file a copy of additional pleadings or orders with this Court.

4. The parties' first attempt at the Knox Transaction was not completed successfully and the relevant agreements expired in August 2007 without the contemplated securitization having occurred. (*Id.* at 3.) Rather than end their relationship, however, Highland and Claimant continued to consider the possibility of pursuing the contemplated securitization in 2008 under restructured versions of the prior agreements. Highland and Claimant always understood that—if the securitization were not successful—the Fund Counterparties would be obligated to pay Claimant for 100% of the losses on any CLO or CDS assets that been acquired and warehoused for the securitization. In order to convince Claimant to agree to enter restructured versions of those agreements and to finance the acquisition of the CLO and CDS assets, Highland assured Claimant that the Fund Counterparties had sufficient assets to cover any losses. It did so by providing Claimant with false, incomplete, and otherwise misleading information concerning the Fund Counterparties' finances and assets. (Ex. A, Compl. ¶¶ 47-61.)

5. In addition, Claimant specifically conditioned its agreement to enter the restructured agreements on the Fund Counterparties' ability to post an additional $70 million in cash and securities as collateral (the "**Initial Restructuring Collateral**"), in which Claimant would hold a security interest. (*Id.* ¶¶ 56-59; Ex. B, Decision at 3.) Highland assembled $70 million in such Initial Restructuring Collateral. But what Highland did not tell Claimant—and what is now clear was omitted on purpose—was that the Fund Counterparties did not own all of the Initial Restructuring Collateral they were expected to post. Instead, to meet this obligation, the Debtor exercised its control over other Highland affiliates, transferring and redirecting assets from such other entities that it controlled to assemble the Initial Restructuring Collateral. (Ex. A, Compl. ¶¶ 56-59.)

6. Similarly, while negotiating the restructured transaction, Highland provided Claimant with financial reports and statements that contained materially false and misleading information and omissions concerning the financial condition of the Fund Counterparties. (*Id.* ¶¶ 47-52.) The Debtor itself had prepared these financial statements and knew they contained material misstatements. (*Id.* ¶¶ 48-50, 54.) Among other things, Highland misrepresented the amount of cash held by CDO Fund. (*Id.* ¶ 52.) Highland also failed to disclose that many of the assets on the Fund Counterparties' financial statements already had been encumbered. (*Id.* ¶¶ 51, 53.) These misrepresentations not only evince a specific intent by Highland to induce Claimant into entering the restructured agreements, but a longstanding willingness to prevent Claimant from ever recovering the amounts owed under the parties' proposed agreements in the event the Knox Assets suffered any losses. In addition, these events show the Debtor's singular control over—and ability to move—assets from one Highland affiliate to another at will.

7. Based on Highland's material misstatements and omissions, Claimant agreed to pursue the restructured transaction and once more attempt the securitization, and the parties executed three new written agreements: an Engagement Letter, a Cash Warehouse Agreement, and a Synthetic Warehouse Agreement (collectively, the "**Warehouse Agreements**"). (*See* Ex. B, Decision at 3.) The Engagement Letter was executed by Claimant and the Debtor; the Fund Counterparties were not parties to the Engagement Letter. (Ex. A, Compl. ¶ 62.) The Cash Warehouse and Synthetic Warehouse Agreements were executed by Claimant and the Debtor, along with the Fund Counterparties. (*Id.* ¶¶ 64-65.)

8. As described above, Claimant agreed to finance the acquisition of the CLO and CDS assets that the parties planned to securitize. In so doing, the key risk Claimant faced was the possibility that the Knox Assets would lose value while securitization was pending. To address

this risk, Claimant and the Debtor agreed in the Engagement Letter that the Fund Counterparties would bear this risk. Notably, at the time, the Debtor was the Investment Manager to the Fund Counterparties under agreements that gave the Debtor total control over those entities. (Ex. A, Compl. ¶¶ 24, 26.)

9. The Warehouse Agreements reiterated that the Fund Counterparties (as controlled by the Debtor) would bear the risk, specifying that if the Knox Assets lost value while securitization was pending, the Fund Counterparties "will in aggregate bear 100% of the risk" for the Knox Assets—with CDO Fund bearing 51% of any losses and SOHC bearing the remaining 49%.

10. To further protect Claimant in the event that the Knox Assets lost value, the Warehouse Agreements provided for recurring measurements of mark-to-market losses on all assets in the Knox Warehouse and required the Fund Counterparties to post collateral in the event the Knox Assets lost a set amount of value. Specifically, the parties agreed that the Fund Counterparties would post an additional $10 million in collateral for each $100 million in losses to the overall value of the Knox Assets. (Ex. B, Decision at 4.)

11. In September and October 2008, amid the global economic recession, the value of the Knox Assets dropped by $100 million, twice. Thus, Claimant twice exercised its contractual right to demand additional collateral. And twice Highland posted the required collateral. (*Id.*) Although the Warehouse Agreements specified that it was the Fund Counterparties who would post collateral, the Debtor moved assets around from other entities it controlled to make the first two collateral calls (without disclosing this practice to Claimant). (Ex. A, Compl. ¶ 79.) On or about November 7, 2008, Claimant issued a third margin call, because the value of the Knox Assets suffered additional losses of $200 million (bringing the aggregate losses to over $400 million).

(Ex. B, Decision at 4.) This time, Highland refused to provide the additional collateral required under the Warehouse Agreements.

12. Highland's default on Claimant's third margin call triggered a termination event under the Warehouse Agreements. (*Id.*) On December 5, 2008, Claimant gave Highland formal notice of default and demanded the Fund Counterparties pay Claimant for 100% of the losses incurred on the Knox Assets—which had, by then, grown to over $520 million.

13. There is no question that the Debtor knew the Fund Counterparties were liable for the losses under the Warehouse Agreements. Indeed, the Highland officer who executed the Warehouse Agreements admitted under oath that, "as of the end of the year 2008," Highland knew that the Fund Counterparties owed Claimant "hundreds of millions of dollars in connection with the Knox Warehouse Agreements." (Travers Dep. at 261:8-20).) But rather than paying Claimant what it was owed, the Debtor, with Mr. Dondero at the helm, "devised a strategy to delay the resolution of that obligation [to pay Claimant] for as long as possible." (*Id.*) To that end, Highland devised and subsequently deployed a multifaceted strategy—one that would last for many years thereafter—to intentionally frustrate and prevent Claimant from recovering any of the amounts that both the Debtor and the Fund Counterparties knew were rightfully owed to Claimant under the Warehouse Agreements.

14. First, the Debtor directed the Fund Counterparties to withhold any payment to Claimant—a position that the Fund Counterparties maintained (again, under the specific direction of the Debtor) for more than a decade. (*See id.*) The Debtor did so not only with the specific knowledge that the Fund Counterparties owed hundreds of millions of dollars to Claimant for the losses on the Knox Assets, but with the knowledge that Claimant would come seeking payment

for such losses and, in particular, to look toward any and all collateral owned by the Fund Counterparties as one source of payment. As one of Highland's officers stated an internal email to Mr. Dondero in an internal email dated January 16, 2009: "[UBS] is going to be calling [] today asking for all additional collateral that cdo and sohc have left to cover the obligation left by the knox transaction." But rather than turning over the collateral in question to Claimant or, at the very least, securing such assets so that they could be used to pay Claimant, the Debtor directed the Fund Counterparties to withhold such assets and payments from Claimant: "[T]hey can see us in court for their additional collateral." True to that promise, even after Claimant filed suit and laid out the amounts due under the contracts, the Debtor forced the Fund Counterparties to launch an affirmative, multi-year campaign—one which would consume much of the cash and assets belonging to the Fund Counterparties themselves—to stave off any payment from the Fund Counterparties to force Claimant to try to recover such claims through litigation and, once in litigation, devising knowingly baseless defenses and arguments for the Fund Counterparties to assert in such litigation.

15. On top of directing the Fund Counterparties to withhold payment and force Claimant to litigate for amounts the Debtor already knew they rightfully owed to Claimant, the Debtor undertook a litany of other actions to ensure that, even if Claimant were successful in the litigation it had been forced to initiate against the Fund Counterparties, it would not be able to collect any judgment arising out of the litigation. Such actions included, but were not limited to, a series of fraudulent transfers out of, and away from, an alter ego of SOHC, Highland Financial Partners, L.P. ("**HFP**"). (Ex. A, Compl. ¶ 109.) These internal transfers of funds—all overseen by James Dondero, the Debtor's founder and president—were designed to prevent Claimant from ever collecting the millions of dollars it was owed under the Warehouse Agreements.

16. In addition to such fraudulent transfers, the Debtor also took steps after the lawsuit was filed to ensure that no additional value would be transferred ***to*** the Fund Counterparties—deliberately taking steps to keep both SOHC and CDO Fund undercapitalized. Not only did the Debtor prevent additional value from being transferred to the Fund Counterparties, it is clear that the Debtor also failed to ensure that the Fund Counterparties retained assets that could be used to pay any such judgment. Quite to the contrary, it is now clear that any and all assets of any value that once belonged to the Fund Counterparties have, in one way or another, been transferred away, drained, or otherwise wasted by the Fund Counterparties, the Debtor itself, or the Debtor's affiliates—all at the Debtor's direction. Indeed, in a recent filing before this Court, the Debtor recently disclosed that both of the Fund Counterparties are completely "insolvent." (Docket No. 687 at 1.) This means that—separate and apart from the transfers of assets out of, and away from, HFP that occurred in 2009—the Debtor has directed, or otherwise permitted, the Fund Counterparties to engage in acts that have left these once marque investment funds with literally ***no*** assets that can be used to pay Claimant. All such actions and omissions by the Debtor were performed with either the specific intent to prevent or frustrate Claimant's ability to recover the amounts owed under the Warehouse Agreements, or a wanton and reckless disregard of Claimant's rights to those amounts. Such actions and omissions constitute breaches of the Debtor's duty of good faith and fair dealing under the Warehouse Agreements.

B. The State Court Action and the Debtor's Efforts to Avoid Paying Claimant

17. On February 24, 2009, Claimant filed a complaint in the Supreme Court of the State of New York (the "**State Court**") against the Debtor and the Fund Counterparties. With knowledge of Claimant's lawsuit, the Debtor exercised its control over the Fund Counterparties to ensure they would not meet their obligations and to impede Claimant's ability to recover the

amounts owed by those entities. (*Id.* ¶¶ 112, 114.) Rather than paying Claimant what it was owed, and as discussed above, the Debtor orchestrated an extensive multi-part strategy to delay resolution of Claimant's claims for as long as possible. As a result, the Debtor further interfered with Claimant's contractual rights, thereby breaching the covenants of good faith and fair dealing inherent in the Warehouse Agreements. (*Id.*)

18. By this time, the Fund Counterparties and SOHC's alter ego, HFP, had become insolvent, although they still owned significant assets. (*Id.* ¶ 108.) Nonetheless, the Debtor failed to act in good faith to cause HFP to satisfy the debts, as much as possible, then owed to Claimant. Instead, the Debtor caused HFP to make additional improper and fraudulent asset transfers, deliberately kept the Fund Counterparties undercapitalized, and allowed all assets of any value to be drained from the Fund Counterparties—acts which not only impaired Claimant's ability to recover anything from the Fund Counterparties, but precluded it altogether. (*Id.* ¶ 111.) In March 2009, conscious that Claimant had commenced an action against Highland a few weeks earlier, and in breach of their continuing duty of good faith and fair dealing, and with actual fraudulent intent, the Debtor and HFP caused asset transfers of millions of dollars of assets to the Debtor, Highland Credit Strategies Master Fund, L.P., Highland Crusader Offshore Partners, L.P., and Highland Credit Opportunities CDO, L.P. (now Highland Multi Strategy Credit Fund, L.P.) (collectively, the "**Affiliated Transferee Defendants**"), among others, thereby further reducing Highland's abilities to meet their obligations to Claimant. (*Id.* ¶¶ 111, 113.) The Debtor and its principals exercised domination over the Fund Counterparties to improperly transfer substantial assets from the Fund Counterparties and HFP for their own personal gain, i.e., solely and improperly to protect and enhance the value of the Debtor and its principals by wrongful and improper means. In the

process, the Debtor and its principals made it impossible for the Fund Counterparties to pay Claimant the losses that they and the Debtor had agreed they would pay under the Warehouse Agreements. (*Id.* ¶¶ 112-114.)

19. As Claimant learned about Highland's conduct through discovery, Claimant amended its complaint to assert additional claims and name additional Highland entities, including HFP, the Affiliated Transferee Defendants, and Strand Advisors, Inc. As amended and stated in its Second Amended Complaint (attached hereto as Exhibit A) in the State Court Action, filed on May 11, 2011, Claimant's claims include breach of contract claims directly against the Fund Counterparties, as well as claims for fraudulent inducement, breach of the duty of good faith and fair dealing, fraudulent conveyance, tortious interference, and declaratory judgments for alter ego liability against HFP and general partner liability against Strand Advisors, Inc. The Debtor subsequently brought counterclaims against Claimant for breach of contract and unjust enrichment. (*See* Ex. B, Decision at 35-37.)

20. The procedural history of the State Court Action is complex. The Debtor and its affiliates and Claimant filed, and the State Court ruled on, four sets of motions to dismiss. The Debtor and its affiliates then filed two sets of summary judgment motions, which led to a series of complex rulings by the State Court in 2017. The parties filed various interlocutory appeals of the State Court's rulings on the motions to dismiss and for summary judgment. Those appeals were heard by the Appellate Division for the First Judicial Department in the County of New York, with the Appellate Division issuing five decisions over this suit's protracted history (some of which are still subject to further appellate rights).

21. Also included in the Appellate Division's decisions was an order arising from an appeal of the State Court's ruling on Claimant's motion to restrain Defendants Highland Credit

Strategies Master Fund, L.P. and Highland Crusader Partners, L.P. from disposing of property received through the fraudulent transfers orchestrated by the Debtor. Claimant showed it had a likelihood of success on the merits of its fraudulent transfer claims, and the Appellate Division enjoined both Highland entities from disposing of their assets. Ultimately, these injunctions resulted in partial settlements between Claimant and Highland Credit Strategies Master Fund, L.P. and Highland Crusader Partners, L.P.

22. By early 2018, more than nine years after Claimant first filed suit, the parties were finally ready to proceed to trial. Due to a jury waiver clause in the Warehouse Agreements, however, and after related pre-trial briefing, the State Court bifurcated Claimant's claims into two distinct phases for trial: Phase I, consisting of a bench trial on Claimant's claims against the Fund Counterparties for breach of the Cash Warehouse and Synthetic Warehouse Agreements, as well as the Debtor's counterclaims; and Phase II, consisting of a jury trial on Claimant's remaining claims against all remaining Highland entities, including the Debtor.[3] (Ex. B, Decision at 2 n.1, 38.)

23. The State Court presided over a thirteen-day bench trial for Phase I from July 9 through July 27, 2018. (*Id.* at 1.) On November 14, 2019, the State Court entered a Decision and Order on Phase I (attached hereto as Exhibit B), ruling in favor of Claimant on almost every issue presented in Phase I. In particular, the court found the Fund Counterparties liable to Claimant for breach of the Cash Warehouse and Synthetic Warehouse Agreements, found no liability on the part of Claimant for either of the Debtor's counterclaims, and rejected almost every one of the Debtor's offset arguments with the only remaining issue (affecting approximately $70,500,000) to

[3] Remaining claims are to be tried to a jury, with the court deciding liability as to the breach of the implied covenant of good faith and fair dealing claim and the jury deciding all remaining issues.

be determined after Phase II. (*Id.* at 39.) An Entry of Judgment on Phase I was entered on February 10, 2020. Under that Phase I final judgment, Claimant is entitled to $1,039,957,799.44, consisting of $519,374,149.00 in damages and $520,583,650.44 in pre-judgment interest as of January 22, 2020, with additional interest of $128,065 having accrued daily until the Entry of Judgment.

24. The next step in the State Court Action is Phase II of the trial, where Claimant's remaining claims against not only the Debtor, but also against other Highland affiliates are to be tried to a jury, with the court deciding liability as to the breach of the implied covenant of good faith and fair dealing claim and the jury deciding all remaining claims. (*Id.* at 2 n.1, 38.) The claims to be tried in Phase II include claims for breach of the implied covenant of good faith and fair dealing, fraudulent conveyances, and alter-ego liability. The specific amounts the two non-Debtor affiliates owe to Claimant for their breach of the Warehouse Agreements are now set forth and embodied in the final $1 billion judgment from Phase I. And Claimant has stated claims against the Debtor—which was also a party to the same contract and exercised complete control over the two liable affiliates—under which Claimant is entitled to damages that are at least as much as the Phase I judgment amount. Claimant will seek damages for the Debtor's various breaches of the implied covenant as well as its specific role in the fraudulent transfer scheme, and pre-judgment interest and attorneys' fees where available. In addition, Claimant will seek punitive damages against the Debtor for its role in orchestrating the extended efforts to prevent Claimant from collecting the amounts owed under the Warehouse Agreements.

25. Currently, Phase II of the State Court Action is stayed against the Debtor by the automatic stay imposed pursuant to section 362 of the Bankruptcy Code when the Debtor commenced this Chapter 11 Case.

26. Claimant hereby asserts a claim, pending litigation of Phase II, for damages arising from the Debtor's breach of the implied covenant of good faith and fair dealing, its specific role in directing the fraudulent transfers of assets involving HFP, additional interest, further damages (including punitive damages), and attorneys' fees that may be awarded by any court at the conclusion of Phase II.

Reservation of Rights

27. Claimant does not waive or release, and expressly reserves, all rights and remedies at law or in equity that it has or may have against the Debtor, the Fund Counterparties, Strand Advisors, Inc., other non-Debtor Highland Defendants, or any other Debtor affiliate, subsidiary, person, or entity.

28. Claimant expressly reserves all of its rights to assert any additional claims, defenses, remedies, and causes of action, including without limitation, claims for fraudulent inducement, breach of contract, tortious interference with contractual relations, fraudulent conveyances, or alter ego recovery. Claimant further reserves all rights to amend, modify, supplement, reclassify, or otherwise revise its Proof of Claim at any time and in any respect, including, without limitation, as necessary or appropriate to amend, quantify or correct amounts, to provide additional detail regarding the claims set forth herein, to assert additional grounds for any of the claims, to seek reconsideration under section 502(j) of the Bankruptcy Code or otherwise of any disallowance of any amounts claimed hereunder, or to reflect any and all additional claims of whatever kind or nature that Claimant has or may have against the Debtor.

29. To the extent any payment to Claimant based on this Proof of Claim, or any portion thereof, is clawed back from Claimant, avoided, or set aside, for any reason whatsoever, or Claimant is required to disgorge any such payment, or any portion thereof, Claimant hereby reserves its rights to amend this Proof of Claim accordingly.

30. The execution and filing of this Proof of Claim is not intended as, nor should it be construed as or deemed to be any of the following: (i) a waiver of the right to seek withdrawal of the reference, or to otherwise challenge the jurisdiction of this Court, with respect to the subject matter of the claims asserted herein, any objection or other proceeding commenced with respect thereto, or any other action or proceeding commenced in this Chapter 11 Case against or otherwise involving Claimant; (ii) an admission that any matter is a core matter for purposes of 28 U.S.C. § 157(b) or is a matter as to which this Court can enter a final order or judgment consistent with Article III of the United States Constitution; (iii) a waiver of the right to *de novo* review by the district court of any order or judgment for which this Court, absent Claimant's consent, lacks authority to enter a final order or judgment; (iv) a consent to the entry by this Court of a final order or judgment with respect to the claims asserted herein or any other matter; (v) a waiver of Claimant's right to a jury trial against the Debtor, as applicable, or waiver of Claimant's right to a jury trial against any of the non-Debtor Defendants; (vi) a waiver or release of the claims or rights of Claimant against any other entity or person that may be liable for all or any part of the claims or any matters related to the claims asserted herein; (vii) a waiver of any rights and remedies Claimant has or may have under the Cash Warehouse and Synthetic Warehouse Agreements, Engagement Letter, or any other contract, whether mentioned in this Proof of Claim or not; (viii) a waiver of Claimant's contractual right to seek to have these or any other claims settled by binding arbitration; (ix) a waiver of any right related to the confirmation of any plan of reorganization proposed in this

Chapter 11 Case, or any other insolvency-related proceeding that may be commenced, either in the United States or abroad, by or against the Debtor, or any non-Debtor affiliate; (x) a waiver or agreement granting any party relief; or (xi) an election of remedies.

31. Neither this Proof of Claim nor any of its contents shall be deemed or construed as an acknowledgment or admission of any liability or obligation on the part of Claimant. Claimant specifically reserves all of its defenses and rights, procedural and substantive, including, without limitation, its rights with respect to any claim that may be asserted against Claimant by the Debtor, the Fund Counterparties, or any affiliate of the Debtor, and its rights to enforce the Cash Warehouse or Synthetic Warehouse Agreements, Engagement Letter, or any other contract.

Right of Setoff and Recoupment

32. Claimant reserves all rights of setoff and recoupment that it may have. To the extent the Debtor or any non-Debtor affiliate asserts any claim against Claimant, Claimant shall have a secured claim to the extent of its right of setoff under section 553 of the Bankruptcy Code or right of recoupment against such claim with respect to the claims asserted herein and any amendments thereto.

Notice

33. Copies of all notices and communications concerning this Proof of Claim should be sent to:

UBS Securities LLC
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New York, NY 10019
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Telephone: (212) 713-3432
Email: suzanne.forster@ubs.com

With a copy to:

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Exhibit 4

11/20/20 Hrg. Transcript (Excerpt Only)

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

In Re:	**Case No. 19-34054-sgj-11**
	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,	Dallas, Texas
	Friday, November 20, 2020
	9:30 a.m. Docket
Debtor.	
	- DEBTOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT [1214]
	- REDEEMER COMMITTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT [1215, 1216]
	- UBS'S MOTION FOR TEMPORARY ALLOWANCE OF CLAIM FOR VOTING PURPOSES [1338]

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

WEBEX APPEARANCES:

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For UBS Securities, LLC: Andrew Clubok
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example, precluding damages relating to the $45 million that HFP had in March 2009 or the $20-plus million that the CDO Fund had in December 2009.

So I think that's the answer I got from Mr. Feinstein at the end of oral argument. But even if the Debtor was making the request that the Court rule that, as a matter of law, UBS cannot assert any claim against the Debtor except the claims relating to the $61 million of transfers, I think that UBS has shown, has put summary judgment evidence in the record that there may be a fact issue here with regard to these funds. They may be able to prove, have a potential theory here that Highland breached the covenant of good faith and fair dealing by somehow exercising control over the CDO Fund and HFP and causing them to dissipate those assets and not pay them to UBS. There might be a theory there.

So I hope that is clear, that I'm not granting summary judgment declaring that UBS is barred from asserting something more than the $61 million of March 2009 transfers.

So that is my ruling on the motions for partial summary judgment. I'll turn now to the UBS Rule 3018(a) estimation motion. Once again, given the late hour, I'm going to dispense with the flowery legal standards that apply to this motion. I reserve the right in my order to supplement with more fulsome statements.

But I have decided that I should estimate UBS's claim for

voting purposes at the following number: $94,761,076. Okay. So here is my math for how I get there. Let's start with the three transfers in March 2009 that have been alleged to be fraudulent transfers or, you know, Highland caused to be made in breach of its duty of good faith and fair dealing. And I'm talking about, obviously, the Multi-Strat entities, you know, the $25,782,988 that HFP transferred in March 2009, then there was $17,778,566 transferred to the Debtor, and then Citibank received $17,481,808.

So, as we've talked about, we've talked about $61,043,362. Okay. So, obviously, I've ruled summary judgment that Crusader -- transfers to Crusader and the transfer to Credit Strategies are gone. They're off the table. So, but focusing in on that $61 million, I start with the $25-plus million to Multi-Strat. I am estimating a high chance of UBS winning on that, a 90-percent chance. So, 90 percent of $25,783,300 -- what is the number? $25 million. I may have done my math wrong. I've computed it equals $23,205,008, but I think I -- no, no, no, no. No, no, no. Let me back up. Just a minute. Hang on. (Pause.) All right. I think what I meant to do is calculate 90 percent of $25,782,988, and my math may be wrong. I've got that equals $23,205,008, but I feel like I did something wrong there. Someone can double-check my math there. Can someone -- I've left my calculator back in chambers. What's 90 percent of $25,783,343? Hello. You've

got a calculator over there?

THE CLERK: Yeah. What was the number?

THE COURT: Okay.

THE CLERK: You said $25,783,4 --

THE COURT: No, no, no. I'm sorry. That's where I went wrong, I think. The number is should have -- not -- that's where I went wrong. I should have been using $25,782,988. And I have no idea where I got that $25,783,000 number. So, 90 percent of $25,782,988.

MR. FEINSTEIN: My calculator says that $23.2 million, Your Honor.

THE COURT: Okay. Well, I guess I was right. Okay.

MR. FEINSTEIN: You were right.

THE COURT: Okay. So I'm putting a 90 percent chance of winning on that, so $23.2 million.

And then on the transfer to the Debtor, I'm using the expert report, if you will, of I think his name is Mr. Dudney, UBS's own expert, where he used $8 million. He said you should adjust that number to $8 million, if I was understanding correctly, because of HFP, the transferor, having some percentage ownership in that. So if I use $8 million, that gets us up to $31.2 million.

Then, with regard to Citibank, the transfer to Citibank of $17,481,808, I'm giving a 20 percent chance of success on that one. I just, again, feel in my gut, you know, in my

discretion, looking at the summary judgment evidence, I just feel in my gut there's going to be defenses to that. So, 20 percent of that would be $3,555,713.

So that gets us up to roughly 31 -- excuse me, $34.76 million. So, if you assume interest, pre-judgment interest, I used $30 million there. Again, that's imprecise. But that gets us up to $64.76 million.

Then what I did beyond that is, with regard to the summary judgment evidence thrown out that maybe there was 40 -- $45 million on hand at HFP in March of 2009 -- I think we're talking about UBS Exhibit 25 -- and then another $23 million may have been on hand at the CDO Fund, at least in December 2009, that's about $68 million. And I am just assuming that there might be a credible argument made as to $10 million of that. And then I'll add $10 million of interest for all of these years, of pre-judgment interest.

And then I've plugged in another $10 million for attorneys' fees, because I believe there is the ability to get attorneys' fees for actual fraudulent transfers. And I'm assuming that some of these, the ones to Highland and Multi-Strat, there might be credible arguments of actual fraudulent transfers. And then I have been told, I think, by Mr. Clubok that you might even get attorneys' fees for breach of covenant of good faith and fair dealing.

So, $64.761 million plus $10 million plus another $10

million plus $10 million is $94.761 million.

Any questions? I know that was probably hard to follow, but any questions about that estimation?

MR. CLUBOK: Your Honor, the only question, and maybe it's too late and that's fine, I understand your analysis, but the calculation of the amount that was transferred to Highland, I think even Highland had agreed in their -- that the number is higher. I think that's out of context, and if that's -- if there's no chance for us to clear that up, I understand. You've made your decision. But I do want to say that I think even Highland would agree that they received more than $8 million. The footnote from (inaudible) is a little bit out of context, and, you know, there was -- if you look at Highland's papers in terms of their response on 3018, I think they have accepted our 17, roughly $17 million number. I think that is a -- it's complicated. But anyway, I just raise that, and maybe because you've done all this math, that won't affect your view, Your Honor. Totally understand that. But I do want to say that I think that Highland even acknowledges that the amount received was $17 million. That was (inaudible) by Redeemer. I think it's misunderstood. You know, our -- a footnote from our expert report that takes the full expert report out of context.

THE COURT: Well, that's going to be my ruling. And, again, you know, estimation --

MR. CLUBOK: Understood.

THE COURT: -- is just that. It's imprecise. And I may have cut you some slack in other areas where I'm sure Highland and the Crusader Fund would vehemently contest what I did. You know, the 90-percent chance of winning I gave you on Multi-Strat, you know, they said it should be a much lower number, 30 percent or whatever.

So that is going to be the ruling.

Okay. Here is what I would like to do. I'm going to push off work, is what I'm going to do. I know that on the motions for partial summary judgment Highland submitted a proposed form of order that was pretty short and to the point. I can't remember seeing one for Redeemer.

Bankruptcy Rule 7056, Rule 56, they don't require, obviously, findings of facts and conclusions of law. They just require some reasoning to support the Court's ruling. So I feel like I need something more fulsome than what was uploaded by the Debtor, but it doesn't have to be extremely beyond what the Court ruled. I would, though, ask -- you know, I don't know if a combined order granting both motions with -- you all talk offline, Mr. Feinstein and Ms. Mascherin, whether you want separate orders and judgments or you feel like a combined one suffices.

MS. MASCHERIN: Your Honor, I can say with respect to the motions for summary judgment I think they could be dealt

(Proceedings concluded at 4:12 p.m.)

--oOo--

CERTIFICATE

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

/s/ Kathy Rehling **11/25/2020**

Kathy Rehling, CETD-444 Date
Certified Electronic Court Transcriber

Appendix Exhibit 106

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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]	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
	§	

DEBTOR'S MOTION FOR AN ORDER REQUIRING THE VIOLATORS TO SHOW CAUSE WHY THEY SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING TWO COURT ORDERS

Highland Capital Management, L.P., the debtor and debtor-in-possession (the "Debtor" or "Highland") in the above-captioned chapter 11 case ("Bankruptcy Case"), by and through its

[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.

undersigned counsel, files this motion (the "Motion") seeking entry of an order requiring The Charitable DAF Fund, L.P. ("The DAF"), CLO Holdco, Ltd. ("CLO Holdco"), the persons who authorized The DAF and CLO Holdco, respectively (together, the "Authorizing Persons") to file the Seery Motion (as defined below) in the DAF Action (as defined below), and Sbaiti & Company PLLC ("Sbaiti & Co." and together with The DAF, CLO Holdco, and the Authorizing Persons, the "Violators"), counsel to The DAF and CLO Holdco in the DAF Action, to show cause why each of them should not be held in civil contempt for violating the Court's: (a) *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 339], and (b) *Order Approving 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] (together, the "Orders"). In support of its Motion, the Debtor states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334(b). The Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.

3. The predicates for the relief requested in the Motion are sections 105(a) and 362(a) of title 11 of the United States Code (the "Bankruptcy Code") and Rules 7065 and 7001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

RELIEF REQUESTED

4. The Debtor requests that this Court issue the proposed form of order attached as **Exhibit A** (the "Proposed Order"), pursuant to sections 105(a) and 362(a) of the Bankruptcy Code and Rules 7001 and 7065 of the Bankruptcy Rules.

5. For the reasons set forth more fully in the *Debtor's Memorandum of Law in Support of Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders* (the "Memorandum of Law"), filed contemporaneously with this Motion, the Debtor requests that the Court: (a) find and hold each of the Violators in contempt of court; (b) direct the Violators, jointly and severally, to pay the Debtor's estate an amount of money equal to two (2) times the Debtor's actual expenses incurred in bringing this Motion, payable within three (3) calendar days of presentment of an itemized list of expenses; (c) impose a penalty of three (3) times the Debtor's actual expenses incurred in connection with any future violation of any order of this Court (including filing any motion in the District Court to name Mr. Seery as a defendant without seeking and obtaining this Court's prior approval, as required under the Orders), and (d) grant the Debtor such other and further relief as the Court deems just and proper under the circumstances.

6. In accordance with Rule 7007-1 of the *Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas* (the "Local Rules"), contemporaneously herewith and in support of this Motion, the Debtor is filing: (a) its Memorandum of Law, and (b) the *Declaration of John A. Morris in Support of the Debtor's Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders* (the "Morris Declaration") together with the exhibits annexed thereto.

7. Based on the exhibits annexed to the Morris Declaration, and the arguments contained in the Memorandum of Law, the Debtor is entitled to the relief requested herein as set forth in the Proposed Order.

8. Notice of this Motion has been provided to all parties. The Debtor submits that no other or further notice need be provided.

WHEREFORE, the Debtor respectfully requests that the Court (i) enter the Proposed Order substantially in the formed annexed hereto as **Exhibit A** granting the relief requested herein, and (ii) grant the Debtor such other and further relief as the Court may deem proper.

Dated: April 23, 2021.

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EXHIBIT A

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

In re:	§	
	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[2]	§	
	§	Case No. 19-34054-sgj11
Debtor.	§	
	§	

ORDER GRANTING DEBTOR'S MOTION FOR AN ORDER REQUIRING THE VIOLATORS TO SHOW CAUSE WHY THEY SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING TWO COURT ORDERS

Having considered (a) the *Debtor's Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders* [Docket No. __] (the "Motion"),[3] (b) the *Debtor's Memorandum of Law in Support of Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for*

[2] 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.

[3] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Memorandum of Law.

Violating Two Court [Docket No. __] (the "Memorandum of Law"), (c) the exhibits annexed to the *Declaration of John A. Morris in Support of the Debtor's Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders* [Docket No. __] (the "Morris Declaration"), and (d) all prior proceedings relating to this matter, including the proceedings that led to the entry of each of the Orders and the Approval Order; 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 sanctions 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 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 DAF, CLO Holdco, and Sbaiti & Co. shall show cause before this Court on **[ ], May [ ], 2021 at 9:30 a.m. (Central Time)** why an order should not be granted: (a) finding and holding each of the Violators in contempt of court; (b) directing the Violators, jointly and severally, to pay the Debtor's estate an amount of money equal to two (2) times the Debtor's actual expenses incurred in bringing this Motion, payable within three (3) calendar days of presentment of an

itemized list of expenses; (c) imposing a penalty of three (3) times the Debtor's actual expenses incurred in connection with any future violation of any order of this Court (including filing any motion in the District Court to name Mr. Seery as a defendant without seeking and obtaining this Court's prior approval, as required under the Orders), and (d) granting the Debtor such other and further relief as the Court deems just and proper under the circumstances.

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END OF ORDER

Appendix Exhibit 107

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3. The predicates for the relief requested in the Motion are sections 105(a) and 362(a) of title 11 of the United States Code (the "Bankruptcy Code") and Rules 7065 and 7001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

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	§	Chapter 11
HIGHLAND CAPITAL MANAGEMENT, L.P.,[2]	§	
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END OF ORDER

Appendix Exhibit 108

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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	*	

MOTION TO COMPEL COMPLIANCE WITH BANKRUPTCY RULE 2015.3

NO HEARING WILL BE CONDUCTED HEREON UNLESS A WRITTEN RESPONSE IS FILED WITH THE CLERK OF THE UNITED STATES BANKRUPTCY COURT AT THE EARLE CABELL FEDERAL BUILDING, 1100 COMMERCE STREET, RM. 1254, DALLAS, TEXAS 75242-1496 BEFORE CLOSE OF BUSINESS ON MAY 20, 2021, WHICH IS AT LEAST 21 DAYS FROM THE DATE OF SERVICE HEREOF.
ANY RESPONSE SHALL BE IN WRITING AND FILED WITH THE CLERK, AND A COPY SHALL BE SERVED UPON COUNSEL FOR THE MOVING PARTY PRIOR TO THE DATE AND TIME SET FORTH HEREIN. IF A RESPONSE IS FILED A HEARING MAY BE HELD WITH NOTICE ONLY TO THE OBJECTING PARTY.
IF NO HEARING ON SUCH NOTICE OR MOTION IS TIMELY REQUESTED, THE RELIEF REQUESTED SHALL BE DEEMED TO BE UNOPPOSED, AND THE COURT MAY ENTER AN ORDER GRANTING THE RELIEF SOUGHT OR THE NOTICED ACTION MAY BE TAKEN.

Now into Court, through undersigned counsel, come The Dugaboy Investment Trust and Get Good Trust ("Movers"), who file this motion to compel Highland Capital Management, L.P. ("Debtor") to comply with Bankruptcy Rule 2015.3 ("Motion"). In support of the Motion, Movers aver as follows:

CASE BACKGROUND

1. The Debtor filed for relief under Chapter 11 of the United States Bankruptcy Code on October 16, 2019 in the United States Bankruptcy Court for the District of Delaware.
2. The case was subsequently transferred to this Court on the 4th day of December, 2019 [Dkt. #1].
3. On November 24, 2020, the Debtor filed its *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* ("Fifth Amended Plan of Reorganization") [Dkt. #1472].
4. The Fifth Amended Plan of Reorganization was confirmed by this Court's *Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief* ("Order") on the 22nd day of February, 2021 [Dkt. #1943].
5. The Court's Order confirming the Debtor's Fifth Amended Plan of Reorganization has been appealed by Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. [Dkt. #1957].
6. In connection with the appeal, Motions for Stay Pending Appeal have been filed by (i) Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. [Dkt. #1955] (the "Advisors"); (ii) Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and NexPoint Capital, Inc. [Dkt. #1967] (the

"Funds"); (iii) The Dugaboy Investment Trust and Get Good Trust [Dkt. 1971] (the "Movers"); and (iv) James Dondero [Dkt. 1973] ("Dondero").

7. This Court entered an *Order on Motions for Stay Pending Appeal* on March 23, 2021, denying the requests for a stay pending appeal ("Order Denying Requests") [Dkt. #2084].
8. Advisors, Funds, Movers and Dondero have appealed this Court's Order Denying Requests for a stay pending appeal.
9. The appeal of this Court's Order Denying Requests for stay pending appeal is presently before Judge Godbey, United States District Judge for the Northern District of Texas.
10. The Debtor has not filed any reports required by Bankruptcy Rule 2015.3 over the approximately thirty (30) months in which this case has been pending.
11. The Effective Date for the Fifth Amended Plan confirmed by this Court has yet to occur.

OVERVIEW OF BANKRUPTCY RULE 2015.3

Rule 2015.3 requires "periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or debtor . . . in which the estate holds a substantial or controlling interest." Fed. R. Bankr. P. 2015.3(a). The purpose of Rule 2015.3 is "to assist parties in interest taking steps to ensure that the debtor's interest in any entity . . . is used for payment of allowed claims against the debtor." Pub. L. No. 109-8 § 419(b) (2005).

The term "substantial or controlling interest" is not defined, nor does it appear elsewhere in the Bankruptcy Code or Bankruptcy Rules. 9 Collier on Bankruptcy § 2015.3.07 (16th ed. 2020). In the absence of other guidance, Collier suggests that a court may turn to the definition of an "affiliate"[1] or "insider"[2] in the Bankruptcy Code, or even state law on the definition of a

[1] Bankruptcy Code § 102(2) defines an affiliate:
(2) The term "affiliate" means—
(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

controlling or substantial interest. See 9 Collier on Bankruptcy § 2015.3.07 (16th ed. 2020) ("case law regarding the definition of 'insider' or 'affiliate' may be helpful. Additionally, there is a substantial body of corporate case law regarding controlling interests that could be consulted.")

Under Rule 2015.3, there is a rebuttable presumption that the estate has a "substantial or controlling interest" of an entity in which it "controls or owns at least a 20 percent interest." Fed. R. Bankr. P. 2015.3(c).

The Court may, after notice and a hearing, vary the reporting requirement established by subdivision (a) of this rule for cause, including that the trustee or debtor in possession is not able, after a good faith effort, to comply with those reporting requirements, or that the information

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(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities—

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

[2] The Bankruptcy Code included a non-exclusive list of insiders:

(B) if the debtor is a corporation—

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership—

(i) general partner in the debtor;

(ii) relative of a general partner in, general partner of, or person in control of the debtor;

(iii) partnership in which the debtor is a general partner;

(iv) general partner of the debtor; or

(v) person in control of the debtor[.]

required by subdivision (a) is publicly available. The examples given for waiving cause are not exclusive. 9 Collier on Bankruptcy §2015.3.08 (16th ed. 2020).

When questioned at the confirmation hearing in connection with Bankruptcy Rule 2015.3, James Seery, on behalf of the Debtor, testified as to the following:

a) He was familiar with BR 2015.3 [Dkt. #1905, pg. 48, lines 12-15];

b) No report in compliance with BR 2015.3 has been filed by the Debtor [Dkt. #1905, pg. 48, lines 15-17]; and

c) "There was no reason for it (failure to file the 2015.3) other than we did not get it done initially and it fell through the cracks" [Dkt. #1905, pg. 49, lines 18-21].

EXISTING CASE LAW ON BANKRUPTCY RULE 2015.3

Little case law exists on the requirements of Bankruptcy Rule 2015.3. In general, cases where parties have sought and received a waiver fall into two categories: (1) cases where the subsidiary is in the process of being sold; and (2) prepacked bankruptcies if the plan is not confirmed by a certain date. See e.g., *In re RCS Capital Corp*., Case No. 16-102233 (Bankr. D. Del. Mar. 4, 2016) [Dkt. 714 ¶17] ("The Purchase Agreement has already been approved by the Court . . . . Therefore, within a relatively short period of time . . . , the Debtor will no longer have a substantial or controlling interest in [the subsidiary"); *In re HCR Manorcare*, Case No. 18-10467 (Bankr. D. Del. Oct. 3, 2018) [Dkt. 8 ¶ 47] (Seeking waiver of reporting requirements if a pre-packed bankruptcy plan is not confirmed within a set period of time).

The case law as it exists does not support a waiver of Bankruptcy Rule 2015.3 and especially for the "it slipped through the cracks excuse." It has been three (3) months since the issue of Debtor's failure to comply with Bankruptcy Rule 2015.3 was raised to the Debtor and

Debtor has not sought to remedy the failure and file the requisite 2015.3 reports for the applicable periods or seek leave of Court. The Debtor must believe the issue will simply go away and not be brought to the attention of the Court and, therefore, the Debtor will not have to disclose the financial condition of the assets in which it possesses a controlling or substantial interest. The Debtor's typical excuse in this case is the creditors committee has seen the information, however, Bankruptcy Rule 2015.3 requires a public filing and not a disclosure limited to a select few.

The Seery attempted excuse that "we were told we didn't have separate consolidating statements for every entity and it would be difficult" [Seery testimony Dkt. #1905, page 49, lines 14-20] is not credible in light of the fact that the majority of entities in which Debtor has a controlling or substantial interest are investment funds. Most of the entities listed below in which the Debtor has a substantial or controlling interest are either regulated or have third party investors and, as such, separate accounting and statements on an entity by entity basis are required. In addition, the fact that the Debtor lacked a "consolidated statement" on one entity is not a legitimate excuse for not filing a 2015.3 report for the other entities in which the Debtor has a controlling or substantial interest.

ENTITIES IN WHICH THE DEBTOR OWNS OR MAY OWN A CONTROLLING INTEREST

There is no complete listing in any one place that identifies the entities in which the Debtor possesses a substantial or controlling interest. To assemble the list, Mover has had to parse through various documents and filings. The entities include, but are not limited, to the following:

a) Highland Select Equity Fund [See ftn. 8, Debtor's Motion for Exit Loan Dkt. #2229]. The Exit Loan Motion identifies Highland Select Entity Fund, L.P., Highland

Restoration Capital Partners, L.P. Highland CLO Funding, Ltd., Highland Multi Strategy Credit Fund L.P., Highland Capital Management Korea Limited, Cornerstone Healthcare and Trussway Industries and Trussway Holdings, LLC.[3]

b) The Exit Financing Motion [Dkt. #2229, pg. 7, ftn. 9] indicates that the Debtor owns additional assets that, by the literal reading of ftn. 9, are not listed in the section of the motion that identifies the collateral for the loan. These entities should be specifically identified and reports should be filed for these entities that are not listed in the collateral section of the motion.

c) In the Deposition of James Seery taken on January 29, 2021, in addition to the entities listed above, James Seery generically identifies CCS Medical Inc., Targa International, PetroCap and JHT as entities controlled by Debtor or controlled through funds that are controlled by Debtor. It is believed the corporate names are PetroCap LLC, PetroCap Partners II LP, PetroCap Incentive Partners II LP , Targa Resources Partners LP, Targa S.A and JHT Holding Inc.

d) SSP Holdings Inc. and Omni Max, which were sold by the Debtor without Court approval based upon the Debtor's belief that Court approval was not required, should also have been the subject of a 2015.3 report for the period between the filing and the date of the sale.

CONCLUSION

Throughout this case the Debtor has taken the position that it does not have to seek court approval for sales of assets or report to anyone relative to assets owned by entities in which it has

[3] a) On information and belief, the Debtor asserted ownership of one hundred percent (100%) of Highland Select Entity Fund LP is incorrect and Mark Okata and PCMG Trading partners XXIII L.P. own an interest.

either control or a substantial interest. See Dondero *Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside the Ordinary Course of Business* [Dkt. #1439] and the Debtor's Objection thereto [Dkt. #1546]. In its Objection, the Debtor states in PP 9 that the sales at issue (Highland Multi Strategy Credit Fund L.P, Highland Restoration Capital Partners L.P and SSI Holdings Inc.) were not subject to Court approval and 11 USC §363. It appears, however, that this restricted view of Bankruptcy Court jurisdiction no longer suits the Debtor's new narrative and now it is seeking court authority to secure an exit loan and to use the assets of a controlled non-debtor entity (See Debtor's Motion for an Exit Loan, Dkt. # 2229) in order that the Debtor can pay its professionals and, in a second Motion, settle the UBS claim using the assets of a different non-debtor controlled entity [Dkt. #2199].

Had the Debtor followed Bankruptcy Rule 2015.3, both this Court and the creditors, large and small, of the Estate along with the creditors and minority owners of the controlled entities would have had some insight over the Debtor's actions with respect to these entities over the course of the Chapter 11. Bankruptcy Rule 2015.3 was designed to provide transparency and it should be enforced as a matter of public policy.

April 29, 2021

Respectfully submitted,

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Appendix Exhibit 109

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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	*	

LIMITED PRELIMINARY OBJECTION TO THE DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH UBS SECURITIES LLC AND UBS AG LONDON BRANCH AND AUTHORIZING ACTIONS CONSISTENT THEREWITH

Now into Court, through undersigned counsel, comes The Dugaboy Investment Trust and Get Good Trust ("Objectors"), who file this limited preliminary opposition to the *Debtor's Motion for Entry of an Order Approving Settlement with UBS Securities LLC and UBS AG London Branch and Authorizing Actions Consistent Therewith* ("Motion") [Dkt. #2199]. The limited preliminary objection is being filed so that a contested matter will exist between Highland Capital Management, L.P. (the "Debtor") and the Objectors, thus allowing the Objectors to conduct discovery to ascertain facts and obtain documents in support of the Objectors' limited objection and determine if additional grounds exist for an amended objection.

Objectors and other entities own interests in Highland Credit Opportunities CDO, L.P. (n/k/a Highland Multi Strategy Credit Fund, L.P. ("Multi-Strat") and, on information and belief, the interests of Objectors and third parties is in excess of any interest owned by the Debtor in Multi-Strat.

Objectors' issues with the settlement do not revolve around the Debtor settling its claims with UBS Securities LLC and UBS AG London Branch (collectively, "UBS") but, rather, go to the following issues:

1) That the Bankruptcy Court has no jurisdiction to rule on the settlement of litigation between UBS and Multi-Strat. The Debtor's sole position with the Multi-Strat entities appears to be as an investment advisor and possibly a general partner. The position taken by the Debtor in seeking Court approval for the Multi-Strat portion of the settlement is inconsistent with its previously articulated position taken in its *Debtor's Response to Mr. James Dondero's Motion to Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside the Ordinary Course of Business* ("Response") (Dkt. #1546) to *James Dondero's Motion for Entry of an Order Requiring Notice and Hearing for Future Estate Transactions Occurring Outside the Ordinary Course of Business* ("Motion for Future Estate Transactions") (Dkt. #1439). In the Motion for Future Estate Transactions filed by James Dondero seeking notice and hearing, one of the sales mentioned in the Motion for Future Estate Transactions was the sale of an asset owned by Multi-Strat (See Dkt. #1439). In its Response, the Debtor stated:

> However, the assets of a debtor's non-debtor subsidiaries are *not* property of a debtor's estate. *See, e.g., In re Guyana Dev. Corp.*, 168 B.R. 892, 905 (Bankr. S.D. Tex. 1994) ("As a general rule, property of the estate includes the debtor's stock in a subsidiary but not the assets of the subsidiary."); *see also*

> *Parkview-Gem, Inc.*, 516 F.2d 807, 809 (8th Cir. 1975) ("Ownership of all of the outstanding stock of a corporation, however, is not the equivalent of ownership of the subsidiary's property or assets. . . Even though the value of the subsidiary's outstanding shares owned by the debtor may be directly affected by the subsidiary's disputes with third parties,' Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate.'") (*citing In re Beck Indus., Inc.*, 479 F.2d 410 (2d Cir. 1973)).
>
> Further, while the Debtor has certain control rights over RCP, MSCF, and SSPI, those rights do not make the assets of RCP, MSCF, and SSPI property of the Debtor's estate. *See In re Thomas*, 2020 Bankr. LEXIS 1364 at *31 (Bankr. W.D. Tenn. 2020) (a debtor's membership interest in an LLC, including both its economic rights and governance rights, became property of the estate on the petition date, but the assets of the LLC remain separate and the debtor must manage them consistent with the terms of the operating agreement and applicable law); *In re Cardinal Indus.*, 105 B.R. 834, 849 (Bankr. S.D. Ohio 1989) (a debtor's ownership interests and control rights in non-debtor partnerships were property of the estate; but those rights did not make the assets of the partnership property of the estate or implicate the automatic stay so as to prevent secured creditors of the non-debtor partnerships from foreclosing on properties of the partnerships).

The law has not changed since the Response filed by the Debtor and this Court has no jurisdiction to approve the transfer of assets by a non-debtor "affiliated entity" to a third party in settlement of the claims of the third party against the non-debtor.

This position that the Court has jurisdiction over the UBS/Multi-Strat portion of the Settlement Agreement and Motion is also inconsistent with the fact that the Debtor did not seek Court approval for a May 2020 settlement between UBS and Multi-Strat, Highland Credit Opportunities CDO and Highland CDO Asset Holding L.P. Clearly, Highland, as both the Investment Advisor and either General Partner or Managing Member of the entities other than UBS, did not believe the Bankruptcy Court had jurisdiction over the May 2020 settlement identified in the Settlement Agreement attached to the Motion. The status of Debtor, with respect to the Multi-Strat portion of the Motion before this Court, has not changed from its status at the time of the May 2020 Settlement Agreement that was not brought before this Court. It is

also apparent that UBS did not believe that Bankruptcy Court approval was necessary for the May 2020 settlement.

2) Whether the Debtor, under the organizational documents of Multi-Strat and its Investment Advisor Agreement with Multi-Strat, possesses the requisite authority to bind Multi-Strat under the terms of the proposed settlement. The Motion fails to identify the authority possessed by the Debtor to bind Multi-Strat and fails to attach the documents giving the Debtor requisite authority to bind Multi-Strat to the proposed settlement. The Motion does not attach exhibits that evidence such authority or even quote portions of such documents giving rise to the Debtor's authority to bind the entity.

3) While the Debtor's bankruptcy counsel can advise the Debtor as to the wisdom of the settlement, the Motion fails to state whether a third party other than the Debtor or its counsel rendered an opinion to Multi-Strat and its owners that the settlement between the UBS entities was in the best interests of Multi-Strat. In fact, it is unknown as to whether anyone on behalf of Multi-Strat other than Highland or its counsel was apprised of the Multi-Strat/UBS settlement. Clearly, counsel for the Debtor cannot render such an opinion inasmuch as they do not represent Multi-Strat. While the case against Multi-Strat appears to be based upon transfers made to it, issues between Multi-Strat and the Debtor exist as to whether a portion of the Debtor's payments to the UBS entities reduces the claims by UBS against Multi-Strat under the single recovery rule. For example, if the case against Multi-Strat was brought by the Debtor and the property subject to the unlawful transfer had been transferred by another Highland Fund to Multi-Strat under 11 U.S.C. § 550(d), the Debtor could obtain only

a single satisfaction of the claim. Objectors believe that the interests of Debtor with respect to its own liability to UBS and its bargained for settlement and release for itself, Strand Advisors, Inc. and the list of released third parties place Debtor and its counsel in a conflict of interest position in evaluating the wisdom of the settlement between Multi-Strat and the various UBS entities.

4) The portion of the Settlement Agreement that confers exclusive jurisdiction of any dispute between Multi-Strat and UBS is void. It is well settled law that the parties cannot confer jurisdiction where no jurisdiction exists.

Objectors recognize that this Court has jurisdiction under Bankruptcy Rule 9019 of the settlement between the Debtor and UBS. The Court, however, does not have jurisdiction to give res judicata or collateral estoppel effect to a settlement of a dispute between three (3) non-debtors. The Dugaboy Investment Trust and Get Good Trust reserve the right to amend and supplement this objection upon obtaining documents and discovery from the Debtor and possibly UBS.

May 4, 2021

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CERTIFICATE OF SERVICE

I do hereby certify that on May 4, 2021, a copy of the above and foregoing *Limited Preliminary Objection to the Debtor's Motion for Entry of an Order Approving Settlement with UBS Securities LLC and UBS AG London Branch and Authorizing Actions Consistent Therewith* 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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Appendix Exhibit 110

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

DEBTOR'S OPPOSITION TO MOTION TO COMPEL COMPLIANCE WITH BANKRUPTCY RULE 2015.3 FILED BY DUGABOY INVESTMENT TRUST AND GET GOOD TRUST

Highland Capital Management, L.P., the debtor and debtor-in-possession ("Debtor") in the above-captioned chapter 11 case, submits this opposition to the *Motion to Compel*

Compliance With Bankruptcy Rule 2015.3 [D.I. 2256] ("Motion") filed by Dugaboy Investment Trust and Get Good Trust (collectively, the "Movant").

Preliminary Statement

1. The request by the Movant—who are two of James Dondero's family trusts—that the Court order the Debtor to comply with Federal Rule of Bankruptcy Procedure 2015.3 is not a legitimate request by a creditor for information. Neither the Movant nor Mr. Dondero have any bona fide claims against the Debtor and the Motion has nothing to do with transparency to creditors. Rather, it is a pretext for Mr. Dondero's latest attempt to (1) improperly obtain information about assets owned by non-debtors in order to interfere with the Debtor's monetization of its assets for the benefit of the estate's legitimate creditors; and (2) gain insight and access to information which will presumably form the basis of the litigation to be brought against Mr. Dondero and his related entities by the Litigation Trustee and/or the Reorganized Debtor. Mr. Dondero and his related entities would not otherwise be entitled to this information under applicable discovery rules. Importantly, the Debtor's reluctance to publicly disclose this information is also due to the fact that much of the information on the Debtor's controlling interests in its non-debtor subsidiaries was prepared by the Debtor's former legal team, who now are employed either by Mr. Dondero or by entities controlled by him and certain of whom were terminated for cause. The Debtor has substantial concerns whether the existing information in the Debtor's records prepared by these individuals is accurate.

2. The Debtor's non-compliance with Bankruptcy Rule 2015.3 was first raised at the hearing on confirmation of the Debtor's *Fifth Amended Plan of Reorganization of*

Highland Capital Management, L.P. (as Modified) [Docket No. 1808] (the "Plan")[1] in a desperate—but futile—attempt to defeat confirmation. Now, eighteen months after commencement of this chapter 11 case, two months after confirmation of the Plan, and shortly before the Debtor anticipates that the Plan will become effective, the Movant seeks the Debtor's compliance with Bankruptcy Rule 2015.3.

3. The Debtor has determined, in the exercise of its business judgment, that providing Mr. Dondero—either directly or through one of the many entities that have appeared in this case representing his interests—with detailed information regarding affiliate assets, will frustrate the Debtor's ability to maximize value of the assets of the estate and potentially compromise the Debtor's litigation position against Mr. Dondero and his related entities. The Debtor's position, which is supported by the Committee, is based upon, among other things, the mischief Mr. Dondero has already caused in this case and his documented attempts to interfere with the Debtor's operations and asset sales. Conversely, the Debtor has provided the Committee—the fiduciary for the Debtor's general unsecured creditors—information to enable it to adequately monitor and evaluate management of assets of entities that would be covered by Bankruptcy Rule 2015.3.

4. The Debtor currently expects that the Plan will become effective on or about July 1, 2021, provided the Court approves the Debtor's motion to obtain exit financing.[2] Once the Plan becomes effective, Bankruptcy Rule 2015.3 will no longer apply, and the Motion will be moot. If the Plan does not become effective by such time, the Debtor requests that the Court

[1] The Plan included certain amendments. *See Debtor's Notice of Filing of Plan Supplement to the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)*, Ex. B [Docket No. 1875]. Unless otherwise noted, capitalized terms used herein have the meanings ascribed in the Plan.

[2] *See Debtor's Motion for Entry of an Order (I) Authorizing the Debtor to (A) Enter Into Exit Financing Agreement in Aid of Confirmed Chapter 11 Plan, (B) Incur and Pay Related Fees and Expenses, and (C) Granting Related Relief*, filed on April 20, 2021 [Docket No. 2229] (the "Exit Financing Motion").

enter an order waiving the reporting requirements provided under Bankruptcy Rule 2015.3 to avoid aiding Mr. Dondero, and his related entities in obtaining information that they will improperly use to handicap the Debtor's monetization of its assets and initiate vexatious litigation against the Debtor.

Background

5. 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 Bankruptcy Court").

6. On October 29, 2019, the Official Committee of Unsecured Creditors (the "Committee") was appointed by the U.S. Trustee in the Delaware Bankruptcy Court. On December 4, 2019, the Delaware Bankruptcy Court entered an order transferring venue of the Debtor's chapter 11 case to this Court [Docket No. 186].[3]

7. On February 22, 2021, after a two-day hearing, 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") with respect to the Plan. The Plan was accepted by 99.8% of the amount of creditors that voted to accept or reject the Plan. *See* Confirmation Order ¶ 3.

8. The Effective Date of the Plan has not yet occurred. The Debtor currently expects that the Effective Date to occur on or after July 1, 2021, provided the Court approves the Exit Financing Motion.

9. On May 14, 2021, the Committee filed its *Application for Order Pursuant to Section 1103 of the Bankruptcy Code Authorizing the Employment and Retention of Teneo*

[3] All docket numbers refer to the docket maintained by this Court.

Capital, LLC as Litigation Advisor to the Official Committee of Unsecured Creditors Effective April 15, 2021 [Docket No. 2306] (the "Teneo Retention Application").

10. Upon the effective date of the Plan, a Litigation Sub-Trust created for the benefit of the holders of claims and interests in the Debtor, will be vested with certain claims and causes of action of the Debtor (the "Causes of Action"). Pursuant to the Plan, Marc S. Kirschner, Senior Managing Director of Teneo Capital, LLC ("Teneo"), will be appointed as Litigation Trustee and will be tasked with, among other things, the investigation and monetization of the Causes of Action.

11. To ensure that the Causes of Action are investigated and pursued in a vigorous and timely manner, the Committee believed it was essential to require Mr. Kirschner and Teneo to commence work effective April 15, 2021 on an interim basis under the direction of the Committee. The Committee has noted that if the Plan becomes effective before the return date of the Teneo Retention Application, such application will be withdrawn, and the Litigation Trust will succeed to the Kirschner and Teneo work product as provided for in the Plan.

The Court Should Defer Debtor's Compliance
With Bankruptcy Rule 2015.3 Pending the Effective Date of the Plan

12. Bankruptcy Rule 2015.3(a) provides in pertinent part as follows:

> In a chapter 11 case, the . . . debtor in possession shall file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest. The reports shall be prepared as prescribed by the appropriate Official Form, and shall be based upon the most recent information reasonably available to the . . . debtor in possession.

Fed. R. Bankr. 2015.3(a). The reporting requirements of Bankruptcy Rule 2015.3 run until "the effective date of a plan or the case is dismissed or converted." *Id.* 2015.3(b).

13. Upon the occurrence of the Effective Date—anticipated to be on or about July 1, 2021—the reporting requirements of Bankruptcy Rule 2015.3 are no longer applicable and the Reorganized Debtor will implement and carry out the provisions of the Plan that was overwhelmingly supported by the Committee and 99.8% of the dollar amount of creditors. As the Motion acknowledges, courts have approved similar waivers in connection with plans that were on the eve of becoming effective. *See In re Hornbeck Offshore Servs.*, No. 20-32679 (DRJ) (Bankr. S.D. Tex. May 20, 2020) (excusing requirement to file Bankruptcy Rule 2015.3 Reports if plan confirmed within 50 days from petition date); *In re Jason Indus.*, No. 20-22766 (RDD) (Bankr. S.D.N.Y. July 2, 2020) (granting 14-day extension to file Bankruptcy Rule 2015.3 reports in connection with debtor's prepackaged plan); *HRC ManorCare*, No. 18-10467 (KG) (Bankr. D. Del. March 6, 2018) (extending time to file Bankruptcy Rule 2015.3 report for approximately 50 days and waiving requirement to file report if plan is confirmed within such time); *see also In re RCS Capital Corp.*, No. 16-10223 (MFW) (Bankr. D. Del. May 23, 2016) (waiving requirement to file 2015.3 report for entity that was in the process of being sold and to avoid prejudicial impact). Given the relatively short time until the anticipated Plan Effective Date, the Debtor's requested waiver of the reporting requirements imposed under Bankruptcy Rule 2015.3 is appropriate and justified, especially in light of the improper purpose by which the Movant and Mr. Dondero would exploit any information obtained on the Debtor's assets to the detriment of the estate.

14. Movant waited fourteen months after the Petition Date to raise the Debtor's non-compliance with Bankruptcy Rule 2015.3. And it did so after an aborted effort to require the

Debtor to seek Court approval of sales of non-debtor assets.[4] Movant ambushed the Debtor at the Plan confirmation hearing and unsuccessfully tried to leverage the Debtor's non-compliance to defeat confirmation of the Plan.[5] Movant then waited two months after Plan confirmation to file this Motion. The foregoing demonstrates that the Motion is about leverage and gamesmanship and not about transparency.

If the Expected Plan Effective Date Does Not Occur, the Court Should Waive the Reporting Requirements Pursuant to Bankruptcy Rule 2015.3(d)

15. Bankruptcy Rule 2015.3(d) permits a court to modify a debtor's obligations under Bankruptcy Rule 2015.3(a) for cause shown. *See* Fed. R. Bankr. P. 2015.3(d). In addition to this subsection, Bankruptcy Rule 2015.3(e) provides that "the entity in which the estate has substantial or controlling interest, or a person holding an interest in that entity, may request protection of the information under section 107 of the Code." *See id.* 2015.3(e).

16. Bankruptcy Rule 9018 defines the procedures by which a party may move for relief under section 107(b) of the Bankruptcy Code, providing that:

> On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information . . .

Fed. R. Bankr. P. 9018.

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[4] *See James Dondero's Motion for Entry of an Order Requiring Notice and a Hearing for Future Estate Transactions Occurring Outside of the Ordinary Course of Business*, filed on November 19, 2020 [Docket No. 1439].

[5] *See* Transcript of Transcript of Proceedings Before Honorable Stacey J.C. Jernigan, United States Bankruptcy Judge, March 19, 2021 Regarding Motion to Stay Pending Appeals, at 69-70:

> "There were, of course, three primary legal issues raised as errors by this Court in the confirmation order. The first two arguments were not pressed too much in legal argument today although they were stressed in the briefing. One, the absolute priority rule violation argument; and then, two, the Bankruptcy Rule 2015.3/Bankruptcy Code Section 1129(a)(2) violation argument. The Court considered these arguments to wholly lack merit, and are borderline frivolous, frankly. They do not raise a serious legal question."

17. Section 107(b) requires courts to protect confidential commercial information. *In re Frontier Group,* 256 B.R. 771, 773 (Bankr. E.D. Tenn. 2000). This Court has defined commercial information as "information which would result in 'an unfair advantage to competitors by providing them information as to the commercial operations of the debtor,'" the disclosure of which "[must] reasonably be expected to cause the entity commercial injury," and "'is so critical to the operation of the entity seeking the protective order that its disclosure will unfairly benefit that entity's competitors.'" *In re Alterra Healthcare Corp.*, 353 B.R. 66, 75 (Bankr. D. Del 2006) (MFW) (internal citations omitted).

18. The Debtor submits that the unique facts and circumstances of this case provide ample cause to waive the reporting requirements of Bankruptcy Rule 2015.3. The Debtor has determined, in the exercise of its business judgment that the reporting requirements under Bankruptcy Rule 2015.3 would force the Debtor to disclose confidential propriety information to Movant and Mr. Dondero that would undermine the Debtor's ability to monetize its assets for fair value. First, the obvious purpose behind the Motion is enable Mr. Dondero to obtain confidential information on the Debtor's assets that he otherwise would not be entitled to and which will be used in future litigation with the Debtor or used to interfere in asset sales. The Court should not permit Mr. Dondero to gain access and insight on the Debtor's assets, claims and the Causes of Action that will be managed by the Litigation Trust once the Plan becomes effective and provide him with materials that he could not otherwise obtain in the normal course of discovery. Moreover, providing the information required by Bankruptcy Rule 2015.3 may also inhibit the ability of the Debtor to monetize these assets because other potential buyers would obtain information and insights on the value of these assets to which they otherwise would not be privy. If such information were made available for public consumption, potential

purchasers would be able to learn potentially valuable information about these entities' operations.

19. Finally, as discussed above, the Debtor has serious concerns about the accuracy and completeness of the information created by its former legal team, who are now employed by Mr. Dondero and his related entities, and are working under his direction and control. As the Court is aware, the many entities in Mr. Dondero's byzantine business enterprise have been the subject of misinformation. For example, the Debtor recently discovered misrepresentations made to it by certain former employees falsely claiming that the redeemed limited partners of one of the Debtor's managed funds (a fund in which the Debtor is also a limited partner) were third party investors unaffiliated by the Debtor.[6] However, the Debtor recently discovered that this was false and that the largest redeemer is Sentinel Reinsurance – an entity owned by Mr. Dondero and the Debtor's former general counsel, Scott Ellington. Sentinel Reinsurance claims to be owed approximately $33 million on account of its redeemed interest. In light of these facts and in the event that the Plan Effective Date is delayed beyond July 1, 2021, the Court should waive the requirements of Bankruptcy Rule 2015.3 to avoid the harm that would befall the Debtor if such information were obtained by Mr. Dondero and his related entities for the improper purposes described herein.

Conclusion

WHEREFORE, the Debtor respectfully requests that the Court defer the reporting requirements of Bankruptcy Rule 2015.3 until September 1, 2021. If the Effective Date of the Plan occurs by such date, the Motion will be moot. If the Effective Date of the Plan does not occur by

[6] *See Debtor's Omnibus Reply in Support of Debtor's Motion for Entry of an Order Approving Settlement with UBS Securities and UBS AG London Branch and Authorizing Actions Consistent Therewith*, filed on May 14, 2021 [Docket No. 2308]

such date, the Debtor requests that the Court waive the requirements of Bankruptcy Rule 2015.3 for the reasons set forth herein.

Dated: May 20, 2021.

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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.	

OBJECTION TO DEBTOR'S MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE SALE OF CERTAIN PROPERTY AND (II) GRANTING RELATED RELIEF

NexPoint Advisors, L.P. ("NPA") files this objection to the *Motion of the Debtor for Entry of an Order (I) Authorizing the Sale of Certain Property and (II) Granting Related Relief* (the "Motion") [Dkt. # 2535] filed by Highland Capital Management, L.P. ("Debtor") and would show the Court as follows:

1. NPA objects to the Motion because the Debtor intentionally created a sale process specifically designed to exclude NPA without articulating a sound business justification for doing so. In addition, the Debtor has exhibited bad faith and abused its discretion by disallowing competitive bidding for the Property (defined below), thereby reducing recoveries for the estate and harming creditors.

2. The Motion seeks authority to sell the real property bearing the common address of 2817 Maple Ave., Dallas, Texas 75201 (the "Property") to Stonelake Capital Holdings, LP

("Stonelake") in accordance with the Purchase and Sale Agreement attached to the Motion as Exhibit "C" (the "Stonelake APA"). The purchase price under the Stonelake APA was $9.75 million, subject to certain prorations.

3. On July 26, 2021, NPA submitted an increased offer of $10.1 million for the Property, in accordance with the Purchase and Sale Agreement attached hereto as Exhibit "A" (the "NPA PSA"). The NPA PSA is substantially identical to the Stonelake PSA[1]. As such, the offers submitted by NPA and Stonelake are "apples to apples," other than the fact that NPA's offer provides for an additional $350,000 recovery for the estate and its creditors. The Debtor summarily rejected the NPA PSA on July 27, 2021 without considering its benefits to the estate.

4. The Debtor proclaims in the Motion that it simply "will not entertain any offers" from NPA, a decision it has applied to the sale process without considering the benefits of the NPA PSA itself. While the Debtor asserts that disqualifying NPA from the sale process is within its business judgment, the Debtor's own arguments in the Motion blatantly shows an unjustified prejudice toward NPA supported by conclusory statements and incomplete facts.

5. As one of its primary reasons to disqualify NPA from the sale process, the Debtor argues that "allowing [NPA] into the sale process would chill bidding and depress the value of the Property …". Motion, ¶ 32. The facts of the case prove otherwise. According to the Motion, the two early offers received for the Property were $5.8 million from Stonelake and $7.5 million from another bidder. At some point in the sale process, Stonelake increased its existing offer to $9.75 million[2]. Motion, ¶¶ 17-20. Subsequently, NPA submitted a substantially higher bid of $9.82 million. *Id*. In light of the Motion, NPA increased its offer to $10.1 million. Accordingly, rather

[1] A true and correct copy of the redline comparison of the NPRE PSA to the Stonelake PSA is attached hereto as Exhibit B.
[2] The exact dates of Stonelake's offers are conspicuously absent from the Motion.

than "chill bidding," NPA's participation in the sale process has resulted in incremental estate recoveries.

6. The Debtor's abuse of discretion during the sale process is further evidenced by the "bid and offer" narrative articulated by the Motion. *See* Motion, ¶ 21 (suggesting that accepting NPA's bid would violate the Debtor's agreement with Stonelake). To be sure, the Debtor admits NPA's initial $9.82 million offer was received on May 18, 2021, but the Debtor admits that it did not enter into a binding agreement with Stonelake until June 22, 2021 (which offer was then later amended on July 8, 2021). The Debtor thus rejected NPA's initial offer before it had a binding offer from Stonelake. *See* Motion, ¶ 21. This timeline illustrates that the Debtor purposefully did not create a process for competitive bidding or establish a bid deadline for this sale, which belies any suggestion that the NPA offer is too late.

7. In addition, the original financial justifications provided by the Debtor have materially changed since the filing of the Motion, further calling into question the Debtor's decision to hold a private sale without competitive bidding. At the time the Motion was filed, the Debtor concluded that the NPA offer for the Property was only "slightly above Stonelake's offer" by $70,000. Motion, ¶ 20. Since that time, however, NPA has increased its offer by another $280,000, an offer the Debtor refuses to consider on its merits. An arbitrary denial of the NPA PSA without considering its actual terms does not satisfy the Debtor's obligations to the estate and creditors. Indeed, the terms of the NPA PSA and the Stonelake PSA are substantively identical, but a a side-by-side comparison of the economics plainly reveals that NPA's is materially superior:

	Stonelake	**NPA**
Purchase Price:	$9,975,000	$10,100,000
Earnest Money:	$500,000	$1,000,000
Inspection Period:	15 days	10 days
Closing Conditions:	Identical	Identical

The Debtor should not be afforded deference to its business judgment when it fails to consider the material elements of competing bids, as it has done with this sale.

8. Moreover, the Debtor also attempts to characterize NPA as a litigation risk as an alternative reason to disqualify it from participating in the sale process. However, the existence of unrelated litigation in and of itself is not grounds for disqualification. Importantly, the Debtor has failed to articulate any specific litigation risk related to this sale transaction – nor can it:

- The terms of the agreements are the same, so there is no greater litigation or closing risk with NPA than with Stonelake.
- The Debtor mentions the risk of post-closing litigation, however, the only post-closing issues or adjustments that need to be finalized are simple prorations. The provisions of the NPA PSA and Stonelake PSA are, again, identical on this point, so the risk is identical.[3]
- There is no allegation that NPA lacks the financial wherewithal to close. To the contrary, NPA is proposing to double the Stonelake earnest money deposit from $500,000 to $1 million. NPA thus has twice as much invested in the deal, twice the risk and twice the incentive to make sure the sale closes.

NPA's unquestioned ability to close the transaction, coupled with its identical form of agreement to that proposed by Stonelake, disprove the Debtor's characterization of NPA as a litigation risk with this specific Property-related transaction.

9. The Debtor simply does not want to sell the Property to NPA, and has gone out of this way to convince the Court that its issues with Mr. Dondero (and, by inapt proxy, NPA) outweigh its obligations to maximize recoveries for the estate. However, the "paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate." *In re Dura Automotive Sys., Inc.*, 06-11202 KJC, 2007 WL 7728109, at *90 (Bankr. D. Del. Aug. 15,

[3] Any post-closing adjustment should be minimal because the leases are triple net.

2007) (citing *In re Mushroom Transp. Co., Inc*., 382 F.3d 325, 339 (3rd Cir. 2004); *In re Food Barn Stores, Inc*., 107 F.3d 558, 564–65 (8th Cir. 1997)).

10. The Debtor has taken an opposite approach, unabashedly seeking to exclude NPA as a way to further punish Mr. Dondero. The Debtor's actions, however, are directly contrary to the recent ruling by the Fifth Circuit in *Walker County Hosp*., which noted that the best way to maximize estate recoveries is to promote competitive bidding. *Matter of Walker County Hosp. Corp*., 3 F.4th 229, 2021 WL 2910595 at *3 (5th Cir. 2021) ("The purpose of § 363 is to promote the finality of bankruptcy sales, thereby maximizing the purchase price of estate assets…. And ultimately, maximizing bidding on and the purchase price for a debtor's assets benefits a debtor's creditors.") (internal citations and quotation marks omitted").

11. Such conduct should not be sanctioned by the Court. In light of the foregoing, the Debtor has abused its discretion and acted in bad faith by summarily disqualifying NPA from the sale process for the Property. As such, the Debtor is not entitled to deference with respect to its unjustified decision to hold a private sale and exclude qualified bidders at the expense of the estate.

12. NPA is ready, willing and able to close a sale of the Property—a property it already knows well. The current NPA PSA eliminates risk and maximizes creditor recoveries. The Debtor should not be allowed to foster a private sale and eliminate competitive bidding to the detriment of creditors simply because the Debtor has an issue with Mr. Dondero. As this Court previously noted, money provided by corporate insiders like NPA "is as green as the money" provided by non-insiders. *In re Equip. Equity Holdings, Inc*., 491 B.R. 792, 840 (Bankr. N.D. Tex. 2013). There is no basis to hold otherwise here.

Based upon the foregoing, NPA requests that the Court deny the Motion and direct the Debtor to consider the NPA PSA as a qualified bid for the Property.

Dated: July 29, 2021

Respectfully submitted,

NEXPOINT ADVISORS, L.P.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 29th day of July, 2021, a true and correct copy of this document was served via the Court's ECF notification system on all parties entitled to notice thereby, including counsel for movant.

By: */s/ Thomas Berghman*
Thomas D. Berghman, Esq.

Appendix Exhibit 112

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Counsel 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.,	Case No. 19-34054-sgj11
Debtor.	

OBJECTION TO MOTION OF THE DEBTOR FOR ENTRY OF AN ORDER (I) AUTHORIZING THE SALE AND/OR FORFEITURE OF CERTAIN LIMITED PARTNERSHIP INTERESTS AND OTHER RIGHTS AND (II) GRANTING RELATED RELIEF

NexPoint Advisors, LP ("NPA") files this objection to the *Motion of the Debtor for Entry of an Order (I) Authorizing the Sale and/or Forfeiture of Certain Limited Partnership Interests and Other Rights and (II) Granting Related Relief* (the "Motion") [Dkt. # 2537] filed by Highland Capital Management, L.P. ("Debtor") and would show the Court as follows:

1. The Motion seeks authority to sell certain partnership and limited partnership interests (the "Interests") pursuant to that certain Partnership Interest Purchase and Sale Agreement by and among the Debtor, PetroCap, the PetroCap III GP, SLP, and the SLP GP (the

"PetroCap Purchase Agreement").[1] The purchase price under the PetroCap Purchase Agreement is $2,684,886, and certain other related considerations.

2. On July 29, 2021, The Dugaboy Investment Trust ("DPI") submitted an offer of $2,953,374.60 for the Interests in accordance with the Partnership Interest Purchase and Sale Agreement attached hereto as Exhibit A (the "DPI Purchase Agreement"). The DPI Purchase Agreement provides for materially higher estate recoveries on identical terms.

3. Upon information and belief, the Debtor has not yet responded to the DPI Purchase Agreement. NPA therefore files this objection out of an abundance of caution to insure that a competitive bidding process designed to maximize estate recoveries is employed by the Debtor.

4. The DPI Purchase Agreement is substantially identical to the PetroCap Purchase Agreement.[2] As such, the offers submitted by DPI and PetroCap are "apples to apples," other than the fact that DPI's offer provides for an additional $268,488.60 recovery for the estate and its creditors.

5. Consistent with the Debtor's past practice, NPA expects that the Debtor may summarily reject the DPI Purchase Agreement without considering its benefits to the estate. If this occurs, the Debtor will have continued to allow its issues with Mr. Dondero (and, by inapt proxy, DPI) to outweigh its obligations to maximize recoveries for the estate. However, the "paramount goal in any proposed sale of property of the estate is to maximize the proceeds received by the estate." *In re Dura Automotive Sys., Inc*., 06-11202 KJC, 2007 WL 7728109, at *90 (Bankr.

[1] Capitalized terms used but not defined herein have the respective meaning ascribed to such term in the Motion and the Purchase Agreement, as applicable.

[2] A true and correct copy of the redline comparison of the DPI Purchase Agreement to the PetroCap PSA is attached hereto as Exhibit B.

D. Del. Aug. 15, 2007) (citing *In re Mushroom Transp. Co., Inc*., 382 F.3d 325, 339 (3rd Cir. 2004); *In re Food Barn Stores, Inc*., 107 F.3d 558, 564–65 (8th Cir. 1997)).

6. Any failure by the Debtor to consider the DPI Purchase Agreement would be directly contrary to the recent ruling by the Fifth Circuit in *Walker County Hosp*., which noted that the best way to maximize estate recoveries is to promote competitive bidding. *Matter of Walker County Hosp. Corp*., 3 F.4th 229, 2021 WL 2910595 at *3 (5th Cir. 2021) ("The purpose of § 363 is to promote the finality of bankruptcy sales, thereby maximizing the purchase price of estate assets…. And ultimately, maximizing bidding on and the purchase price for a debtor's assets benefits a debtor's creditors.") (internal citations and quotation marks omitted"). The Court should not sanction a sale process that fails to do so

7. DPI is ready, willing and able to close a sale of the Interests, and the DPI Purchase Agreement eliminates risk and maximizes creditor recoveries.

Based upon the foregoing, NPA requests that the Court deny the Motion and direct the Debtor to consider the DPI Purchase Agreement as a qualified bid for the Interests.

Dated: July 29, 2021

Respectfully submitted,

NEXPOINT ADVISORS, L.P.

By: s/ Thomas Berghman

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 29th day of July, 2021, a true and correct copy of this document was served via the Court's ECF notification system on all parties entitled to notice thereby, including counsel for movant.

By: */s/ Thomas Berghman*
Thomas D. Berghman, Esq.

Appendix Exhibit 113

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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.,	§	
	§	Case No. 19-34054-sgj11
Reorganized Debtor.	§	
	§	

HIGHLAND'S SUPPLEMENTAL MOTION TO DISQUALIFY WICK PHILLIPS GOULD & MARTIN, LLP AS COUNSEL TO HCRE PARTNERS, LLC AND FOR RELATED RELIEF

Highland Capital Management, L.P., the reorganized debtor[1] ("Highland" or "HCMLP" as may temporally be required) in the above-captioned chapter 11 case (the "Bankruptcy Case"), by and through its undersigned counsel, files this *Supplemental Motion to Disqualify Wick Phillips*

[1] 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* [Docket No. 1808] (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].

Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief (the "Supplemental Motion") seeking entry of an order: (i) directing the disqualification of Wick Phillips Gould & Martin, LLP ("Wick Phillips") as counsel to HCRE Partners, LLC ("HCRE") in connection with the prosecution of HCRE's Claim;[2] (ii) directing Wick Phillips to immediately turnover to the Debtor all files and records relating to the LLC Agreement, the Loan Agreement, and the Restated LLC Agreement; and (iii) directing HCRE to (a) reimburse the Debtor all costs and fees incurred in making the Motion and this Supplemental Motion, including reasonable attorneys' fees; and (b) engage substitute counsel in connection with the prosecution of HCRE's Claim within fourteen (14) days of the entry of this Order. In support of its Supplemental Motion, Highland states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the Supplemental Motion pursuant to 28 U.S.C. §§ 157 and 1334(b). The Supplemental Motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409. The predicate for the relief requested in the Supplemental Motion is section 105(a) of title 11 of the United States Code (the "Bankruptcy Code").

RELIEF REQUESTED

2. Highland requests that this Court grant the relief requested in the proposed *Order Granting Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* [Docket No. 2196-1] (the "Proposed Order").[3]

3. For the reasons set forth more fully in Highland's Memorandum of Law, Highland seeks (i) disqualification of Wick Phillips as counsel to HCRE in connection with the prosecution of HCRE's Claim and (ii) related relief.

---

[2] Capitalized terms not otherwise defined in this Supplemental Motion have the meanings ascribed to them in *Highland's Memorandum of Law in Support of Supplemental Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* (the "Memorandum of Law") being filed contemporaneously herewith.

[3] The Proposed Order is annexed as Exhibit A to the *Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* [Docket No. 2196] (the "Motion").

4. Wick Phillips' continued representation of HCRE constitutes a direct conflict of interest. The undisputed facts demonstrate that Wick Phillips' Prior Representation of HCRE and Prior Representation of Highland involve the same matter and, at a very minimum, are clearly "substantially related." Wick Phillips' Current Representation of HCRE in connection with the prosecution of HCRE's Claim violates its duty of loyalty and confidentiality to its former client, Highland, under applicable ethical standards.

5. In accordance with Rule 7007-1 of the *Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas* (the "Local Rules"), contemporaneously herewith and in support of this Supplemental Motion the Debtor is filing its: (i) Memorandum of Law, and (ii) the *Declaration of Kenneth Brown in Support of Highland's Supplemental Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* (the "Brown Declaration").

6. Based on (i) the facts and arguments set forth in the Memorandum of Law and (ii) the exhibits attached to the Brown Declaration, Highland is entitled to the relief requested herein as set forth in the Proposed Order.

7. Notice of this Supplemental Motion has been provided to Wick Phillips, individually and in its capacity as counsel to HCRE. Highland submits that no other or further notice need be provided.

WHEREFORE, Highland respectfully requests that the Court (i) enter the Proposed Order substantially in the form annexed as Exhibit A to the Motion, granting the relief requested herein, and (ii) grant the Debtor such other and further relief as the Court may deem proper.

Dated: October 1, 2021

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John A. Morris (NY Bar No. 266326)
Kenneth Brown (CA Bar No. 100396)
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Counsel for Highland Capital Management, L.P.

Appendix Exhibit 114

The following constitutes the ruling of the court and has the force and effect therein described.

Signed December 10, 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
Reorganized Debtor.	§	
	§	

ORDER GRANTING IN PART AND DENYING IN PART HIGHLAND'S SUPPLEMENTAL MOTION TO DISQUALIFY WICK PHILLIPS GOULD & MARTIN, LLP AS COUNSEL TO HCRE PARTNERS, LLC AND FOR RELATED RELIEF

The Court conducted a hearing on November 30, 2021 (the "Hearing") to consider *Highland's Supplemental Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* [Docket No. 2893] (the "Supplemental Motion") which supplemented the *Debtor's Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* [Docket No. 2196] (the "Original Motion", and together with the Supplemental Motion, the "Motion") filed by Highland Capital Management,

[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.

L.P. ("Highland" or the "Reorganized Debtor") in the above-captioned chapter 11 case (the "Bankruptcy Case"). In the Motion, Highland sought entry of an order (i) directing the disqualification of Wick Phillips Gould & Martin, LLP ("Wick Phillips") as counsel to HCRE Partners, LLC ("HCRE") in connection with the prosecution of HCRE's Claim;[2] (ii) directing Wick Phillips to immediately turnover to Highland all files and records relating to the LLC Agreement, the Loan Agreement, and the Restated LLC Agreement; and (iii) directing HCRE to (a) reimburse Highland for all costs and fees incurred in making the Motion, including reasonable attorneys' fees; (b) engage substitute counsel in connection with the prosecution of HCRE's Claim within fourteen (14) days of the entry of an order of the Court; and (c) disclose all communications it (or anyone purporting to act on its behalf, including Wick Phillips) has had with Mark Patrick and Paul Broaddus concerning HCRE's Claim. In considering the Motion, the Court has reviewed the (i) Original Motion; (ii) *Debtor's Memorandum of Law in Support of Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* [Docket No. 2197]; (iii) the *Declaration of John A. Morris in Support of the Debtor's Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* [Docket No. 2198] and the exhibits attached thereto; (iv) the Supplemental Motion; (v) *Highland's Memorandum of Law in Support of Supplemental Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* [Docket No. 2894]; (vi) the *Declaration of Kenneth H. Brown in Support of Supplemental Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief*

[2] Capitalized terms not otherwise defined in this Order have the meanings ascribed to them in *Debtor's Memorandum of Law in Support of Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* [Docket No. 2197] and *Highland's Memorandum of Law in Support of Supplemental Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* [Docket No. 2894].

[Docket No. 2895] and the exhibits attached thereto; (vii) the *Response to Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC* [Docket No. 2278]; (viii) the *Brief in Opposition to Debtor's Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC* [Docket No. 2279]; (ix) the sealed *Appendix in Support of HCRE Partners, LLC Brief in Opposition to Debtor's Motion to Disqualify Wick Phillips Gould & Martin, LLP* [Docket No. 2926]; (x) the *Response and Brief in Opposition to Highland's Supplemental Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* [Docket No. 2927]; (xi) the *Supplemental Appendix in Support of NexPoint Real Estate Partners, LLC's Response and Brief in Opposition to Debtor's Supplemental Motion to Disqualify Wick Phillips Gould & Martin, LLP* [Docket No. 2928]; (xii) *Highland's Reply in Support of Supplemental Motion to Disqualify Wick Phillips Gould & Martin, LLP as Counsel to HCRE Partners, LLC and for Related Relief* [Docket No. 2952]; (xiii) the exhibits admitted at the Hearing on the Motion [Docket No. 3065]; and (xiv) the arguments of counsel at the Hearing. After considering the foregoing, the Court finds that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; (b) this matter constitutes a core proceeding under 28 U.S.C. § 157; (c) venue is proper in this judicial district pursuant to 28 U.S.C. § 1409; (d) notice of the Motion and the Hearing were appropriate and adequate; and (e) all persons with standing have been afforded the opportunity to be heard on the Motion. As a result of the findings of fact and conclusions of law set forth on the record at the Hearing, the Court finds good cause to grant in part, and deny in part, the relief requested in the Motion. Accordingly, **IT IS HEREBY ORDERED THAT:**

1. The Motion is **GRANTED** in part and **DENIED** in part as set forth herein.

2. Wick Phillips is **DISQUALIFIED** from serving as counsel to HCRE in connection with the prosecution of HCRE's Claim.

3. Wick Phillips is directed to immediately turnover to Highland all files and records relating to the LLC Agreement, the Loan Agreement, and the Restated LLC Agreement.

4. HCRE is directed to engage substitute counsel in connection with the prosecution of HCRE's Claim within thirty (30) days of the entry of this Order.

5. Highland's request that HCRE disclose all communications it (or anyone purporting to act on its behalf, including Wick Phillips) has had with Mark Patrick and Paul Broaddus concerning HCRE's Claim is **DENIED**.

6. Highland's request that HCRE reimburse it all costs and fees incurred in making and prosecuting the Motion, including reasonable attorneys' fees, is **DENIED**.

7. The Court shall retain jurisdiction to hear and determine all matters arising from the implementation of this Order.

End of Order

Appendix Exhibit 115

CASE NO. 3:21-02268-S

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

HIGHLAND CAPITAL MANAGEMENT LP

(Debtor)

THE DUGABOY INVESTMENT TRUST AND
GET GOOD TRUST

(Appellants)

v.

HIGHLAND CAPITAL MANAGEMENT LP

(Appellee)

On appeal from the United States Bankruptcy Court for the Northern District of Texas, Dallas Division

APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO DISMISS APPEAL AS MOOT

Filed by Heller, Draper & Horn, LLC
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Appellants, Dugaboy Investment Trust ("Dugaboy") and the Get Good Trust ("Get Good", in accordance with Federal Rule of Bankruptcy Procedure 8013 and Local Rule 7.1, respectfully file this Response to Appellee's Motion to Dismiss Appeal as Moot. Although Appellants may have dismissed their direct prepetition claims against the Debtor, Highland Capital Management, L.P. (the "Debtor" or "Highland"), Dugaboy still owns a significant interest in some of the very entities that would have been involved in the Rule 2015.3 Reports, had they been filed. Because one of the purposes of the Rule 2015.3 Reports, in addition to assisting prepetition creditors, is to provide a complete accounting of all transactions involving non-debtor affiliates of the Debtor to determine any *post-petition* claims that may exist, Dugaboy still has both a substantive and pecuniary interest in the production of the 2015.3 Reports.[1]

Appellee seems to take the stance that no one (not even the Bankruptcy Court) needs to see what happened behind the scenes during the bankruptcy case and that the Bankruptcy Court, the United States Trustee, and all interest holders in the non-debtor affiliates (including Dugaboy) need to just zip it and stay quiet. Although the majority of the unsecured creditors may have accepted the Plan of Reorganization, that does not mean that the Bankruptcy Court's Order denying the Motion to Compel as moot did not harm the interest holders in the non-debtor affiliates—who are also affected by the Rule 2015.3 Reports. At the very least, amount of Dugaboy's pecuniary interest in the bankruptcy estate cannot be known because the Debtor has refused to provide the Rule 2015.3 Reports as required under the Bankruptcy Code and the Bankruptcy Court has denied Dugaboy the right to examine those reports. That is the point of this appeal: to determine what claims against the estate exist which arose from transactions with

[1] The Appellants concede that due to the dismissal of Get Good's claim and the lack of an ownership interest in any of the non-debtor affiliates or the Debtor, it has lost standing and consents to the dismissal of Get Good **only**.

the non-debtor affiliates—a determination that was foreclosed because of the Bankruptcy Court's Order rendering production of the 2015.3 Reports moot.

Dugaboy has a Direct Pecuniary Interest in the Production of the Rule 2015.3 Reports

As outlined in the Appellants' Brief, at the confirmation hearing before the Bankruptcy Court, the Appellants raised the fact that the Debtor, after over a year, had not filed a single report as required under Federal Rule of Bankruptcy Procedure 2015.3. The explanation provided by the Debtor's Chief Restructuring Officer, James Seery, was that the reports simply slipped through the cracks and seemed to imply that once brought to the Debtor's attention, it would provide them. Needless to say, that did not occur, which prompted the subject Motion to Compel Compliance with Rule 2015.3, the Bankruptcy Court's final Order rendering the issue moot, and the instant appeal.

The Debtor's Motion to Dismiss is nothing more than an attempt to muddy the water and confuse the issues that are actually before this Court. While the amount of Dugaboy's claim against the estate is contingent upon the contents of the Rule 2015.3 Reports that were never produced, the issue here is the fact that Dugaboy was denied the right to even assert a claim in the first place due to the Bankruptcy Court's ruling that the Debtor would not be required to produce the Rule 2015.3 Reports at all. The Bankruptcy Court's Order caused actual and direct harm to Dugaboy by taking away that right to assert a claim based on the transactions that would be disclosed in the Rule 2015.3 Reports.

The Debtor correctly points out that in bankruptcy matters, a more exacting standard is applied to determine standing. That is, in order to have standing, a party must meet the "person aggrieved" test, which requires that the appellant show that it is directly and adversely affected

pecuniarily by the order of the bankruptcy court.[2] The Debtor relies, primarily, on *Matter of Technicool Sys., Inc.*, 896 F.3d 382 (5th Cir. 2018), which denied standing to the debtor's owner, Robert Furlough, who's complained grievance was that the same firm who represented one of the estate's creditors was also representing the estate's chapter 7 trustee in its effort to consolidate claims and pierce the corporate veil against several of the owner's other non-debtor companies. The principal argument asserted by Furlough was that the firm may fail to disclose problems with the creditor's claims against the estate on account of its dual representation, which could harm the overall recovery to the unsecured creditors, which, in turn, would harm any potential recovery to him, as an equity holder.[3] The Fifth Circuit found this too tenuous and stated that while that scenario was a possibility, "it would not be a direct result of this appeal."[4]

The same cannot be said in the instant matter. The harm visited upon Dugaboy (as an owner of the non-debtor affiliates) is that it has *actually* been denied an opportunity to determine whether or not a claim against the estate exists. In other words, the Bankruptcy Court's Order denying the Motion to Compel as moot directly affected Dugaboy's rights. The extent of the pecuniary effect on Dugaboy's pocket is unknown because the Bankruptcy Court never bothered to allow proper examination through the production of the Rule 2015.3 Reports.

Other cases cited in the Debtor's Motion to Dismiss are also easily distinguished from the instant case. In *Harriman v. Vactronic Sci, Inc. (In re Palmaz Sci., Inc.)*, 262 F.Supp 3d 428 (W.D. Tex. 2017), the appellant in that case was found to have lacked standing because she never even filed a proof of claim in the case much less made an objection to the confirmed plan.

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[2] *See, Gibbs & Bruns LLP v. Coho Energy, Inc. (In re Coho Energy, Inc.)*, 395 F.3d 198, 202–03 (5th Cir. 2004).

[3] *Id.* at 386.

[4] *Id.*

"If a party fails to appear at a hearing or object to a motion or proceeding, it cannot expect or implore the bankruptcy court to address the issues raised by the motion or proceeding for a second time," and will lack standing to appeal that decision." *Id.* at 435 *quoting In re Ray*, 597 F.3d 871, 874 (7th Cir. 2010). The Appellants, as the Debtor points out, have been active participants in the bankruptcy case and, in fact, did object to the Plan of Reorganization and raised the issue that the Rule 2015.3 Reports were not filed with the Bankruptcy Court at the confirmation hearing and in its Motion to Compel. It simply cannot be said that Dugaboy failed to make its concerns known to the Bankruptcy Court.

Similarly, in *Coho Energy*, the appellant claimed injury based on a settlement that the debtor reached in a contract dispute in which dispute the appellant had previously represented the debtor and was subsequently replaced by other counsel. The dispute at the heart of the appeal was over the fees awarded to both the appellant and subsequent counsel from the settlement. The original counsel complained that the amount of the attorneys fees awarded to the subsequent counsel was excessive and that the excessive award diminished the amount that would be available for its own fees. The settlement awarded $8.5 million to the estate.[5] Of that, $1.7 million was awarded to the former shareholders and $2.3 million was awarded to the subsequent firm, leaving approximately $4.5 million left for the appellant/original counsel's fees.[6] By the appellant's own admission, the high-end estimate of its fees was $3.4 million (substantially less than the $4.5 million left of the settlement funds). As such, the Fifth Circuit found that

[5] *Coho Energy*, 395 F.3d at 203.

[6] *Id.*

"Thomas's conjectural injury as a claimant to the fund … is too tenuous to support 'aggrieved person' standing."[7]

As stated above, Dugaboy's injury in this appeal is far from conjectural. The harm is actual in that Dugaboy (and all other interest holders in the non-debtor affiliates) was denied the opportunity to even examine whether a claim exists. Nor can the possibility of post-petition claims be considered conjectural. In fact, the United States Supreme Court considered the possibility of claims arising from transactions with non-debtor affiliates plausible enough to create a rule that requires certain disclosures that would reveal such transactions: ***Rule 2015.3***.

A case that was distinguished by the *Coho Energy* court is *Ergo Science, Inc. v. Martin*, 73 F.3d 595 (5th Cir. 1996), which is more applicable to the instant case. In *Ergo*, the appellant, ETI, was a claimant to a fund. The district court held that ETI had waived all claims against the fund in oral argument at the bankruptcy court. ETI appealed that order. At the Fifth Circuit, the standing of ETI was challenged on the grounds that its interest in the fund was too speculative. However, as the Fifth Circuit noted, the issue was not the contingent nature of the claimant's interest in the fund, rather, the issue was whether the claimant was denied its right to assert an interest in the first place.

> This dispute involves a potential claimant to the fund, not the stakeholder, and the very issue on appeal is whether ETI has waived its interest in the interpleaded funds or not. The district court's judgment decrees that ETI has no interest or right to the interpleaded funds. ETI, therefore, has standing to challenge this order because it is not faced with a hypothetical or indirect injury as in *Rohm,* but a real and immediate injury.[8]

[7] *Id.*

[8] *Ergo Sci., Inc. v. Martin*, 73 F.3d 595, 597 (5th Cir. 1996).

That is the precise scenario at issue in this appeal. By not requiring the Debtor to make the Rule 2015.3 disclosures, the Bankruptcy Court denied Dugaboy (and the non-debtor affiliates in which it owns an interest) the right to assert post-petition claims against the estate. Just as in *Ergo*, this is not a hypothetical or indirect injury. Rather, this is a real and immediate injury to Dugaboy.

Dugaboy's Standing Has Not Gone Away

In the Motion to Dismiss, the Debtor makes much over the fact that the Appellants' claims against the estate were dismissed, but it failed to address the statement in the Appellants' Brief that Dugaboy holds an ownership interest in several of the entities for which Rule 2015.3 Reports should have been filed. As an owner of those entities, any causes of action that arose during the bankruptcy case between the Debtor and those entities would have a direct effect on Dugaboy's pocketbook. While Dugaboy's claims against the Debtor may have been dismissed, its ownership interest in the non-debtor affiliates still exists and its pecuniary interest in those entities and any claims against the estate also exists.

Furthermore, Dugaboy is a contingent beneficiary under the terms of the Plan. As a former equity interest holder in the Debtor, Dugaboy is entitled to payment after all creditors are paid in full. How can the Debtor credibly argue that a contingent beneficiary under the Plan of Reorganization has no standing to appeal an order directly affecting the implementation of the Plan?

Conclusion

The Bankruptcy Court's Order denying the Motion to Compel as moot directly harmed Dugaboy by taking away their right to even examine whether there exists a post-petition claim against the estate by the non-debtor affiliates. The propriety of that order is what is on appeal to

this Court. This is an actual and direct harm to Dugaboy as an interest holder in the non-debtor affiliates. The potential amount of those claims is not at issue as that was never decided. The harm complained of is the deprivation to examine the disclosures that would have been provided by the Rule 2015.3 Reports had they been filed.

As such, Dugaboy respectfully requests that this Court deny the Motion to Dismiss Appeal as Moot as to Dugaboy and move forward with a determination of whether the Bankruptcy Court's Order was proper in the first place.

CERTIFICATE OF COMPLIANCE

In compliance with Rules 8013(f), I hereby certify that this document complies with the type-volume limit of Fed. R. Bankr. P. 8013(f)(3) because this document contains 2000 words.

Dated January 5, 2022:

/s/Douglas S. Draper
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The Dugaboy Investment Trust and
The Get Good Nonexempt Trust

CERTIFICATE OF SERVICE

I, Douglas S. Draper, hereby certify that on January 5, 2022, this Response was served electronically upon all parties registered to receive service in this case via the Court's CM/ECF system.

/s/ Douglas S. Draper
Douglas S. Draper

Appendix Exhibit 116

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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

HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., Defendant.	§	Adv. Proc. No. 21-3004 Case No. 3:21-cv-00881-X

HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	§	Adv. Proc. No. 21-3005 Case No. 3:21-cv-00880-C
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	§	Adv. Proc. No. 21-3006 Case No. 3:21-cv-01378-N
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HCRE PARTNERS, LLC (n/k/a NexPoint Real Estate Partners, LLC), JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	§	Adv. Proc. No. 21-3007 Case No. 3:21-cv-01379-X

PLAINTIFF'S OMNIBUS MOTION
(A) TO STRIKE CERTAIN DOCUMENTS AND ARGUMENTS FROM THE RECORD, (B) FOR SANCTIONS, AND (C) FOR AN ORDER OF CONTEMPT

Highland Capital Management, L.P. ("Highland" or "Plaintiff"), the reorganized debtor in the above-captioned chapter 11 case (the "Bankruptcy Case") and plaintiff in the above-referenced

adversary proceedings (collectively, the "Notes Actions"), hereby files this *Omnibus Motion (A) to Strike Certain Documents and Arguments from the Record, (B) for Sanctions, and (C) for an Order of Contempt* (the "Motion").[1] In support of the Motion, Plaintiff respectfully represents as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334(b).

2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.

3. The predicates for the relief requested in the Motion are section 105(a) of title 11 of the United States Code (the "Bankruptcy Code") and Rules 12 and 37 of the Federal Rules of Civil Procedure, made applicable herein pursuant to Rules 7012 and 7037 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

RELIEF REQUESTED

4. Plaintiff requests that this Court enter an order substantially in the form annexed hereto as **Exhibit A** (the "Proposed Order") (a) striking (i) the Pully Report and (ii) all references to, and all arguments derived from, the Pully Report and the Barred Defense, as highlighted on **Morris Exhibits 1 and 2**,[2] respectively; (b) imposing sanctions on the Alleged Violators[3] for

[1] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the *Brief in Support of Plaintiff's Omnibus Motion (A) to Strike Certain Documents and Arguments from the Record, (B) for Sanctions, and (C) for an Order of Contempt* (the "Brief") being filed contemporaneously with this Motion.

[2] References to "Morris Exhibit __" are to the exhibits attached to the *Declaration of John A. Morris in Support of Plaintiff's Omnibus Motion (A) to Strike Certain Documents and Arguments from the Record, (B) for Sanctions, and (C) for an Order of Contempt* (the "Morris Declaration") being filed contemporaneously with this Motion.

[3] The "Alleged Violators" include each of the corporate entities that are defendants in the Notes Actions and their counsel.

violating multiple rules; and (c) holding the Alleged Violators in civil contempt for their willful and knowing violation of three court Orders.

5. In accordance with Rule 7007-1 of the *Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas* (the "Local Rules"), the evidence and arguments supporting the Motion are set forth in Plaintiff's Brief and the Morris Declaration being filed contemporaneously herewith and are incorporated in this Motion as if set forth fully herein.

6. Based on the exhibits annexed to the Morris Declaration and the arguments contained in the Brief, Plaintiff is entitled to the relief requested herein as set forth in the Proposed Order.

8. Notice of this Motion will be provided to all parties in the Notes Actions. Plaintiff submits that no other or further notice need be provided.

WHEREFORE, Plaintiff respectfully requests that the Court (i) enter the Proposed Order substantially in the formed annexed hereto as **Exhibit A** granting the relief requested herein, and (ii) grant Plaintiff such other and further relief as the Court may deem proper.

Dated: February 7, 2022.

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Counsel for Highland Capital Management, L.P.

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that, between January 22 and January 26, 2022, Plaintiff's counsel corresponded with Defendants' counsel regarding the relief requested in the foregoing Motion. Based on the email exchange between Plaintiff's counsel and Defendants' counsel, the relief requested in the Motion is **OPPOSED** by Defendants.

/s/ Zachery Z. Annable
Zachery Z. Annable

EXHIBIT A

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

HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., Defendant.	§ § § § § § § § § § § § §	Adv. Proc. No. 21-3004 Case No. 3:21-cv-00881-X

HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. NEXPOINT ADVISORS, L.P., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	§	Adv. Proc. No. 21-3005 Case No. 3:21-cv-00880-C
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HIGHLAND CAPITAL MANAGEMENT SERVICES, INC., JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	§	Adv. Proc. No. 21-3006 Case No. 3:21-cv-01378-N
HIGHLAND CAPITAL MANAGEMENT, L.P., Plaintiff, vs. HCRE PARTNERS, LLC (n/k/a NexPoint Real Estate Partners, LLC), JAMES DONDERO, NANCY DONDERO, AND THE DUGABOY INVESTMENT TRUST, Defendants.	§	Adv. Proc. No. 21-3007 Case No. 3:21-cv-01379-X

ORDER GRANTING PLAINTIFF'S OMNIBUS MOTION (A) TO STRIKE CERTAIN DOCUMENTS AND ARGUMENTS FROM THE RECORD, (B) FOR SANCTIONS, AND (C) FOR AN ORDER OF CONTEMPT

Having considered (a) the *Omnibus Motion (A) to Strike Certain Documents and Arguments from the Record, (B) for Sanctions, and (C) for an Order of Contempt* (the "Motion") filed by Highland Capital Management, L.P. ("Highland" or "Plaintiff"), the reorganized debtor in the above-captioned chapter 11 case (the "Bankruptcy Case") and plaintiff in the above-referenced adversary proceedings (collectively, the "Notes Actions"); (b) the *Brief in Support of Plaintiff's Omnibus Motion (A) to Strike Certain Documents and Arguments from the Record, (B) for Sanctions, and (C) for an Order of Contempt* (the "Brief");[1] (c) the exhibits annexed to the *Declaration of John A. Morris in Support of Plaintiff's Omnibus Motion (A) to Strike Certain Documents and Arguments from the Record, (B) for Sanctions, and (C) for an Order of Contempt* (the "Morris Declaration"); and (d) all prior proceedings relating to this matter; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. § 1409; and this Court having found that Plaintiff'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.

[1] Capitalized terms not otherwise defined in this Order have the meanings ascribed to them in the Brief.

2. The Barred Defense is hereby **STRICKEN**, and HCMFA is directed to refile its *Brief in Opposition to Plaintiff's Motion for Summary Judgment* [Adv. Proc. No. 21-3004, Dkt. 127] (the "HCMFA Brief") with all language highlighted in Morris Declaration Exhibit 2 redacted from the HCMFA Brief.

3. The Pully Report is hereby **STRICKEN** from the summary judgment record, and the Term Note Defendants are directed to refile their Appendix without the Pully Report.

4. HCMFA, the Term Note Defendants, and their counsel shall show cause before this Court on **_____, _____, 2022 at _____ __.m. (Central Time)** why an order should not be granted (i) finding and holding HCMFA, the Term Note Defendants, and their counsel in civil contempt of the (x) Second Motion for Leave Order, (y) the Scheduling Order, and (z) the Expert Order; (ii) directing HCMFA, the Term Note Defendants, and their counsel to pay Plaintiff an amount of money equal to Plaintiff's reasonable and necessary fees and expenses incurred in bringing this Motion; and (iii) granting Plaintiff such other and further relief as the Court deems just and proper under the circumstances.

5. 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

Appendix Exhibit 117

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[1] Reorganized Debtor.	§	Chapter 11 Case No. 19-34054-sgj11
UBS SECURITIES LLC AND UBS AG LONDON BRANCH, Plaintiffs, vs. HIGHLAND CAPITAL MANAGEMENT, L.P., Defendant.	§	Adversary Proceeding No. 21-03020

[1] The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

HIGHLAND CAPITAL MANAGEMENT, L.P.'S MOTION TO WITHDRAW ITS ANSWER AND CONSENT TO JUDGMENT FOR PERMANENT INJUNCTIVE RELIEF

Highland Capital Management, L.P., the reorganized debtor and defendant ("Defendant" or "Highland") in the above-captioned adversary proceeding (the "Adversary Proceeding") in the above-captioned chapter 11 case (the "Bankruptcy Case"), pursuant to Federal Rules of Civil Procedure 11 and 15, made applicable to the Adversary Proceeding by Federal Rules of Bankruptcy Procedure 9011 and 7015, hereby submits *Highland Capital Management L.P.'s Motion to Withdraw its Answer and Consent to Judgment for Permanent Injunctive Relief* (the "Motion"). In support of its Motion, Highland respectfully states as follows:

PRELIMINARY STATEMENT[2]

1. In or around February 2021, Highland, through the diligence of the independent directors appointed by this Court in January 2020 (the "Independent Directors"), discovered that, in August 2017, Highland's senior management and certain of its employees had caused Highland CDO Opportunity Master Fund, L.P. ("CDO Fund") and Highland Special Opportunities Holding Company ("SOHC," and together with CDO Fund, the "Funds"), among others, to transfer in excess of $300 million in face-amount of cash and securities to Sentinel Reinsurance, Ltd. ("Sentinel"). The transfers were ostensibly made to pay a $25 million "premium" on a $100 million "after-the-event" insurance policy issued by Sentinel (the "Policy") that purportedly insured defense costs and judgments incurred in connection with a lawsuit brought by UBS Securities LLC and UBS AG London Branch (together, "UBS") against the Funds and Highland in New York state court. Former management and employees of Highland, including in-house

[2] Capitalized terms not defined in this Preliminary Statement shall have the meanings ascribed to them below.

attorneys, purposefully hid the transfers and the Policy from the Independent Directors causing significant damage to Highland.

2. Promptly after discovering the transfers to Sentinel, Highland disclosed them to UBS and was consequently forced to renegotiate its settlement of UBS's claim against Highland's estate—a settlement ultimately approved by this Court.

3. UBS subsequently commenced the Adversary Proceeding against Highland seeking an injunction prohibiting Highland from making, or causing to be made, transfers to the Sentinel Entities. Although Highland consented to the relief requested on a temporary basis, the underlying facts concerning the Transferred Assets were largely in the hands and memories of certain of Highland's former employees and third parties, such as Sentinel and its accounting firm. Consequently, Highland believed a fully-developed factual record was required before it could determine whether permanent injunctive relief was justified.

4. Now, after having reviewed the factual discovery conducted in the Adversary Proceeding, as well as its own books and records, Highland has concluded that, subject only to further Court order, it is compelled to withdraw its Answer and consent to the permanent injunctive relief sought by UBS. Specifically, Highland has concluded that (a) its defenses are not warranted by existing law or supported by a non-frivolous argument for extending, modifying, or reversing existing law, or establishing new law, (b) after having a reasonable opportunity for further investigation and discovery, there is no evidentiary support to oppose the relief requested, and (c) certain of Highland's prior denials in its Answer are no longer reasonably based on a lack of information.

5. Based on the foregoing, including events that occurred after Highland served its Answer, Highland (a) moves for leave to withdraw its Answer and (b) consents to the entry of a

judgment (the "Judgment") in the form annexed hereto as **Exhibit A** that provides, among other things, that:

> Subject to any further order of the Court, Highland is hereby permanently enjoined from making, or allowing funds under its control (including but not limited to Multi-Strat or CDO Fund) to make, any payments or further transfers to the Sentinel Entities (or any entities known by Highland to be transferees of the Sentinel Entities) consisting of, resulting from, or relating to the Transferred Assets pending a decision of a court of competent jurisdiction as to whether the Transferred Assets were fraudulently transferred to or for the benefit of Sentinel, Dondero, Ellington, and/or any of their affiliates or as part of a fraudulent scheme.

See Docket No. 3 (*Original Complaint for Injunctive Relief*) ¶ 6.

6. Entry of an order granting the relief requested herein will conserve the resources of the parties to the Adversary Proceeding and third-parties, and the Court and is justified based on the factual record developed in this Action.

STATEMENT OF FACTS

A. The Bankruptcy Case

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

8. On December 4, 2019, the Delaware Court entered an order transferring venue of Highland's bankruptcy case to the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court") [Bankr. Docket No. 186].[3]

9. On January 22, 2021, Highland filed its *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [Bankr. Docket No. 1808] (the "Plan").

10. On February 22, 2021, the Bankruptcy Court entered the *Order Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and*

[3] "Bankr. Docket No. __" refers to the docket maintained by the Bankruptcy Court in Case No. 19-34054.

(ii) Granting Related Relief [Bankr. Docket No. 1943] (the "Confirmation Order") which confirmed Highland's Plan.

11. On August 11, 2021, the Plan became effective [Bankr. Docket No. 2700].

B. The Adversary Proceeding

12. On March 31, 2021, UBS commenced the Adversary Proceeding by filing its *Original Complaint for Injunctive Relief* (the "Complaint") against Highland [Docket No. 3].[4]

13. In its Complaint, UBS alleged that James Dondero (Highland's founder and former President and CEO) and certain former Highland employees fraudulently transferred assets worth hundreds of millions of dollars from funds currently or previously owned, controlled, or managed by Highland to a Cayman Islands-based entity, Sentinel, that is owned and controlled by Mr. Dondero and Scott Ellington (Highland's former general counsel), in anticipation of UBS obtaining a judgment against those funds in New York. Complaint ¶ 1.

14. In the Adversary Proceeding, UBS seeks a permanent injunction preventing Highland from allowing funds under its management or control to make payments to the Sentinel Entities pending a judicial determination as to whether the Transferred Assets were fraudulently transferred to, or for the benefit of, Sentinel, Mr. Dondero, Mr. Ellington, and/or any of their affiliates or as part of a fraudulent transfer scheme (the "Prohibited Conduct"). Complaint ¶ 6.

15. On the same day it filed its Complaint, UBS also moved for a temporary restraining order enjoining Highland from engaging in any Prohibited Conduct. [Docket No. 4].

16. On April 9, 2021, the Court entered an *Order Granting Plaintiff's Motion for a Temporary Restraining Order* [Docket No. 21] pursuant to which Highland was temporarily

[4] Refers to the docket maintained in the Adversary Proceeding.

enjoined from engaging in the Prohibited Conduct until the Court decided UBS's request for a preliminary injunction.

17. On June 2, 2021, Highland filed its *Answer to Complaint* [Docket No. 84] (the "Answer") in which it denied certain material allegations on the ground that it did not have knowledge or information sufficient to form a belief as to the matters asserted.

18. Indeed, Highland's lack of knowledge prevented it from consenting to the imposition of permanent injunctive relief at the time the Adversary Proceeding was filed. As Highland's counsel explained during a hearing on a related matter, many of the facts alleged were within the exclusive purview of Mr. Dondero, Mr. Ellington, and other former Highland employees and third parties. Accordingly, Highland sought to determine whether a full record would support the imposition of permanent injunctive relief.[5]

19. During these proceedings, UBS sought documents from and/or deposed the following witnesses (collectively, the "Third Party Discovery"): (a) Clifford Stoops; (b) Jeremy Ringheimer; (c) Carter Chism; (d) James Dondero; (e) Shawn Raver; (f) Matthew DiOrio; (g) Scott Ellington; (h) Brian Fuentes; (i) Isaac Leventon; (j) Mary Kathryn Lucas (nee Irving); (k) Jean Paul Sevilla; and (l) Beecher Carlson Insurance Services, LLC.

20. In addition, UBS served broad discovery requests on Highland. In response, Highland searched for, and produced, a large volume of documents to UBS and continued to

[5] If Sentinel, or Mr. Dondero, or Mr. Ellington believed that a good faith, factual basis existed to oppose the relief sought by UBS, they could have and should have intervened in this Action. Indeed, Highland invited them to do so almost a year ago. *See* Transcript of June 24, 2021 hearing at 48:7-18 ("[T]o the extent that anybody is critical of how the Debtor is defending this litigation brought by UBS, Sentinel is free to intervene. In fact, Sentinel's two owners are represented here today. Mr. Dondero owns the majority of it. He's on the line. And Mr. Ellington owns the rest of it, and he's represented by counsel. So if Sentinel is -- wants to, you know, enter this litigation, the Debtor certainly has no objection. . . . [T]hey've been resisting service of process on subpoenas. I don't know whether they'll resist being named in the lawsuit. But they didn't on their own seek to intervene, which we kind of expected they would.").

investigate the underlying facts so it could respond to extensive sets of interrogatories and requests for admission.

21. From Highland's perspective, the Third Party Discovery and the information it produced in discovery shed considerable light on the allegations for which Highland previously lacked knowledge and established or confirmed the following facts, among others:

- Former employees of Highland caused the Transferred Assets to be conveyed to Sentinel in August 2017;
- Highland caused CDO Fund, among others, to transfer assets to Sentinel both before and during the bankruptcy without the knowledge and/or approval of the Independent Board;
- Mr. Dondero and Mr. Ellington indirectly own and control Sentinel;
- The Transferred Assets conveyed to Sentinel had a face value of more than $300 million and a market value at the time of transfer of over $100 million;
- Despite having a face amount of more than $300 million and a market value in excess of $100 million, the Transferred Assets were used to pay a $25 million premium on the $100 million Policy—an "after the event" policy issued by Sentinel;
- The Policy was ostensibly issued to satisfy any judgments in favor of UBS, plus costs of defending against UBS (although Sentinel has refused to pay on the Policy notwithstanding demand having been made);
- None of the former Highland employees subject to the Third Party Discovery ever disclosed the existence of the Policy to Highland or its independent management and, in fact, purposefully hid the existence of the Policy and the transfers from the Independent Board;
- Mr. Ellington and Mr. Leventon told the Independent Board that information on CDO Fund and SOHC assets was limited or did not exist, and it is now clear that those statements were untrue and appear to have been designed to hide the Policy and defraud Highland and its affiliates of the benefits of the Policy;
- In reliance on the information provided by Mr. Ellington and Mr. Leventon, Highland told UBS that information on CDO Fund and SOHC assets was limited or did not exist, statements that subsequently proved to be untrue;
- Mr. Ellington and Mr. Leventon withheld evidence from the Independent Board concerning the Policy and the conveyance of the Transferred Assets to Sentinel

and were assisted in doing so by, among others, Highland legal department employee Matthew DiOrio who was an undisclosed director of Sentinel before and during the bankruptcy case; and

- Mr. Ellington, Mr. Leventon, and Mr. DiOrio lied to the Independent Board and caused them to make misrepresentations to UBS and the Court.

22. Based on the foregoing, Highland has concluded that (a) its defenses are not warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or establishing new law, (b) after having a reasonable opportunity for further investigation and discovery, there is no evidentiary basis to oppose the relief requested, and (c) certain of Highland's prior denials in its Answer are no longer reasonably based on a lack of information.

CONCLUSION

23. For the reasons set forth herein, Highland respectfully requests that the Court (a) grant Highland's Motion, (b) enter without opposition the Judgment annexed as **Exhibit A** hereto, and (c) grant such other and further relief that the Court deems proper and just under the circumstances.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

Dated: June 8, 2022

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Counsel for Highland Capital Management, L.P.

EXHIBIT A

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[6] Debtor.	§	Chapter 11 Case No. 19-34054-sgj11
UBS SECURITIES LLC AND UBS AG LONDON BRANCH, Plaintiffs, vs. HIGHLAND CAPITAL MANAGEMENT, L.P., Defendant.	§	Adversary Proceeding No. No. 20-03020-sgj

ORDER AND JUDGMENT GRANTING PLAINTIFFS' REQUEST FOR A PERMANENT INJUNCTION AGAINST HIGHLAND CAPITAL MANAGEMENT, L.P.

[6] 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 *Highland Capital Management, L.P.'s Motion to Withdraw its Answer and Consent to Judgment for Permanent Injunctive Relief* [Adv. Pro. Docket No. __] (the "Motion"), filed by Highland Capital Management, L.P. ("Highland"), the reorganized debtor and defendant in the above-captioned adversary proceeding (the "Adversary Proceeding") in the above-captioned chapter 11 case (the "Bankruptcy Case"), and this Court having considered (a) the Motion and (b) the *Declaration of James P. Seery, Jr. in Support of Highland Capital Management, L.P.'s Motion to Withdraw its Answer and Consent to Judgment for the Permanent Injunctive Relief Sought by Plaintiff* (the "Seery Declaration" and together with the Motion, "Highland's Papers"), and (c) all prior proceedings relating to the Adversary Proceeding; 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 this Court having found that the Highland'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 Highland's Papers establish good cause for the relief granted herein, and that (1) such relief is necessary to avoid immediate and irreparable harm to UBS Securities LLC and UBS AG London Branch (together, "UBS"), (2) UBS is likely to succeed on the merits of its underlying claim for injunctive relief; (3) the balance of the equities tip in favor of UBS; 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. Highland's *Answer to Complaint* [Docket No. 84] is deemed **WITHDRAWN**.

3. Subject to any further order of this Court, Highland is hereby permanently **ENJOINED AND RESTRAINED** from making or allowing funds under its control (including but not limited to Multi-Strat or CDO Fund) to make any payments or further transfers to the Sentinel Entities (or any entities known by Highland to be transferees of the Sentinel Entities) consisting of, resulting from, or relating to the Transferred Assets pending a decision of a court of competent jurisdiction as to whether the Transferred Assets were fraudulently transferred to or for the benefit of Sentinel, Dondero, Ellington, and/or any of their affiliates or as part of a fraudulent scheme

4. This Order shall remain in effect unless otherwise ordered by the Court.

5. All objections to the Motion are overruled in their entirety.

6. 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

Appendix Exhibit 118

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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
Reorganized Debtor.	§	
	§	
UBS SECURITIES LLC AND UBS AG LONDON BRANCH,	§	
Plaintiffs,	§	
	§	Adv. Proc. No. 21-03020-sgj
vs.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Defendant.	§	

AMENDED NOTICE OF HEARING

PLEASE TAKE NOTICE that the following matter previously scheduled for hearing on Thursday, July 21, 2022 at 9:30 a.m. (Central Time) (the "Hearing") in the above-captioned

[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.

adversary proceeding (the "Adversary Proceeding") has been rescheduled for **Monday, August 8, 2022 at 9:30 a.m. (Central Time)**:

1. *Highland Capital Management, L.P.'s Motion to Withdraw Its Answer and Consent to Judgment for Permanent Injunctive Relief* [Docket No. 169] (the "Motion").

The Hearing on the Motion will be held via WebEx videoconference before The Honorable Stacey G. C. Jernigan, United States Bankruptcy Judge. The WebEx video participation/attendance link for the Hearing is: https://uscourts.webex.com/meet/jerniga.

A copy of the WebEx Hearing Instructions for the Hearing is attached hereto as **Exhibit A**; alternatively, the WebEx Hearing Instructions for the Hearing may be obtained from Judge Jernigan's hearing/calendar site at: https://www.txnb.uscourts.gov/judges-info/hearing-dates/judgejernigans-hearing-dates.

[Remainder of Page Intentionally Left Blank]

Dated: June 24, 2022.

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EXHIBIT A

WebEx Hearing Instructions
Judge Stacey G. Jernigan

Pursuant to General Order 2020-14 issued by the Court on May 20, 2020, all hearings before Judge Stacey G. Jernigan are currently being conducted by WebEx videoconference unless ordered otherwise.

For WebEx Video Participation/Attendance:

Link: https://us-courts.webex.com/meet/jerniga

For WebEx Telephonic Only Participation/Attendance:

Dial-In: 1.650.479.3207
Meeting ID: 479 393 582

Participation/Attendance Requirements:

- Counsel and other parties in interest who plan to actively participate in the hearing are encouraged to attend the hearing in the WebEx video mode using the WebEx video link above. Counsel and other parties in interest who will not be seeking to introduce any evidence at the hearing and who wish to attend the hearing in a telephonic only mode may attend the hearing in the WebEx telephonic only mode using the WebEx dial-in and meeting ID above.
- Attendees should join the WebEx hearing at least 10 minutes prior to the hearing start time. Please be advised that a hearing may already be in progress. During hearings, participants are required to keep their lines on mute at all times that they are not addressing the Court or otherwise actively participating in the hearing. **The Court reserves the right to disconnect or place on permanent mute any attendee that causes any disruption to the proceedings**. For general information and tips with respect to WebEx participation and attendance, please see Clerk's Notice 20-04: https://www.txnb.uscourts.gov/sites/txnb/files/hearings/Webex%20Information%20and%20Tips_0.pdf
- **Witnesses are required to attend the hearing in the WebEx video mode and live testimony will only be accepted from witnesses who have the WebEx video function activated**. Telephonic testimony without accompanying video will not be accepted by the Court.
- All WebEx hearing attendees are required to comply with Judge Jernigan's Telephonic and Videoconference Hearing Policy (included within Judge Jernigan's Judge-Specific Guidelines): https://www.txnb.uscourts.gov/content/judge-stacey-g-c-jernigan

Exhibit Requirements:

- Any party intending to introduce documentary evidence at the hearing must file an exhibit list in the case with a true and correct copy of each designated exhibit filed as a separate, individual attachment thereto so that the Court and all participants have ready access to all designated exhibits.
- If the number of pages of such exhibits exceeds 100, then such party must also deliver two (2) sets of such exhibits in exhibit binders to the Court by no later than twenty-four (24) hours in advance of the hearing.

Notice of Hearing Content and Filing Requirements:

IMPORTANT: For all hearings that will be conducted by WebEx only:

- The Notice of Hearing filed in the case and served on parties in interest must: (1) provide notice that the hearing will be conducted by WebEx videoconference only, (2) provide notice of the above WebEx video participation/attendance link, and (3) attach a copy of these WebEx Hearing Instructions or provide notice that they may be obtained from Judge Jernigan's hearing/calendar site: https://www.txnb.uscourts.gov/judges-info/hearing-dates/judge-jernigans-hearing-dates.
- When electronically filing the Notice of Hearing via CM/ECF select "at https://us-courts.webex.com/meet/jerniga" as the location of the hearing (note: this option appears immediately after the first set of Wichita Falls locations). Do not select Judge Jernigan's Dallas courtroom as the location for the hearing.

Appendix Exhibit 119

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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]	§	Case No. 19-34054-sgj11
	§	
Debtor.	§	
	§	
UBS SECURITIES LLC AND UBS AG LONDON BRANCH,	§	Adversary Proceeding
	§	
	§	No. 21-03020-sgj
Plaintiffs,	§	
	§	
vs.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
	§	
Defendant.	§	

UBS'S RESPONSE TO HIGHLAND CAPITAL MANAGEMENT, L.P.'S MOTION TO WITHDRAW ITS ANSWER AND CONSENT TO JUDGMENT FOR PERMANENT INJUNCTIVE RELIEF

[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.

UBS Securities LLC and UBS AG London Branch (collectively, "UBS"), plaintiffs in the above-captioned adversary proceeding (the "Adversary Proceeding") and creditors in the above-captioned chapter 11 case (the "Bankruptcy Case"), submit this response (the "Response") to the *Motion to Withdraw its Answer and Consent to Judgment for Permanent Injunctive Relief* (the "Motion") filed by Highland Capital Management, L.P. ("Highland" or the "Debtor") on June 8, 2022 (Adv. Dkt. No. 169). In support of the Response, UBS states as follows:

UBS agrees, as Highland states in the Motion, that the Court should permanently enjoin Highland from making or allowing funds under its management or control (including, but not limited to, Multi-Strat and CDO Fund) to make any payments or further transfers to Sentinel or any of its affiliates (the "Sentinel Entities") or any transferees of the Sentinel Entities consisting of, resulting from, or relating to the Transferred Assets, and that "(a) [Highland's] defenses are not warranted by existing law or supported by a non-frivolous argument for extending, modifying, or reversing existing law, or establishing new law, (b) after having a reasonable opportunity for further investigation and discovery, there is no evidentiary support to oppose the relief requested, and (c) certain of Highland's prior denials in its Answer are no longer reasonably based on a lack of information." Mot. at 2.

UBS, however, believes that the Court should modify Highland's proposed judgment attached to the Motion as Exhibit A and submits an alternative proposed judgment attached to this Response as Exhibit 1. Specifically, UBS submits that this Court should find that UBS has satisfied the standard for a permanent injunction: "(1) success on the merits; (2) that a failure to grant the injunction will result in irreparable injury; (3) that said injury outweighs any damages that the injunction will cause the opposing party; and (4) that the injunction will not disserve the public interest." *In re Heritage Real Est. Inv., Inc.*, No. 14-03603-NPO, 2021 WL 1395592, at

*13 (Bankr. S.D. Miss. Feb. 4, 2021) (quoting *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 824 F.3d 507, 533 (5th Cir. 2016)). UBS intends to submit evidence during the August 8, 2022 hearing that will support the alternative proposed judgment and permit this Court to find that the standard can be met and therefore a permanent injunction is warranted.

As a result, UBS proposes that this Court enter the proposed judgment attached to this Response as **Exhibit 1**. A redline comparison to show the differences between UBS's proposed judgment at Exhibit 1 and Highland's proposed judgment at Exhibit A to the Motion is attached to this Response as **Exhibit 2**.

CONCLUSION

WHEREFORE, UBS respectfully requests that the Court enter the judgment attached hereto as Exhibit 1 and grant such further relief as the Court deems just and proper.

Dated: July 27, 2022

Respectfully submitted,

LATHAM & WATKINS LLP

By */s/ Kathryn George*

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Counsel for UBS Securities LLC and UBS AG London Branch

CERTIFICATE OF SERVICE

I, Martin Sosland, certify that *UBS's Response to Highland Capital Management, L.P.'s Motion to Withdraw its Answer and Consent to Judgment for Permanent Injunctive Relief* was filed electronically through the Court's ECF system, which provides notice to all parties of interest.

Dated: July 27, 2022

/s/ Martin Sosland
Martin Sosland

Appendix Exhibit 120

United States District Court

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE DUGABOY INVESTMENT TRUST and GET GOOD TRUST Appellants, v. HIGHLAND CAPITAL MANAGEMENT, L.P., Appellee.	§	CIVIL ACTION NO. 3:21-CV-2268-S
In re: HIGHLAND CAPITAL MANAGEMENT, L.P., Debtor.	§	CASE NO. 19-34054-sgj11

ORDER

Before the Court is Appellee's Motion to Dismiss Appeal as Moot ("Motion to Dismiss") [ECF No. 12]. The Court has reviewed and considered the Motion to Dismiss, Appellants' Response to Appellee's Motion to Dismiss Appeal as Moot ("Response") [ECF No. 15], Reply in Support of Appellee's Motion to Dismiss Appeal as Moot [ECF No. 16], Appellants' Sur-Reply to Appellee's Motion to Dismiss Appeal as Moot [ECF No. 22], the record on appeal ("Record") [ECF No. 9], and the applicable law. For the following reasons, the Court **GRANTS** the Motion to Dismiss and **DISMISSES** this appeal for lack of jurisdiction.

I. BACKGROUND

This bankruptcy appeal arises from the bankruptcy court's denial of the Motion to Compel Compliance with Bankruptcy Rule 2015.3 (the "Motion to Compel") filed by Appellants The Dugaboy Investment Trust ("Dugaboy") and Get Good Trust ("Get Good") (collectively, "Appellants"). R. vol. 2 at 421. Appellee Highland Capital Management, L.P. ("Appellee" or

"Debtor") initiated the underlying Chapter 11 bankruptcy proceeding in October 2019. Dugaboy subsequently filed three proofs of claim in April 2020, including a proof of claim as a purported "successor in interest" to Canis Major Trust. Around the same time, Get Good also filed three proofs of claim, including two as a purported "successor in interest" to Canis Major Trust.

In the meantime, Debtor filed the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (the "Plan") in January 2021, and the bankruptcy court held a Plan confirmation hearing in February 2021. R. vol. 1 at 290. At the hearing, Appellants raised the issue of Debtor's failure to file any reports as required under Bankruptcy Rule 2015.3, which requires debtors to file "periodic financial reports of the value, operations, and profitability" of each non-debtor entity in which the debtor "holds a substantial or controlling interest." FED. R. BANKR. P. 2015.3(a). The bankruptcy court confirmed the Plan over Appellants' objections and entered the Confirmation Order on February 22, 2021. R. vol. 1 at 290.

Three months later, Appellants filed the Motion to Compel. R. vol. 2 at 421. Debtor filed its opposition, and the bankruptcy court conducted a hearing on the Motion to Compel on June 10, 2021. R. vol 1. at 356. Following the hearing, the bankruptcy court issued a minute order providing that (1) the hearing on the Motion to Compel would be continued to September 2021; (2) if the Plan effective date occurred before the hearing, the matter would become moot; and (3) if the Plan effective date had not occurred by the hearing, the court would consider the Motion to Compel further. *Id.* at 357. However, the Plan became effective on August 11, 2021, and the bankruptcy court therefore issued its Order Denying Motion to Compel Compliance with Bankruptcy Rule 2015.3 ("Order") on September 6, 2021. R. vol. 1 at 10. Appellants filed their notice of appeal of the Order on September 22, 2021. *See* Notice of Appeal [ECF No. 1].

After this appeal was filed, however, all of the proofs of claim filed by Dugaboy and Get Good were withdrawn with prejudice. Specifically, on October 27, 2021, with Dugaboy's consent, the bankruptcy court entered orders withdrawing two of the Dugaboy claims with prejudice, and on November 10, 2021, the bankruptcy court entered an order approving a stipulation between Dugaboy and Debtor withdrawing the third Dugaboy claim with prejudice. *See In re Highland Capital Management, L.P.*, (Bankr. N.D. Tex. Oct. 16, 2019), ECF Nos. 2965, 2966, 3007. Similarly, on November 10, 2021, all three of the Get Good claims were withdrawn with prejudice either by consent or pursuant to stipulation by Get Good. *Id.*, ECF Nos. 3008, 3009, 3010.

Shortly after all of Appellants' claims were withdrawn, Appellee filed its Motion to Dismiss, asserting that this appeal is constitutionally moot for lack of standing.

II. LEGAL STANDARD

Standing to appeal a bankruptcy court decision is a question of law. *In re Technicool Sys., Inc.*, 896 F.3d 382, 385 (5th Cir. 2018). Compared to traditional Article III standing, "standing to appeal a bankruptcy court order is, of necessity, quite limited." *In re Dean*, 18 F.4th 842, 844 (5th Cir. 2021). The Fifth Circuit applies the "person aggrieved" test, which imposes a "more exacting standard than traditional constitutional standing." *Id.* The "person aggrieved" test "demands a higher causal nexus between act and injury," and requires an appellant to show that she is "directly and adversely affected pecuniarily by the order of the bankruptcy court." *In re Coho Energy Inc.*, 395 F.3d 198, 202-03 (5th Cir. 2004) (citations omitted). It is not enough that an appellant is directly impacted by "the proceedings more generally." *In re Dean*, 18 F.4th at 844. Rather, to have standing, the exact order being appealed must "directly affect [appellants'] wallets." *Id.* Such a narrow standing inquiry "ensur[es] that only those with a direct, financial stake in a given order can appeal it." *Technicool*, 896 F.3d at 386. As the Fifth Circuit has observed, "in bankruptcy

litigation, as in life, 'the more money we come across, the more problems we see.'" *Id.* (quoting NOTORIOUS B.I.G., *Mo Money Mo Problems*, on LIFE AFTER DEATH (Bad Boy/Arista 1997)).

Standing must exist both at the commencement of the litigation and throughout its existence. *Goldin v. Bartholow*, 166 F.3d 710, 717 (5th Cir. 1999) (quoting *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (internal alterations and quotation marks omitted)). A case becomes moot when a party loses standing, as "there are no longer adverse parties with sufficient legal interests to maintain the litigation." *Id.* (citation omitted). And when a case becomes moot, the court loses its "constitutional jurisdiction to resolve the issues it presents." *Id.* (citing *Hogan v. Miss. Univ. for Women*, 646 F.2d 1116, 1117 n.1 (5th Cir. 1981)).

III. ANALYSIS

Appellee asserts that while Appellants had standing at the commencement of the appeal, they lost that standing when all of their claims were withdrawn on November 10, 2021, because at that point they were no longer creditors. Appellants concede that Get Good has lost standing to pursue the appeal,[1] but contend that Dugaboy still has standing because it owns an interest in some of the entities for which Rule 2015.3 reports would have been required. Dugaboy claims that because the purpose of requiring reports under Rule 2015.3 is to "provide a complete accounting of all transactions involving non-debtor affiliates of the Debtor to determine any post-petition claims that may exist," Dugaboy still has a pecuniary interest in the production of the 2015.3 reports themselves. Resp. 2.

The Court finds that Dugaboy is not "directly and adversely affected pecuniarily" by the Order as required to establish standing. *Coho*, 395 F.3d at 203. By withdrawing its remaining

[1] *See* Resp. 2 n.1 ("The Appellants concede that due to the dismissal of Get Good's claim and the lack of an ownership interest in any of the non-debtor affiliates or the Debtor, it has lost standing and consents to the dismissal of Get Good only.").

claims against Debtor, Dugaboy no longer has any pecuniary interest in the bankruptcy estate and therefore is not a "person aggrieved" by the Order. *Id.* While Dugaboy does not dispute that it is no longer a creditor of the estate, it asserts that its pecuniary interest is its ownership interest in the non-debtor affiliates and a potential recovery under the Plan as one of Debtor's former equity holders. In other words, Dugaboy's primary contention is that, but for the bankruptcy court's failure to compel Debtor to file retroactive reports regarding its ownership interests in non-debtor subsidiaries as of the bankruptcy petition date, Dugaboy might have used the information in those reports to investigate whether any post-petition claims exist against Debtor's estate by any non-debtor affiliates. But such an injury is precisely the type of "hypothetical or indirect injury" that the Fifth Circuit has consistently found insufficient to confer standing. *Coho*, 395 F.3d at 203 (quoting *Ergo Science v. Martin,* 73 F.3d 595, 597 (5th Cir. 1996)).

Further, even if Dugaboy did still have some claim to the estate, "[e]ven a claimant to a fund must show a realistic likelihood of injury in order to have standing." *Id.* There is no such likelihood here. Were the Court to reverse the Order, the effect of the bankruptcy court granting the Motion to Compel is simply that Debtor would be required to file retroactive reports regarding its ownership interests in non-debtor subsidiaries. It is unclear how post-dated reports disclosing years-old facts could lead to any direct recovery by a creditor, let alone recovery by a non-creditor with a purported ownership in non-debtor affiliates. This attenuated interest in a potential future outcome is not sufficient: "the order must burden [Dugaboy's] pocket before [it] burdens the docket." *Technicool*, 896 F.3d at 386.

Dugaboy also argues that it has standing as a "contingent beneficiary" under the Plan, or a beneficiary who will be entitled to payment after all creditors are paid in full. Resp. 7. This assertion is premised on the assumption that Dugaboy's 0.1866% pre-bankruptcy limited

partnership interest in Debtor—which was extinguished under the Plan—makes it a contingent beneficiary of the creditor trust created under the Plan. As an initial matter, Dugaboy still does not demonstrate the requisite "causal nexus" between the actual Order being appealed and its purported interest in potential future recovery under the Plan. *Coho*, 395 F.3d at 202. But in any event, such a "speculative prospect of harm is far from a direct, adverse, pecuniary hit" as required to confer standing. *Technicool*, 896 F.3d at 386.

While Dugaboy may have a direct interest in the "proceedings more generally," bankruptcy standing requires that there is a direct, adverse, and pecuniary effect on the appellant, and that the effect is tied to the specific order being appealed. In the absence of any claim to Debtor's estate or direct financial injury flowing from the Order, Dugaboy simply cannot be a "person aggrieved" by the Order. Accordingly, the Court finds that Appellants lack standing and, as a result, this appeal is constitutionally moot.

IV. CONCLUSION

For the reasons set forth above, Appellee's Motion to Dismiss Appeal as Moot [ECF No. 12] is **GRANTED**, and this appeal is **DISMISSED** for lack of jurisdiction.

SO ORDERED.

SIGNED August 8, 2022.

KAREN GREN SCHOLER
UNITED STATES DISTRICT JUDGE

Appendix Exhibit 121

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ATTORNEYS 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-SGJ-11**
Debtor.	§	
	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Movant,	§	
	§	**Contested Matter**
v.	§	
NEXPOINT REAL ESTATE PARTNERS, LLC, F/K/A HCRE PARTNERS, LLC,	§	
Respondent.	§	

MOTION TO WITHDRAW PROOF OF CLAIM

NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC ("NREP" or "Claimant") files this, its Motion to Withdraw Proof of Claim [Proof of Claim No. 146], and respectfully states as follows:

PRELIMINARY STATEMENT

Claimant filed a proof of claim, timely, but long before any Plan was proposed. The Debtor objected.

Since then, the LLC subject to the objection has operated without anticipated interference from the Debtor, and NREP would prefer that the LLC continue to do so. As a result of the Company's operations, and in consideration of the cost and uncertainty with pursuing the Claim in the face of Debtor's objection, Claimant now wishes to withdraw the claim to which the Debtor objected.

At the time of this filing, Debtor was unable to agree or provide that it was unopposed to the withdrawal. Respectfully, objection to the proposed withdrawal of a claim, if any, should be overruled, and this Motion should be granted.

PROCEDURAL HISTORY

On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the Bankruptcy Court for the District of Delaware, Case No. 19-12239 (CSS) (the "Delaware Court"). The Delaware Court thereafter entered an order transferring venue of the Debtor's bankruptcy case (the "Bankruptcy Case") to this Court.

On March 2, 2020, the Court entered its Order (I) Establishing Bar Dates for Filing Claims and (II) Approving the Form and Manner of Notice Thereof [Docket No. 488] (the "Bar Date Order"), which, among other things, established April 8, 2020 as the deadline for all entities holding claims against the Debtor that arose before the Petition Date to file proofs of claim.

On April 8, 2020, NREP timely filed a proof of claim (the "Proof of Claim") regarding its and the Debtor's interest in a limited liability company, SE Multifamily Holdings, LLC (the "Company").

On July 30, 2020, the Debtor objected to the Proof of Claim in its First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims [Docket No. 906] (the "Objection") on the ground that it had no liability. NREP responded the objection on October 19, 2020 (the "Response").

The Debtor's Fifth Amended Plan of Reorganization (the "Plan") [Docket. No. 1808] was confirmed by Order entered by the Bankruptcy Court on February 22, 2021 [Docket No. 1943], and the effective date of the Plan as August 11, 2021 [Docket No. 2700].

A year after NREP filed the Proof of Claim, and eight months after it filed the Objection, the Debtor sought to disqualify NREP's then-counsel Wick Phillips Gould & Martin LLP [Docket Nos. 2196 and 2893]. Following notice and hearing, the Court entered an Order granting in part and denying in part the Debtor's motion, and NREP thereafter secured new counsel.

Thereafter in June 2022, Debtor and NREP (via new counsel) entered a Scheduling Order regarding the Proof of Claim [Docket No. 3356] and the parties have engaged in document and third-party deposition discovery. There have been no hearings in the matter, and no dispositive motions have been filed or set. This contested matter is set for hearing on November 1 and 2, 2022.

There is no other pending proceeding, lawsuit, or matter regarding the Proof of Claim or the claim made in the Proof of Claim.

Given the uninterrupted operation of the Company, and in order to put a stop to the anticipated future time and effort expended on pursuit of the Proof of Claim and the Debtor's

objection to it, NREP conferred with the Debtor about withdrawal. Counsel for the Debtor was unable to state it was agreed or unopposed.

This Motion follows.

ARGUMENT AND AUTHORITY

A. Bankruptcy Rule 3006

Rule 3006 provides after a creditor's proof of claim has drawn an objection, the creditor may not withdraw the claim except on order of the court, after a hearing, and on such terms and conditions as the court deems proper.[1]

B. Standards for Applying Bankruptcy Rule 3006

Although Rule 3006 itself does not provide guidance as to the standards to be applied for withdrawing a proof of claim, the cases and comments applying it advise applying the standards used in relation to FED. R. CIV. P. 41(a).[2]

Courts in the Fifth Circuit "follow the traditional principle that dismissal should be allowed unless the defendant will suffer some plain prejudice other than the mere prospect of a second lawsuit. It is no bar to dismissal that plaintiff may obtain some tactical advantage thereby,"[3] and there are, in fact, "only a limited number of circumstances that will warrant denial of a Federal

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[1] *See* FED. R. BANKR. P. 3006.

[2] *See In re Manchester, Inc.*, Case No. 08-03163-BJH, 2008 WL 5273289, *3 (Bankr. N.D. Tex. December 19, 2008) (Houser, C.J.) ("A motion to withdraw a proof of claim is frequently analogized to a motion to withdraw a complaint under Federal Rule of Civil Procedure 41(a).") (citing *In re 20/20 Sport, Inc.*, 200 B.R. 972, 979-80 (Bankr. S.D.N.Y. 1996)); Advisory Committee Notes on Rules – 1983 ("This rule recognizes the applicability of the considerations underlying Rule 41(a) F.R.Civ.P. to the withdrawal of a claim after it has been put in issue by an objection.").

[3] *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976) (quoting *Holiday Queen Land Corp. v. Baker*, 489 F.2d 1031, 1032 (5th Cir. 1974)); *Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 317 (5th Cir. 2002) ("We have explained that, as a general rule, motions for voluntary dismissal should be freely granted unless the non-moving party will suffer some plain legal prejudice other than the mere prospect of a second lawsuit."); *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176, 177 (5th Cir. 1990) ("Generally, courts approve such dismissals unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second lawsuit."); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976) ("Nevertheless, in most cases a dismissal should be granted unless the defendant will suffer some legal harm.").

Rule 41(a)(2) motion since 'the [court] should not require that a plaintiff continue to prosecute an action that it no longer desires to pursue.'"[4]

Legal prejudice here means prejudice to some legal interest, some legal claim, some legal argument, and may occur when a dismissal strips an otherwise available defense (*e.g.*, statute of limitation, *forum non conveniens*),[5] or dismissal is requested after an adverse ruling is entered or one is imminent.[6]

The prospect of a second lawsuit, or the fact that plaintiff may obtain some tactical advantage, are *not* sufficient to establish legal prejudice,[7] and that the dismissing party might possibly obtain some tactical advantage in some future litigation is not a bar.[8]

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[4] *Kumar v. St. Paul Surplus Lines Ins. Co.*, Case No. 3:10-CV-166-O, 2010 WL 1946341, at *2 (N.D. Tex. May 12, 2010) (citing *Radiant Tech. Corp. v. Electrovert USA Corp.*, 122 F.R.D. 201, 204 (N.D. Tex. 1988)).

[5] *See, e.g., Elbaor*, 279 F.3d at 318–19 (vacating and remanding district dismissal because non-movant could potentially lose a statute of limitations defense); *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176, 178–80 (5th Cir. 1990) (vacating and remanding because non-movant could lose forum non conveniens); *Kumar v. St. Paul Surplus Lines Ins. Co.*, 2010 WL 1946341, *1 ("Legal prejudice has been defined as prejudice to some legal interest, some legal claim, [or] some legal argument.").

[6] *See Robles v. Atlantic Sounding Co., Inc.*, 77 Fed. Appx. 274, 275 (5th Cir. 2003) (per curiam) ("These timing cases are inapposite here because they involve situations where the movant suffered an adverse legal decision *prior* to moving for voluntary dismissal.") (emphasis added); *Forbes v. CitiMortgage, Inc.*, 998 F. Supp. 2d 541, 547 (S.D. Tex. 2014) ("Plain legal prejudice may occur when the plaintiff moves to dismiss a suit at a late stage of the proceedings or seeks to avoid an imminent adverse ruling in the case, or where a subsequent refiling of the suit would deprive the defendant of a limitations defense.") (quoting *Harris v. Devon Energy Prod. Co., L.P.*, 500 Fed. Appx. 267, 268 (5th Cir. 2012))

[7] *See Dale v. Equine Sports Med. & Surgery Race Horse Serv., P.L.L.C.*, 750 Fed. Appx. 265, 268 (5th Cir. 2018) ("[T]he potential for forum-shopping does not count as legal prejudice."); *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176, 177–78 (5th Cir. 1990) ("That plaintiff may obtain some tactical advantage over the defendant in future litigation is not ordinarily a bar to dismissal."); *Reed v. Falcon Drilling Co., Inc.*, No. 99–0927, 2000 WL 222852, *1, (5th Cir. Feb. 18, 2000) ("The mere prospect of a second lawsuit or the fact that plaintiff may obtain some tactical advantage are insufficient to establish legal prejudice.").

[8] *See Ikospentakis v. Thalassic Steamship Agency*, 915 F.2d at 78 ("That plaintiff may obtain some tactical advantage over the defendant in future litigation is not ordinarily a bar to dismissal.") (citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976)); *Bechuck v. Home Depot U.S.A., Inc.*, 814 F.3d 287, 299 (5th Cir. 2016) ("Yet, '[i]t is no bar to dismissal that plaintiff may obtain some tactical advantage thereby.' Indeed, the 'fact that a plaintiff may gain a tactical advantage by dismissing its suit without prejudice and refiling in another forum is not sufficient legal prejudice to justify denying a motion for voluntary dismissal.'") (citation omitted).

In short, absent "legal harm" or "legal prejudice," the general guidance is that Bankruptcy Courts should allow withdrawal absent a showing of legal harm or prejudice.[9]

The burden of showing prejudice falls on the objecting party,[10] and withdrawal is in the Court's discretion, and in consideration of interests of the parties.[11]

In determining whether to approve withdrawal, the Court may consider the (1) diligence in bringing the motion, (2) any "undue vexatiousness" by the movant, (3) the suit's progression, including trial preparation, (4) the duplicative expense of re-litigation, and (5) the movant's reason for seeking withdrawal.[12]

[9] *See In re Manchester*, 2008 WL 5273289, *3 ("[S]ince the general policy under Rule 41(a) is to permit withdrawal of a complaint, withdrawal of a proof of claim should be permitted unless that withdrawal results in a 'legal harm' or 'prejudice' to a non-moving party."); *see also Robles*, 77 Fed. Appx. at 275 (recognizing that Rule 41 motions "should be freely granted unless the non-moving party will suffer some plain legal prejudice other than the mere prospect of a second lawsuit").

[10] *See In re Manchester*, 2008 WL 5273289, *3 ("The non-moving party bears the burden to prove that it will suffer such a legal harm or prejudice."); *see also In re Ogden New York Servs., Inc.*, 312 B.R. 729, 733 (S.D.N.Y. 2004) (recognizing that the objecting party bears the burden of demonstrating legal prejudice).

[11] *See In re Manchester*, 2008 WL 5273289, *3 ("As with a Rule 41 (a) (2) motion, a motion to withdraw a proof of claim is left to the bankruptcy court's discretion, which is 'to be exercised with due regard to the legitimate interests of both [parties].'") (quoting *In re 20/20 Sport*, 200 B.R. at 979).

[12] *See In re Manchester, Inc.*, 2008 WL 5273289, *3 (("In determining whether withdrawal of a proof of claim is appropriate, courts consider the following factors: (1) the movant's diligence in bringing the motion, (2) any "undue vexatiousness" on the part of the movant, (3) the extent to which the suit has progressed, including the effort and expense undertaken by the non-moving party to prepare for trial, (4) the duplicative expense of re-litigation, and (5) the adequacy of the movant's explanation for the need to withdraw the claim.").

C. Standards for Applying Bankruptcy Rule 3006

Considering the factors in *Manchester*,

Standard	**Application**
Diligence in bringing the motion	NREP brought the Motion immediately after conferring with Debtor's counsel.
Undue vexatiousness	NREP has not been vexatious in pursuing its Proof of Claim, and outside the motion to disqualify previous counsel – filed by the Debtor, and which is not substantive – everything in the matter has proceeded by agreement, and there have been no hearings set or held.
Matter's progression, including trial preparation	The hearing on the Debtor's objection is months away, November 1 and 2, and fact and expert discovery is not yet completed.
Duplication of expense of re-litigation	The Proof of Claim is effectively *sui generis* and is not the subject of any other pending action, proceeding, or matter. There is no tactical advantage for the withdrawal.
Reason for dismissal	The operation of the Company during the case, and the anticipated issues therewith, have not materialized and NREP no longer desires to proceed on the matters raised in the Proof of Claim.

There are no pending Motions, and no dispositive motions have been filed, set, or heard.

Neither the Debtor nor any party-in-interest will suffer plain legal prejudice if the Proof of Claim is withdrawn: there are no imminent adverse rulings, no parallel or pending actions, no tactical advantage to be obtained.

The Debtor is reorganized, the Plan effective date has long since passed, and the withdrawal of the Proof of Claim will not have any effect on the Debtor's reorganization.

NREP simply wishes to no longer pursue a claim to which the Debtor has objected.[13]

WHEREFORE, NREP prays that it be allowed to withdraw its claim and for such other relief as may be appropriate.

Respectfully submitted,

/s/ Charles W. Gameros, Jr., P.C.
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F/K/A HCRE PARTNERS, LLC

[13] *See Kumar*, 2010 WL 1946341, *2 ("[T]he [court] should not require that a plaintiff continue to prosecute an action that it no longer desires to pursue.").

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he has communicated with counsel for the Debtor regarding the substance of the forgoing Motion, but that counsel could not agree or disagree with the relief sought. As such, Claimant files this Motion.

/s/ Charles W. Gameros, Jr., P.C.
Charles W. Gameros, Jr., P.C.

CERTIFICATE OF SERVICE

This is to certify parties which have so registered with the Court, including counsel for the Debtor, the United States Trustee, and all persons or parties requesting notice and service shall receive notification of the foregoing via the Court's ECF system, and are considered served pursuant to the Administrative Procedures incorporated into the Order Adopting Administrative Procedures for Electronic Case Filing, General Order 2003-01.2.

/s/ Charles W. Gameros, Jr., P.C.
Charles W. Gameros, Jr., P.C.

Appendix Exhibit 122

The following constitutes the ruling of the court and has the force and effect therein described.

Signed August 19, 2022

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
Reorganized Debtor.	§	
UBS SECURITIES LLC AND UBS AG LONDON BRANCH,	§	
	§	Adversary Proceeding
Plaintiffs,	§	
	§	No. 21-03020-sgj
vs.	§	
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§	
Defendant.	§	

ORDER AND JUDGMENT GRANTING UBS'S REQUEST FOR A PERMANENT INJUNCTION AGAINST HIGHLAND CAPITAL MANAGEMENT, L.P.

[1] The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the above-captioned Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

This matter having come before the Court on *Highland Capital Management, L.P.'s Motion to Withdraw Its Answer and Consent to Judgment for Permanent Injunctive Relief* [Docket No. 169] (the "Motion") filed by Highland Capital Management, L.P. ("Highland"), the defendant in the above-captioned adversary proceeding (the "Adversary Proceeding") and the reorganized debtor in the above-captioned chapter 11 case (the "Bankruptcy Case"); and this Court having considered (a) the Motion and (b) the *Declaration of James P. Seery, Jr. in Support of Highland Capital Management, L.P.'s Motion to Withdraw Its Answer and Consent to Judgment for the Permanent Injunctive Relief Sought by Plaintiff* (the "Seery Declaration" and together with the Motion, "Highland's Papers"),[2] (c) the evidence presented at the August 8, 2022 hearing on the Motion, and (d) all prior proceedings relating to the Adversary Proceeding; 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 this Court having found that Highland'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 considered the evidence presented on August 8, 2022, and in consideration of that evidence, the Court having found that the legal and factual bases presented establish good cause for the relief granted herein, and that (1) such relief is necessary to avoid immediate and irreparable harm to UBS Securities LLC and UBS AG London Branch (together, "UBS"), (2) UBS will succeed on the merits of its underlying claim for injunctive relief, (3) the injury to UBS outweighs any damages that the injunction will cause Highland, and (4) such relief

[2] Capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in Highland's Papers.

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 IN PART** as set forth herein.

2. Highland's *Answer to Complaint* [Docket No. 84] is deemed **WITHDRAWN**.

3. Subject to any further order of this Court, Highland is hereby permanently **ENJOINED AND RESTRAINED** from making or allowing funds under its control (including, but not limited to, Multi-Strat or CDO Fund) to make any payments or further transfers to the Sentinel Entities (or any entities known by Highland to be transferees of the Sentinel Entities) consisting of, resulting from, or relating to the Transferred Assets pending (i) a decision of a court of competent jurisdiction as to whether the Transferred Assets were fraudulently transferred to or for the benefit of Sentinel, Dondero, Ellington, and/or any of their affiliates or as part of a fraudulent scheme, or (ii) an agreement between Highland and UBS as to the disposition of the Transferred Assets.

4. This Order shall remain in effect unless otherwise ordered by the Court.

5. All objections to the Motion are overruled in their entirety.

6. 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

Appendix Exhibit 123

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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]	)	Case No. 19-34054-sgj11
Reorganized Debtor.	)	

HIGHLAND CAPITAL MANAGEMENT, L.P.'S OBJECTION TO MOTION TO WITHDRAW PROOF OF CLAIM

[1] Highland's last four digits of its taxpayer identification number are (8357). The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

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TABLE OF AUTHORITIES

CASES

RULES

Highland Capital Management, L.P. ("Highland" or, as applicable, the "Debtor"), the reorganized debtor in the above-captioned chapter 11 case (the "Bankruptcy Case"), by and through its undersigned counsel, hereby files this objection (the "Objection") to the *Motion to Withdraw Proof of Claim* [Docket No. 3443] (the "Motion to Withdraw"), filed by NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC ("HCRE" and together with Highland/Debtor, the "Parties"). In support of its Objection, Highland states as follows:

PRELIMINARY STATEMENT[1]

1. In another blatant abuse of the bankruptcy rules and system, HCRE (under the control of Mr. Dondero) filed a baseless proof of claim that it now abruptly seeks to withdraw ***after two years of litigation*** during which Highland expended substantial resources, completed all of ***its*** discovery obligations, and uncovered substantial damage caused by HCRE's actions. Just as Highland was compelling HCRE to complete ***HCRE's*** discovery obligations and preparing for summary judgment, HCRE realized the risk it faced and is now desperately trying to dodge Highland's day in court. Shamelessly, HCRE wants to slither away—without consequence and without offering any evidence—just days before it and its owners were to be deposed on matters certain to elicit testimony concerning HCRE's meritless claim, its contractual breaches, and its questionable tax structuring and filings.[2] Under these dubious circumstances, the Motion to Withdraw should be denied.

[1] Capitalized terms not defined in this Preliminary Statement shall have the meanings ascribed to them below.

[2] HCRE's tax filings on behalf of SE Multifamily were so questionable that BH Equities (the lone third-party member of SE Multifamily) disregarded the 2020 Form K-1 that HCRE caused to be prepared and voluntarily reported to the IRS an allocation of profits from SE Multifamily that BH Equities believed comported with the Amended LLC Agreement. *See Declaration of John A. Morris in Support of Highland Capital Management, L.P.'s Objection to Motion to Withdraw Proof of Claim* (being filed simultaneously with this Objection) ("Morris Dec."), Ex. 1 at 129:21-130:7; 144:8-145:12; 147:5-149:14.

2. Pursuant to Bankruptcy Rule 3006, motions to withdraw contested claims may only be granted after a hearing during which courts may consider various factors (the "*Manchester* Factors") intended to protect the integrity of the system. Application of those factors here establishes that the Motion to Withdraw is a strategic ploy intended to avoid depositions, harass Highland, and otherwise game the system:

- Diligence in bringing the motion: HCRE gives no indication when it concluded that SE Multifamily was being "operated without interference from the Debtor,"[3] but it filed its Motion to Withdraw after two years of heavily contested litigation during which it never expressed any concerns, made any demands, or sought judicial relief concerning Highland's alleged "interference."

- Undue vexatiousness: HCRE's conduct in abruptly moving to withdraw its Dondero-signed proof of claim after two years of litigation, and after taking Highland's deposition but days before its own Witnesses were to be deposed, is a textbook example of vexatiousness—and is just the latest instance of Mr. Dondero bringing motions, or asserting claims, or filing objections, only to withdraw them after forcing Highland to spend time, money, and effort addressing them.

- Progress of the case and the effort and expense of the non-moving party: With the exception of the depositions HCRE seeks to avoid, discovery is complete,[4] and Highland is prepared to move for summary judgment—after spending hundreds of thousands of dollars disqualifying its former counsel over HCRE's objection and engaging in exhaustive discovery, including taking the depositions of the Third-Party Witnesses during which HCRE declined to ask any questions.

- Duplication of re-litigation: Given that this case is trial-ready (but for the completion of the HCRE-related depositions), it would be a massive waste of resources to start this litigation anew (as HCRE implicitly threatens) and would be incredibly prejudicial to Highland because the discovery deadlines have passed and HCRE should be precluded from getting a "do-over."

- Adequacy of explanation: HCRE's explanation makes no sense given the timing: HCRE has not (and cannot) identify anything that occurred between August 10,

[3] Motion to Withdraw at 2.

[4] There is one additional exception that warrants mention because of its timing. In addition to the HCRE depositions, HCRE and Highland entered into a stipulation and proposed amended scheduling on August 5, 2022 (***just seven days before HCRE filed its Motion to Withdraw***) pursuant to which Highland agreed to extend the expert discovery deadline to allow HCRE to proffer an expert report while preserving its right to file a motion for summary judgment. Docket No. 3434. On August 9, 2022 (***just three days before HCRE filed its Motion to Withdraw***), the Court entered an Order approving the stipulation. Docket No. 3438.

2022 (when it took the deposition of Highland's corporate representative) and August 12, 2022 (when it filed the Motion to Withdraw) that caused it to conclude that SE Multifamily was being "operated without interference from the Debtor."

3. Based on the evidence that will be adduced,[5] the Court should deny the Motion to Withdraw, direct HCRE to tender the Witnesses for the depositions that HCRE unilaterally cancelled, and promptly proceed either with Highland's expected summary judgment motion or trial.

4. However, if the Court is inclined to grant the Motion to Withdraw, it should exercise its discretion under Bankruptcy Rule 3006 and set the following terms and conditions (collectively, the "Conditions") to mitigate the legal prejudice to Highland:

- HCRE should make its corporate representative, Mr. Dondero, and Mr. McGraner available for substantive depositions as previously agreed in order to level the playing field;
- HCRE should be barred from deposing BH Equities, Barker Viggato, and Mark Patrick because HCRE declined to question any of those witnesses during their respective depositions and the discovery deadline has passed;
- HCRE should be barred from taking any further discovery from Highland because Highland has completed its discovery obligations and the discovery deadline has passed;
- After the Witnesses' depositions are complete, this Court should order that the withdrawal of HCRE's POC be ***with*** prejudice or, alternatively, this Court should retain jurisdiction over all claims initially raised in HCRE's POC such that any re-filing of such claims must be in this Court; and
- HCRE should be ordered to pay all of Highland's legal fees and expenses related to HCRE's POC, including the motion to disqualify and all discovery.

[5] In addition to the application of the *Manchester* Factors, Highland will present evidence establishing that Mr. Dondero lacked a good faith basis to sign HCRE's POC and that it was fabricated. Specifically, the evidence will establish that the Allocation that HCRE contends was the product of a "mistake" was: (a) drafted by employees of entities owned and/or controlled by Mr. Dondero; (b) consistently set forth in four separate provisions of the Amended LLC Agreement; (c) one of the few provisions in the Amended LLC Agreement that was negotiated with BH Equities before BH Equities was admitted as a new member in SE Multifamily; and (d) according to BH Equities, consistent with the Parties' intent.

5. For the reasons set forth herein, the Motion to Withdraw should be denied; if not, it should be granted subject to all of the Conditions.

RELEVANT BACKGROUND

A. Highland, HCRE, and BH Equities Pursue "Project Unicorn" and Enter into the Amended LLC Agreement

6. In the summer of 2018, HCRE and Highland began moving forward with a plan to purchase 26 properties with an estimated value over $1.1 billion (referred to as "Project Unicorn").[6] Project Unicorn was a complex transaction with multiple, overlapping components. *See, e.g.*, **Morris Dec. Ex. 1** at 29:18-30:7.

7. The first step was to formalize the relationship between HCRE and Highland. At all relevant times until January 9, 2020, both entities were controlled by James Dondero ("Mr. Dondero"), but HCRE had no employees of its own and relied on Highland's employees (and employees of other entities controlled by Mr. Dondero) to conduct business on its behalf.

8. Highland and HCRE entered into that certain *Limited Liability Company Agreement* for SE Multifamily Holdings LLC ("SE Multifamily"), dated as of August 23, 2018 (the "Original LLC Agreement") pursuant to which SE Multifamily was created. **Morris Dec. Ex. 2**. SE Multifamily was created to, among other things, serve as the Project Unicorn vehicle to acquire and improve real property on behalf of its members, Highland and HCRE. ***Id.* ¶ 1.3**.

9. The Original LLC Agreement (a) allocated 51% of SE Multifamily's membership interests to HCRE and 49% of those interests to Highland and (b) was signed by Mr. Dondero on behalf of both Highland and HCRE. ***Id***. at 17 and Schedule A.

[6] *See, e.g., Brief in Opposition to Debtor's Motion to Disqualify Wick Phillips* [Docket No. 2279] ¶¶ 4-6.

10. In order to finance the acquisition of the real estate, Highland and HCRE, among other borrowers (the "Borrowers"), entered into that certain *Bridge Loan Agreement* (the "Loan Agreement") pursuant to which the Borrowers obtained a secured loan from Keybank, N.A. ("Keybank"), as of September 26, 2018. *See* **Morris Dec. Ex. 3** § 2.02(a) and (b) (providing that the purpose of the financing was "to finance the acquisition cost of the Mortgaged Properties" and "to finance a portion of the acquisition cost of the Portfolio Properties . . . .") The Loan Agreement financed about half of the purchase price of the real estate acquisition and was a necessary component to the closing of Project Unicorn. **Morris Dec. Ex. 1** at 32:21-33:8.

11. Pursuant to the Loan Agreement, Keybank provided up to $556,275,000 in secured loans to the Borrowers, including Highland and HCRE.[7] The Loan Agreement also provided, among other things, that (a) all of the Borrowers (including Highland) were jointly and severally liable for all amounts owed under the Loan Agreement, but (b) HCRE was designated as the "Lead Borrower" with the sole authority to request and obtain borrowings and to determine how loan proceeds would be distributed among the Borrowers. **Morris Dec. Ex. 3 ¶¶** 1.05(a), (b).

12. Highland was essential to Project Unicorn because, among other things, it enhanced the creditworthiness of the Borrowers and enabled the financing under the Loan Agreement to go forward. *See* **Morris Dec. Ex. 4** at 25:11-17 ("And KeyBank needed more credit from the borrower side since this was such a large transaction, and that's when Highland Capital was added as an additional borrower to the loan").

13. BH Equities, LLC ("BH Equities") worked with Highland on Project Unicorn in anticipation of becoming a member of SE Multifamily. Without any formal agreement,

[7] Notably, SE Multifamily (the entity created to hold the "unicorn") was not a "Borrower."

BH Equities contributed approximately $21 million in capital to fund Project Unicorn expenses. **Morris Dec. Ex. 1** at 33:9-16, 34:5-35:17.

14. BH Equities, HCRE, and Highland formalized their relationship on March 15, 2019, with BH Equities acquiring 6% of SE Multifamily's membership interests from Highland and HCRE in exchange for the $21 million previously contributed pursuant to that certain *Amended and Restated Limited Liability Company Agreement*, dated as of August 23, 2018 (the "Amended LLC Agreement"). Mr. Dondero signed the Amended LLC Agreement on behalf of HCRE and Highland. **Morris Dec. Ex. 5** at 18 and Schedule A.

15. Pursuant to the Amended LLC Agreement, SE Multifamily's membership interests were allocated 47.94% to HCRE, 46.06% to Highland; and 6% to BH Equities (the "Allocation"). ***Id***. at §§ 1.7, 6.1(a), 9.3 and Schedule A. [8]

16. HCRE has served as the manager of SE Multifamily since that entity was formed in August 2018. *See* ***Id***. § 1.6.

[8] Under the Amended LLC Agreement, while HCRE was allocated 47.94% of the ownership interests and entitled to 47.94% of the "Net Distributable Cash," Highland was allocated 94% of the book "Profits and Losses" from the enterprise. **Morris Dec. Ex. 5** § 6.4(a). According to BH Equities, this "wasn't exactly normal" because "[n]ormally the allocation of profit and losses would also follow an allocation—the waterfall allocation or those things more closely." **Morris Dec. Ex. 1** at 62:15-63:21. Notwithstanding this provision, Highland never received any cash distributions, but was allocated in excess of $30 million of net rental real estate income in 2018 and 2019, which it recognized for purposes of preparing Highland's tax returns. By contrast, HCRE allocated itself zero profits for the years 2018 and 2019, while receiving actual distributions in excess of its "contributed capital." Further, by allocating the loan proceeds entirely to itself, notwithstanding that Highland was jointly and severally liable under the Loan Agreement, HCRE took all of the deductible interest for itself thereby reducing its own tax burden. In other words, taxable gains were washed through Highland, while deductions were used by HCRE. Compounding the potential impropriety of these tax allocation gymnastics, all of the "Distributable Cash" that was actually distributed to Highland-related parties (millions of dollars) was sent to HCRE and Liberty while Highland received nothing. Although similar in style, the scale is not near the more than [$350] million of ordinary, capital gain, and other income attributed to "Hunter Mountain Investment Trust" in 2016 after virtually all of the Highland economic interests were transferred to that entity at the end of 2015. Highland is continuing to investigate that transaction. As a minority member of SE Multifamily (controlled and managed by Mr. Dondero), Highland has a reasonable expectation that similar shenanigans will continue or even exacerbate in the future if this matter is not now resolved with finality.

B. HCRE Files a Proof of Claim, the Debtor Objects, and a Contested Matter Is Initiated

17. On October 16, 2019, Mr. Dondero caused Highland to file 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). Docket No. 3 at 4.

18. On April 8, 2020, Mr. Dondero caused HCRE to file a proof of claim that was denoted by the Debtor's claims agent as proof of claim number 146 ("HCRE's POC"). HCRE's POC asserted, among other things, that:

> [HCRE] may be entitled to distributions out of SE Multifamily, but such distributions have not been made because of the actions of inactions of the Debtor. Additionally, [HCRE] contends that all or a portion of Debtor's equity, ownership, economic rights, equitable or beneficial interests in SE Multifamily does [not] belong to the Debtor or may be property of [HCRE]. Accordingly, [HCRE] may have a claim against the Debtor.

Morris Dec. Ex. 6 at 5.[9]

19. On July 30, 2020, the Debtor objected to HCRE's POC contending that it had no liability under HCRE's POC. Docket No. 906 (the "Debtor's Initial Objection").

20. On October 16, 2020, HCRE responded to the Debtor's Initial Objection ("HCRE's Initial Response") asserting, among other things:

> After reviewing what documentation is available to HCREP with the Debtor, HCREP believes the organizational documents relating to SE Multifamily Holdings, LLC (the "SE Multifamily Agreement") improperly allocates the ownership percentages of the members thereto due to mutual mistake, lack of consideration, and/or failure of consideration. As such, HCREP has a claim to reform, rescind and/or modify the agreement.

Morris Dec. Ex. 7 ¶ 5.

[9] Mr. Dondero signed HCRE's POC under penalty of perjury with a notice next to his signature reminding him of the criminal penalties that could be imposed for filing a fraudulent proof of claim.

21. HCRE's Initial Response was filed by the law firm of Wick Phillips Gould & Martin, LLP ("Wick Phillips"). *See* ***id***.

C. The Parties Litigate for Nearly Two Years

22. With the Parties' positions established, they proceeded to litigate the merits of HCRE's POC and Highland's objections thereto.

1. Initial Discovery

23. On December 10, 2020, the Parties entered into a proposed scheduling order that was subsequently approved by the Court. Docket Nos. 1536 and 1568 (the "Initial Scheduling Order"). Pursuant to the Initial Scheduling Order, the Parties were to complete discovery by March 8, 2021. Docket No. 1536 ¶ 1.

24. Consistent with the Initial Scheduling Order, the Debtor (a) timely served deposition notices and subpoenas, as amended, on HCRE and others, (b) engaged in written discovery, and (c) searched for and produced voluminous documents, including e-mail communications, requested by HCRE.[10]

25. While reviewing documents in preparation for depositions, the Debtor discovered that Wick Phillips had jointly represented HCRE and Highland in connection with at least some of the underlying transactions concerning Project Unicorn. Highland immediately brought the issue to HCRE's attention, but HCRE refused to acknowledge that any conflict existed, and Wick Phillips refused to step aside.

2. The Wick Phillips Disqualification Motion

26. With no choice other than litigating against its prior counsel, the Debtor moved to disqualify Wick Phillips on April 14, 2021. Docket Nos. 2196, 2197, and 2198 (the

[10] *See, e.g.*, Docket Nos. 1898, 1918, 1964, 1965, 1995, 1996, 2118, 2119, 2134, 2135, 2136, and 2137.

"Disqualification Motion"). In the Disqualification Motion, the Debtor contended, among other things, that Wick Phillips should be disqualified from representing HCRE because that firm previously represented the Parties jointly such that pursuing claims against the Debtor would violate Wick Phillips' duties to Highland.[11]

27. On May 6, 2021, HCRE filed its opposition to the Disqualification Motion [Docket Nos. 2278 and 2279], and on May 12, 2021, the Debtor filed its preliminary reply. Docket No. 2294.

28. On May 24, 2021, the Court entered a scheduling order with respect to the Disqualification Motion. Docket No. 2361 (the "Initial DQ Scheduling Order"). The Initial DQ Scheduling Order was amended on August 23, 2021. *See* Docket No. 2757.

29. The Disqualification Motion was heavily contested. The Parties engaged in written discovery, took fact depositions, and retained experts and engaged in expert discovery.[12]

30. On October 1, 2021, following the completion of fact and expert discovery, the Debtor supplemented its Disqualification Motion. Docket Nos. 2893, 2894 and 2895 (the "Supplement").

[11] The move to disqualify Wick Phillips was not an academic exercise. Wick Phillips was an integral part of constructing "Project Unicorn" (as the SE Multifamily transaction was known) for the Highland entities and was working with Mr. Dondero to divest Highland of its ownership stake. This was not the first questionable Highland real estate transaction with which these parties were involved. In 2018, in a transaction referred to as "HE 232," Wick Phillips (through D.C. Sauter, then outside counsel) took direction from Scott Ellington to transfer approximately $3 million that rightfully belonged to Highland to a Cayman Islands entity indirectly owned and controlled by Mr. Dondero and Mr. Ellington as part of the secret "**SAS Structure**." Highland continues to investigate these and related Cayman Island transactions.

[12] *See, e.g.*, Docket No. 3054, Ex. 11 (deposition transcript of Robert Wills, HCRE's Rule 30(b)(6) witness for the Disqualification Motion); Docket No. 3054, Ex. 12 (deposition transcript of Robert Kehr, the Debtor's expert on issues of professional responsibilities and attorney ethics); and Docket No. 3060, Ex. 12 (deposition transcript of Ben Selman, HCRE's expert on issues of professional responsibilities and attorney ethics).

31. On October 15, 2021, HCRE filed its response to Highland's Supplement, [Docket Nos. 2927 and 2928], and on October 22, 2021, Highland filed its reply. Docket No. 2952.

32. In advance of the contested hearing on the Disqualification Motion, the Parties filed their respective witness and exhibit lists, as amended. *See* Docket Nos. 3051, 3052, 3054, and 3060.

33. On November 30, 2021, the Court held a lengthy hearing on the Disqualification Motion. *See* Docket Nos. 3062, 3071.

34. On December 10, 2021, the Court entered an order resolving the Disqualification Motion by, among other things, disqualifying Wick Phillips from representing HCRE in the contested matter concerning HCRE's POC. Docket No. 3106.

3. After the Parties Nearly Complete Discovery, Highland Informs HCRE that It Will Move for Summary Judgment

35. On January 14, 2022, Hoge & Gameros, LLP ("Hoge & Gameros") filed a notice of appearance on behalf of HCRE. Docket No. 3181 (the "Notice of Appearance").

36. On June 9, 2022, the Parties filed a proposed amended scheduling order that the Court subsequently approved. Docket Nos. 3356 and 3368 (the "Amended Scheduling Order").[13]

[13] Despite filing the Notice of Appearance, Hoge & Gameros made no effort to contact Highland' counsel to prosecute HCRE's POC for more than two months. Consequently, on March 31, 2022, Highland's counsel took the initiative to try to bring this matter to a conclusion, but it took several more weeks and follow-up communications before HCRE's counsel drafted an amended scheduling order. **Morris Dec. Ex. 8**

37. Pursuant to the Amended Scheduling Order, the Parties exchanged a second round of written discovery and document production and served various deposition notices and subpoenas, as amended.[14]

38. On July 7, 2022, Highland filed notices of subpoena (the "Subpoenas") for Mr. Dondero and Mr. McGraner and a Rule 30(b)(6) notice for HCRE (the "HCRE Notice" and together with the Subpoenas, the "Notices").[15] Docket Nos. 3392, 3393, and 3394. Hoge & Gameros accepted service of the Subpoenas, and the Notices were amended to accommodate the schedules of HCRE's Witnesses and their counsel.[16] **Morris Dec. Ex. 9**.

39. Highland also served a subpoena on Mark Patrick ("Mr. Patrick").[17] Mr. Patrick has worked at Mr. Dondero's direction for many years (first at Highland and then at Skyview) and was one of the architects of the tax structure embedded in the Amended LLC Agreement. Mr. Patrick was represented by separate counsel, and Highland completed his deposition on August 2, 2022, during which HCRE asked no questions.

40. Highland also served a subpoena on BH Equities that required both the production of documents and an appearance at a deposition.[18] BH Equities was represented by independent counsel, and Highland completed its deposition on August 4, 2022, during which HCRE asked no questions.

41. Highland also served a subpoena on Barker Viggato, LLP ("Barker Viggato" and together with BH Equities, the "Third-Party Witnesses") that required both the

[14] *See, e.g.*, Docket Nos. 3385, 3386, 3418, 3363, 3383, 3392, 3393, 3394, 3412, 3415, 3416, 3417, 3451, and 3452.

[15] The witnesses subject to the Notices (*i.e.*, Mr. Dondero, Mr. McGraner, and HCRE's corporate representative) are collectively referred to as "HCRE's Witnesses".

[16] Docket Nos. 3385, 3415, 3416, and 3418.

[17] Docket Nos. 3394 and 3412.

[18] Docket Nos. 3350 and 3363.

production of documents and the appearance at a deposition.[19] Barker Viggato is the accounting firm that prepared the tax returns and the members' Forms K-1s for SE Multifamily based on information provided by HCRE. Barker Viggato was represented by independent counsel, and Highland completed its deposition on August 5, 2022, during which HCRE asked no questions.

42. HCRE served a Rule 30(b)(6) notice on Highland, and James P. Seery, Jr. was deposed as Highland's corporate representative on August 10, 2022.

43. Pursuant to the final versions of the Notices, and as agreed to by the Parties' counsel, Mr. Dondero was scheduled to be deposed on August 16, and Mr. McGraner was scheduled to be deposed on August 17 in both his individual capacity and in his capacity as HCRE's Rule 30(b)(6) witness (the "Consensual Depositions"). **Morris Dec. Ex. 10**.

44. On August 12, 2022, two days after taking Highland's deposition, HCRE filed the Motion to Withdraw. On August 15, 2022, HCRE's counsel informed Highland's counsel that HCRE was unilaterally cancelling the Consensual Depositions scheduled to take place over the next 48 hours.

D. Mr. Dondero Lacked a Good-Faith Basis to Cause HCRE's POC to Be Filed

45. Substantial evidence exists that establishes that HCRE lacked a good-faith basis to assert that the Allocation set forth in the Amended LLC Agreement was the result of a "mistake" or "lack of consideration."

1. Employees Working at Mr. Dondero's Direction Drafted the Amended LLC Agreement

46. The evidence will show that Mr. Dondero controlled HCRE and Highland at the times the Original LLC Agreement and the Amended LLC Agreement were executed, and

[19] Docket Nos. 3383 and 3417.

because HCRE had no employees of its own, it relied on Highland's employees to execute Project Unicorn. The blurred lines between HCRE and Highland were clear to BH Equities.

47. BH Equities could not distinguish HCRE from Highland and observed that it viewed the negotiation of the Amended LLC Agreement as a bi-lateral negotiation, with BH Equities on one side, and Highland, HCRE, and Liberty CLO Holdco, Ltd. (a subsidiary of the DAF) ("Liberty") acting as a unitary actor on the other side. **Morris Dec. Ex. 1** at 26:6-22; 28:10-29:17; 69:10-70:5.[20]

48. "Highland" (the unitary actor from BH Equities' perspective) drafted the Amended LLC Agreement, and BH Equities provided comments. ***Id***. at 43:9-44:3.

49. In short, the evidence will show that the Original LLC Agreement and the Amended LLC Agreement were drafted by individuals working at Mr. Dondero's direction.

2. The Allocation Is Set Forth in Four Different Places in the Amended LLC Agreement

50. The Allocation was reflected in four separate provisions of the Amended LLC Agreement, making the concept of "mistake" or "lack of consideration" far-fetched, at best.

51. Most prominently, Schedule A to the Amended LLC Agreement identified the "Capital Contributions and Percentage Interests" of the members:

Member Name	Capital Contribution	Percentage Interest
HCRE	$291,146,036	47.94%
Highland	$49,000	46.06%
BH Equities	$21,213,721	6.00%

[20] Grant Scott, Mr. Dondero's childhood friend and college roommate, served as Liberty's Director. *See* **Morris Dec. Ex. 5** at 18 (Liberty's signature block). While Liberty apparently acquired certain preferred interests in SE Multifamily, BH Equities did not know who Mr. Scott was, never communicated with him, and never saw any comments to the Amended LLC Agreement tendered on behalf of Liberty. **Morris Dec. Ex. 1** at 42:4-19.

Morris Dec. Ex. 1 at Schedule A.[21]

52. As if Schedule A were not enough, the Allocation was set forth in three other provisions in the Amended LLC Agreement: Section 1.7 (Company Ownership),[22] Section 6.1(a) (Distributable Cash),[23] and Section 9.3(e) (Liquidation).[24]

53. At the time the Amended LLC Agreement was executed, BH Equities believed that the Allocation set forth in Schedule A and in sections 1.7, 6.1(a), and 9.3 reflected the Parties' intent; none of the members identified and errors or suggested otherwise. **Morris Dec. Ex. 1** at 49:5-15; 50:6-11; 50:16-51:7; 54:4-19; 55:12-19; 56:5-57:19; 58:9-59:23; 62:10-14. In fact, BH Equities agreed that Highland would receive 46.06% of the membership interests in SE Multifamily even though it only contributed $49,000 in capital because it understood that was part of the deal. ***Id***. at 52:4-20; 60:16-61:21.

54. In sum, the evidence will show that (a) the Allocation was consistently and unambiguously set forth in four (4) separate provisions of the Amended LLC Agreement; (b) to

[21] The evidence will show that HCRE did not actually contribute ***any*** of its own capital to SE Multifamily—and took no financial risk in connection with Project Unicorn—notwithstanding the "capital contribution" set forth in Schedule A. Instead, HCRE took the corporate opportunity from Highland by misusing its authority under section 1.05(b) of the Loan Agreement to allocate for itself approximately $250 million of the KeyBank loan proceeds and claiming "credit" for the capital even though Highland remained jointly and severally liable for the obligations and provided all of the resources to consummate and execute Project Unicorn. Separately, HCRE borrowed the balance of its "capital contribution" from another affiliate of Mr. Dondero's. Because all of HCRE's "capital contribution" was derived from the proceeds of loans, distributions from SE Multifamily were initially used to pay down those loans in accordance with the "waterfall" set forth in the Amended LLC Agreement. **Morris Dec. Ex. 1** at 123:23-125:7; 126:9-127:21. Thus, by the end of 2020, HCRE held a debt-free 47.94% interest in SE Multifamily without ever having taken any risk and by exploiting Highland's platform, apparent creditworthiness, advantageous tax structure, and human resources. Project Unicorn, indeed.

[22] Section 1.7 of the Amended LLC Agreement provides, among other things, that "except with respect to particular items specified in this Agreement, HCRE shall have 47.94% ownership interest, HCMLP shall have a 46.06% ownership interest, and BH shall have a 6% ownership interest." **Morris Dec. Ex. 5** at 3.

[23] Section 6.1(a) of the Amended LLC Agreement provides, among other things, that "[e]xcept as otherwise specifically provided in this Article 6 and Article 9, all Distributable Cash shall be distributed (i) 47.94% to HCRE, (ii) 46.06% to HCMLP, and (iii) 6% to BH." **Morris Dec. Ex. 5** at 10.

[24] Section 9.3 of the Amended LLC Agreement provides, among other things, that any residual value in a liquidation be distributed "(i) 47.94% to HCRE, (ii) 46.06% to HCMLP, and (iii) 6% to BH." **Morris Dec. Ex. 5** at 14-15.

eliminate any doubt, Schedule A set forth the Parties' respective capital contributions side-by-side with the Allocations; and (c) BH Equities has testified that the Allocation was consistent with the Parties' intent at the time the Amended LLC Agreement was entered into.

3. The Allocation Was Among the Only Provisions in the Amended LLC Agreement that Was Negotiated

55. Ironically, the Allocation was among the only provisions of the Amended LLC Agreement that BH Equities and "Highland" actually discussed.

56. On March 15, 2019 (the day the Amended LLC Agreement was executed), Paul Broaddus, a Highland employee working at Mr. Dondero's direction, sent an e-mail to BH Equities (with a copy to Matt McGraner) attaching a copy of Schedule A that set forth the Allocation as a stand-alone document. **Morris Dec. Ex. 11**. According to BH Equities, ***Schedule A, including the members' actual contribution numbers, was drafted by "Highland"*** and was the subject of discussions before the Amended LLC Agreement was executed – and HCRE has never asked BH Equities to amend Schedule A. **Morris Dec. Ex. 1** at 75:23-78:20; 103:3-7.

57. The Allocation was also raised in the context of Section 6.1, referred as the "waterfall," because that provision fixed the priority of cash distributions from SE Multifamily and BH Equities wanted assurances that all capital contributions would be returned before other distributions were made. Thus, later the same day, BH Equities resurrected an earlier proposal to address the issue, but HCRE rejected it. **Morris Dec. Ex. 1** at 80:23-83:14; **Ex. 12**.

58. Later, Mr. Broaddus sent a counterproposal to BH Equities that was drafted by Freddy Chang (another individual employed in the Highland complex) that (a) addressed BH Equities' concerns, (b) was adopted in full as section 6.1 of the Amended LLC Agreement, and (c) specifically set forth the Allocation. **Morris Dec. Ex. 1** at 88:21-89:25; 91:3-94:16; **Ex. 13**.

59. In sum, Schedule A and Section 6.1 (a) were drafted by employees working within the "Highland" complex; (b) expressly and unambiguously set forth the Allocation; and (c) were among the only provisions in the Amended LLC Agreement that were the subject of negotiations between "Highland" and BH Equities.

4. Highland Intended to Move for Summary Judgment

60. The foregoing facts prove that Mr. Dondero lacked a good-faith basis to file HCRE's POC and would be among the facts Highland would rely upon in support of its anticipated motion for summary judgment.[25]

61. It is absurd to suggest that supposedly sophisticated people like Messrs. Dondero, McGraner, Broaddus, Patrick, and Chang could draft and/or execute the applicable agreements and negotiate BH Equities without ever realizing what the Allocation—again, set out in four different provisions—clearly stated.

62. HCRE's POC was not filed in good faith, and after two years of contested litigation and after receiving notice of Highland's intent to move for summary judgment, HCRE should not be permitted to say "never mind" while reserving the (alleged) right to simply pick up litigation elsewhere at a time and place of its choosing.

E. The Motion to Withdraw Was Not Filed in Good Faith

63. The timing and purported reason for the Motion to Withdraw demonstrate that it was not filed in good faith. HCRE clearly has undisclosed motives and seeks an unfair, strategic advantage.

[25] This list of facts is not intended to be exhaustive. Other evidence—including, but not limited to, tax returns and Forms K-1 that HCRE caused SE Multifamily to prepare—will further establish that HCRE, its principals, and those working on its behalf always knew and intended that Highland had a 46.06% interest in SE Multifamily.

64. ***First***, HCRE claims that it filed the Motion to Withdraw because SE Multifamily has "operated without anticipated interference from the Debtor" and HCRE wants to avoid the cost and uncertainty of litigation. Motion to Withdraw at 2. But HCRE will never be able to offer any evidence to support its suggestion that Highland has interfered or threatened to interfere with SE Multifamily, or that HCRE ever did anything to address its alleged concerns.

65. Moreover, raising concerns about costs (a peculiar proposition given Mr. Dondero's conduct throughout this case) after two years of hard-fought litigation where all that remains is a few depositions and a short trial is simply not credible. It makes no economic sense to shut down the litigation at this stage with so much supposedly at stake.[26]

66. ***Second***, the timing of the Motion to Withdraw is highly suspicious because ***in the seven-day period before the Motion was filed***: (a) the Parties negotiated, and the Court approved, an amendment to the Scheduling Order to enable HCRE to proffer expert opinions [Docket Nos. 3434 and 3438]; (b) HCRE made a supplemental production of over 4,000 documents, and counsel for the Parties spent time dealing with the ramifications of HCRE's untimely and substantial production [**Morris Dec. Ex. 14**]; (c) HCRE took the deposition of Mr. Seery as Highland's corporate representative two calendar days before filing the Motion to Withdraw; and (d) HCRE filed the Motion to Withdraw just days before its Witnesses were expected to testify per agreement [**Morris Dec. Ex. 15**].

67. ***Third,*** based on the foregoing, HCRE's true intent is transparent: it seeks an improper and unfair strategic advantage by avoiding depositions now, leaving the specter of future litigation hanging over Highland's head, and preserving the ability to re-file its claim later

[26] According to Mr. Dondero's "family trust," Highland's interest in SE Multifamily is worth $20 million. *See Motion for Determination of the Value of the Estate and Assets Held by the Claimant Trust* [Docket No. 3382]. Dugaboy's valuation is notable because it shows that HCRE's last-second concern about costs lacks credibility: after two years of litigation, a rational actor would absorb the cost of a few depositions and a short trial to capture a $20 million asset.

(and presumably elsewhere) – in which it could take discovery of Highland and the Third-Party Witnesses, all of which is now foreclosed under the current Scheduling Order.

F. HCRE Materially Breached the Amended LLC Agreement

68. HCRE has breached its obligations to Highland in material ways.

69. ***First***, the evidence will show that HCRE breached its duty of good faith and fair dealing by eliminating the "tax distribution" provision from the Original LLC Agreement while saddling Highland with 94% of SE Multifamily's profits and losses. *See* **Morris Dec. Ex. 2** § 6.1(f) (tax distribution provision in the Original LLC Agreement that was deleted from the Amended LLC Agreement).

70. ***Second***, the evidence will show that, at Mr. McGraner's direction, HCRE breached the Amended LLC Agreement by causing SE Multifamily to return all "capital contributions" to itself and BH Equities while failing to return Highland's capital at the same time.

71. ***Third***, the evidence will show that HCRE breached section 8.3 of the Amended LLC Agreement by failing to allow Highland to inspect and copy SE Multifamily's books and records. **Morris Dec. Ex. 15** (Highland's June 28, 2022 demand for access to SE Multifamily's books and records); **Morris Dec. Ex. 16** (e-mail chain showing that all of the lawyers representing HCRE and Mr. Dondero failed to provide any substantive response to Highland's demand).

ARGUMENT

A. Applying the *Manchester* Factors Mandates Denying the Motion

72. Highland agrees that the applicable standard for this Court's consideration of the Motion is set forth in *Manchester, Inc. v. Lyle (In re Manchester, Inc.)*, 2008 Bankr. LEXIS 3312 (Bankr. N.D. Tex. December 19, 2008). Application of those factors here should compel this Court to deny the Motion.

73. The factors outlined in *Manchester* are:

> (1) the movant's diligence in bringing the motion, (2) any "undue vexatiousness" on the part of the movant, (3) the extent to which the suit has progressed, including the effort and expense undertaken by the non-moving party to prepare for trial, (4) the duplicative expense of re-litigation, and (5) the adequacy of the movant's explanation for the need to withdraw the claim.[27]

74. HCRE applies these factors in a conclusory, selective, and evasive manner.

Instead, based on the facts set forth above, the legal prejudice is clear:

- HCRE failed to diligently bring the Motion to Withdraw—and fails to identify what has occurred after two years of litigation to cause it to file the motion at this time.
- "Undue vexatiousness" is easily established: HCRE forced Highland to spend two years litigating and providing complete discovery while now attempting to shut this down before its Witnesses can be deposed and after being informed that Highland intends to move for summary judgment—all while trying to preserve the ability to resurrect the litigation without the restrictions of this Court's scheduling orders.
- Highland has spent considerable time, money, and effort on this matter, including retaining an expert, searching for and producing thousands of pages of documents, taking third-party discovery, and marshalling evidence to present for summary judgment.
- Re-litigating the claims asserted in HCRE's POC would be needlessly expensive and duplicative and (if HCRE has its way) would result in more discovery that is otherwise now foreclosed to it.
- HCRE's explanation for why it suddenly wishes to withdraw its proof of claim has no basis in fact.

75. The *Manchester* Factors are obviously intended to protect the integrity of the bankruptcy process. When the actual facts and procedural posture of this contested matter are applied, it is clear the Motion to Withdraw should be denied.

76. The cases HCRE cites do not command a different result. HCRE relies on *Le Compte v. Mr. Chip, Inc.*, 528 F.2d 601 (5th Cir. 1976), for the proposition that merely gaining

[27] 2008 Bankr. LEXIS 3312, at *11–12.

a "tactical advantage" is "no bar to dismissal" under Rule 41(a) of the Federal Rules of Civil Procedure. But *Le Compte* is factually distinguishable. There, the defendants opposing the dismissal failed to "indicate how defendants would be prejudiced by an unconditional dismissal …. [T]here is nothing … in the record from which we can ascertain whether the court properly exercised its discretion in imposing conditions on the dismissal." *Id.* at 605. Unlike the defendants in *Le Compte*, Highland has demonstrated the significant prejudice an unconditional dismissal would inflict on Highland and the Claimant Trust beneficiaries.[28]

77. The Fifth Circuit refused to broadly apply *Le Compte* in later cases, calling the district court's conditions in that case "unusual" and noting that "the conditions seemed designed to disadvantage the plaintiff, rather than protect the defendant." *Robles v. Atl. Sounding Co.*, 77 Fed. Appx. 274, 276 (5th Cir. 2003). In *Robles*, the Fifth Circuit affirmed the district court's imposition of two conditions on the dismissal "designed to cure any potential prejudice." *Id.* In affirming the district court's dismissal order, the *Robles* court also noted that "[p]lain legal prejudice can also exist regarding the timing of a motion for voluntary dismissal…. [F]iling a motion for voluntary dismissal at a late stage in the litigation can be grounds for denying the motion." *Id*. at 275 (citing *Davis v. Huskipower Outdoor Equip. Corp.*, 936 F.2d 193, 199 (5th Cir. 1991) ("When a plaintiff fails to seek dismissal until a late stage of trial, *after the defendant has*

[28] HCRE also relies on *Kumar v. St. Paul Surplus Lines Ins. Co.*, 2010 WL 1946341 (N.D. Tex. May 12, 2010), for the unremarkable proposition that a plaintiff should ordinarily be permitted to dismiss a lawsuit it no longer wishes to pursue. In that case, the plaintiff had brought a third-party action against its insurer but then sought to dismiss the case before anything of significance had happened in the litigation. The *Kumar* court did note, however, that "a defendant's loss of significant time, effort, or expense in preparing for trial can also constitute legal prejudice" sufficient to deny a motion to dismiss. 2010 WL 1946341, at *4 (citing *U.S. ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 330 (5th Cir. 2003), and *Oxford v. Williams Cos., Inc.*, 154 F. Supp. 2d 942, 952–53 (E.D. Tex. 2001) (denying dismissal when the plaintiff filed for dismissal after 21 months of significant trial preparation)). Again, Highland will suffer precisely this type of harm, among other things, if HCRE is permitted to withdraw its proof of claim without prejudice and without conditions.

exerted significant time and effort, then a court may, in its discretion, refuse to grant a voluntary dismissal") (emphasis added).[29]

78. A case HCRE cites that *does* resemble this case—to the extent Federal Rule of Civil Procedure 41(a)(2) guides a bankruptcy court's consideration of a motion under Bankruptcy Rule 3006—is *Forbes v. CitiMortgage, Inc.*, 998 F. Supp. 2d 541 (S.D. Tex. 2014). There, the district court denied the plaintiff's motion to dismiss, describing a procedural history that should strike this Court as familiar. The plaintiff commenced a suit and then engaged in "a lengthy discovery dispute" for nearly two years, requiring the defendant to file a motion to compel plaintiff's response to several discovery requests she had ignored. A week after the defendant filed its sanctions motion, but before the court could rule on that motion, the defendant filed a motion for summary judgment and "[w]ithin minutes, [plaintiff] filed her motion to dismiss the entire action without prejudice …." 998 F. Supp. 2d at 546–47. Just like HCRE here,

> Forbes filed her motion to dismiss this action without prejudice nearly **two years** after the action was removed to federal court … The **timing** of Forbes's motion, however—after CitiMortgage filed its motions for discovery sanctions and for summary judgment—provides insight into her reasons. The circumstances indicate that Forbes's motion is a **plain attempt to avoid the consequences of her failure to participate in discovery** and to avoid an adverse ruling in her case. CitiMortgage contends that it will be prejudiced if Forbes's motion is granted and opposes dismissal. At the present stage of the litigation, CitiMortgage has

[29] HCRE ignores *Davis* and other cases that uphold a denial of a dismissal motion but *does* cite *Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314 (5th Cir. 2002), and *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990). Neither case resembles the situation currently before this Court, and neither case supports HCRE's position here. The *Elbaor* court affirmed the district court's placing of conditions on the dismissal because the defendant "argued below in its opposition … that it would be prejudiced by an unconditional dismissal because such a dismissal would potentially strip it of a viable statute of limitations defense." 279 F.3d at 318. The court continued, "because dismissal without prejudice would have caused [defendant] plain legal prejudice, the district court had only two options: it could deny the motion or it could craft reasonable conditions that would eliminate the prejudice." *Id.* at 319. "If the district court chooses the latter path, we note that our case law requires that the district court allow the [plaintiffs] the opportunity to withdraw their motion to dismiss rather than accept the conditions." *Id* at 320. *Ikospentakis* is a maritime case in which the Fifth Circuit **vacated** the district court's dismissal order because the defendants would suffer the clear legal prejudice of losing the ability to assert a substantive venue defense in any subsequent lawsuit. 915 F.2d at 178. That court reached the opposite conclusion HCRE desires here, citing one of the reasons Highland opposes an unconditional dismissal without prejudice.

> answered the complaint, the parties have participated in scheduling conferences, the parties engaged in mediation, discovery is now complete, and Defendant has briefed and filed a motion for summary judgment. **Based on the factual and procedural history of this case, the Court finds that Defendant will suffer plain legal prejudice if Plaintiff's case is dismissed at this late stage** and Plaintiff is given another opportunity to bring her claims without facing the consequences of her actions in this case. Therefore, Plaintiff's motion to dismiss is denied.

Id. at 547 (emphases added).

79. *Forbes* is squarely on point. Just as in *Forbes*, HCRE filed its Motion to Withdraw after two years of litigation during which Highland (a) waged a lengthy battle to disqualify its former counsel; (b) produced thousands of documents and otherwise satisfied ***all*** of its discovery obligations; (c) took third-party discovery; and (d) notified HCRE that it intends to move for summary judgment. Just as in *Forbes*, HCRE's true motive in seeking to withdraw its Proof of Claim can be gleaned from the timing of its motion—HCRE wants to avoid having its witnesses deposed and facing Highland's imminent summary judgment motion. And just as in *Forbes*, Highland "will suffer plain legal prejudice" if HCRE is permitted to withdraw HCRE's POC "at this late stage and … is given another opportunity to bring [its] claims without facing the consequences of [its] actions in this case."[30]

B. Alternatively, the Court Should Impose the Conditions to Mitigate the Prejudice to Highland

80. HCRE fails to cite any decision granting a motion to withdraw a proof of claim under Bankruptcy Rule 3006 without "terms and conditions" in circumstances remotely similar to those present here. The cases HCRE relies on *all* state that the bankruptcy court can and should impose adequate conditions on any order permitting the withdrawal of a contested proof of

[30] The court in *Davis* reached a similar result for similar reasons: "The Davises moved to dismiss this case without prejudice more than a year after the case was removed to federal court. They filed their motion after months of filing pleadings, attending conferences, and submitting memoranda … we do not believe that the district judge abused his discretion in denying the motion for voluntary dismissal without prejudice." 936 F.2d at 199.

claim to redress the "plain legal prejudice" faced by the non-moving party. Conditioning the withdrawal is the only way to remedy Highland's plain legal prejudice and avoid allowing HCRE to benefit from the cynical games HCRE has shamelessly played here.

81. If this Court is inclined to grant the Motion to Withdraw, this Court should exercise its discretion under Bankruptcy Rule 3006 and impose all of the Conditions.

CONCLUSION

82. For the foregoing reasons, Highland respectfully requests that this Court deny the Motion to Withdraw or, alternatively, grant the Motion to Withdraw subject to the Conditions, and grant such other relief the Court deems just and proper.

[Remainder of Page Intentionally Blank]

Dated: September 2, 2022.

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Appendix Exhibit 124

No. 21-10449
IN THE
United States Court of Appeals for the Fifth Circuit

In the Matter of: Highland Capital Management, L.P. Debtor

NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P.; Highland Income Fund; NexPoint Strategic Opportunities Fund; Highland Global Allocation Fund; NexPoint Capital, Incorporated; James Dondero; The Dugaboy Investment Trust; Get Good Trust,

Appellants,

vs.

Highland Capital Management, L.P.,

Appellee.

On appeal from the United States Bankruptcy Court for the Northern District of Texas at No. 19-34054-sgj11

PETITION OF APPELLANTS HIGHLAND INCOME FUND; NEXPOINT STRATEGIC OPPORTUNITIES FUND; HIGHLAND GLOBAL ALLOCATION FUND; AND NEXPOINT CAPITAL, INC. FOR LIMITED PANEL REHEARING

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Appellants Highland Income Fund; NexPoint Strategic Opportunities Fund; Highland Global Allocation Fund; and NexPoint Capital, Inc. (collectively, the "Funds"), petition the Court to grant panel rehearing for the limited purpose of clarifying and confirming one part of its August 19, 2022, opinion. *See* Fed. R. App. P. 35, 40; 5th Cir. R. 40.[1] Specifically, the Funds request that the Court confirm that the scope of the injunction and gatekeeper provisions in the Plan are limited in accordance with the Court's holding on the exculpation provision.[2]

Background

1. In its August 19, 2022, opinion (the "Opinion"), a copy of which is attached at Tab "A," the Court reversed and vacated the provisions of the Plan that exculpated certain non-debtor parties. Relying on *Pacific Lumber*, the Court determined that the exculpation provision ran afoul of 11 U.S.C. § 524(e) by reaching beyond Highland Capital, the Committee and its members, and the Independent Directors. Opinion at 22 (citing *Bank of N.Y. Tr. Co., N.A. v. Official Unsecured Creditors' Comm. (In re Pac. Lumber Co.)*, 584 F.3d 229, 251-53 (5th Cir. 2009). Thus, the Court struck the Plan's exculpation provision to the extent it protected other parties, such as Highland Capital's employees, Strand, the Reorganized Debtor, HCMLP GP, the Claimant Trust along with its trustee and the members of its Oversight Board, the Litigation Sub-Trust and its trustee,

[1] Appellant NexPoint Strategic Opportunities Fund is now known as "NexPoint Diversified Real Estate Trust." To avoid confusion, in this petition, the Funds will refer to that appellant by its former name.

[2] The Funds will use the same defined terms the Court used in its opinion.

professionals retained by Highland Capital and the Committee, and the Related Persons of the foregoing.

2. The Court held that the injunction and gatekeeper provisions in the Plan were generally acceptable, but it noted that the Funds' and the other Appellants' objections to such provisions were resolved by the Court's striking of the impermissibly exculpated parties. Opinion at 27 ("First, Appellants' primary contention—that the Plan's injunction 'is broad' by releasing non-debtors in violation of § 524(e)—is resolved by our striking the impermissibly exculpated parties."); Opinion at 29 ("In sum, the Plan violates § 524(e) but only insofar as it exculpates *and enjoins certain non-debtors.*")(emphasis added); Opinion at 30 n.19 ("But non-debtor exculpation within a reorganization plan is not a lawful means to impose vexatious litigant injunctions and sanctions.").

3. As the Court is aware, together, the Plan injunction and gatekeeper provisions enjoin parties from pursuing a claim or cause of action against any "Protected Party" without the bankruptcy court's blessing. The Plan's definition of "Protected Parties" encompasses parties that the Court struck from the exculpation provision, including Highland Capital's employees and successors and assigns, Strand, the Reorganized Debtor, the Claimant Trust, its trustee and the members of its Oversight Board, the Litigation Sub-Trust and its trustee, HCMLP GP, professionals retained by Highland Capital and the Committee, and the Related Persons of the foregoing. The Plan prevents parties from "commenc[ing] or pursu[ing] a claim or cause of action of any kind ... 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 the Reorganized Debtor, the administration of the Claimant Trust or the Litigation Sub-Trust, or the transactions in furtherance of the foregoing" against any of these non-debtor "Protected Parties" without the bankruptcy court's prior permission. Like the exculpation provision, the impact is that non-debtor parties are potentially protected from liability in contravention of this Court's precedent.

Request for Limited Clarification

4. The Funds' interpretation of the Court's opinion is that the Court correctly held that the parties protected by the injunction and gatekeeper provisions must similarly be limited to Highland Capital, the Committee and its members, and the Independent Directors, such that the protections afforded thereby coincide with the permissible scope of the exculpation provision and 11 U.S.C. § 524(e). Opinion at 27 and 30 n.19. If the Funds' interpretation is correct, the impact is that parties must seek the bankruptcy court's prior permission to pursue claims and causes of action against Highland Capital, the Committee and its members, and the Independent Directors. However, no such permission is required to the extent a party seeks to pursue claims and causes of action against other non-debtor parties (*i.e.*, Highland Capital's employees and successors and assigns, Strand, the Reorganized Debtor, the Claimant Trust, its trustee and the members of its Oversight Board, the Litigation Sub-Trust and its trustee, HCMLP GP, professionals retained by Highland Capital and the Committee, and the Related Persons of the foregoing).

5. To be clear, the Funds do not ask the Court to alter what they understand to be the Court's conclusion with respect to the injunction and

gatekeeper provisions but, rather, ask that the Court issue a limited clarification. The Funds are concerned that the Court's statement that such provisions are "perfectly lawful," might be argued to mean that the injunction and gatekeeper provisions—without any tailoring—are allowed to stand. Opinion at 27. Even though the Funds believe that such an interpretation would run afoul of what the Court intended, they could foresee litigation arising over the extent of these provisions since there remain ongoing relationships among many of the stakeholders.

6. Therefore, the Funds file this petition in order to request that the Court narrowly amend the Opinion in order to confirm the Court's holding that the impermissibly exculpated parties are similarly struck from the protections of the injunction and gatekeeper provisions of the Plan (in other words, that such parties cannot constitute "Protected Parties"), such that the injunction and gatekeeper provisions extend only to Highland Capital, the Committee and its members, and the Independent Directors. The Funds believe that this clarification is important to their ability to exercise contractual rights, and, if necessary, pursue claims against non-debtor parties arising from assumed contracts. Absent such relief, the Funds are concerned that there will be further litigation over the proper meaning of the Court's Opinion, litigation that could be avoided by the sought-after clarification.

Conclusion

WHEREFORE, the Funds respectfully request that the Court grant this petition and enter an order clarifying the Court's August 19, 2022, opinion solely with respect to the breadth of the injunction and gatekeeper provisions.

Respectfully submitted,

September 2, 2022

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CERTIFICATE OF SERVICE

I certify that, on September 2, 2022, I electronically filed the attached petition using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

/s/ David R. Fine

Tab "A"

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 19, 2022
Lyle W. Cayce
Clerk

No. 21-10449

In the Matter of: Highland Capital Management, L.P.,

Debtor,

NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P.; Highland Income Fund; NexPoint Strategic Opportunities Fund; Highland Global Allocation Fund; NexPoint Capital, Incorporated; James Dondero; The Dugaboy Investment Trust; Get Good Trust,

Appellants,

versus

Highland Capital Management, L.P.,

Appellee.

Appeal from the United States Bankruptcy Court
for the Northern District of Texas
USDC No. 19-34054
USDC No. 3:21-CV-538

Before Wiener, Graves, and Duncan, *Circuit Judges*.

Stuart Kyle Duncan, *Circuit Judge*:

Highland Capital Management, L.P., a Dallas-based investment firm, managed billion-dollar, publicly traded investment portfolios for nearly three decades. By 2019, however, myriad unpaid judgments and liabilities forced Highland Capital to file for Chapter 11 bankruptcy. This provoked a nasty breakup between Highland Capital and its co-founder James Dondero. Under those trying circumstances, the bankruptcy court successfully mediated with the largest creditors and ultimately confirmed a reorganization plan amenable to most of the remaining creditors.

Dondero and other creditors unsuccessfully objected to the confirmation order and then sought review in this court. In turn, Highland Capital moved to dismiss their appeal as equitably moot. First, we hold that equitable mootness does not bar our review of any claim. Second, we affirm the confirmation order in large part. We reverse only insofar as the plan exculpates certain non-debtors in violation of 11 U.S.C. § 524(e), strike those few parties from the plan's exculpation, and affirm on all remaining grounds.

I. Background

A. Parties

In 1993, Mark Okada and appellant James Dondero co-founded Highland Capital Management, L.P. ("Highland Capital") in Dallas. Highland Capital managed portfolios and assets for other investment advisers and funds through a complex of entities under the Highland umbrella. Highland Capital's ownership-interest holders included Hunter Mountain Investment Trust (99.5%); appellant The Dugaboy Investment Trust, Dondero's family trust (0.1866%);[1] Okada, personally and through

[1] The Dugaboy Investment Trust appeals alongside Dondero's other family trust Get Good Trust (collectively, the "Trusts").

trusts (0.0627%); and Strand Advisors, Inc. (0.25%), the only general partner, which Dondero wholly owned.

Dondero also manages two of Highland Capital's clients—appellants Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (the "Advisors"). Both the Advisors and Highland Capital serviced and advised billion-dollar, publicly traded investment funds for appellants Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and NexPoint Capital, Inc. (collectively, the "Funds"), among others. For example, on behalf of the Funds, Highland Capital managed certain investment vehicles known as collateral loan obligations ("CLOs") under individualized servicing agreements.

B. Bankruptcy Proceedings

Strapped with a series of unpaid judgments, Highland Capital filed for Chapter 11 bankruptcy in the District of Delaware in October 2019. The creditors included Highland Capital's interest holders, business affiliates, contractors, former partners, employees, defrauded investors, and unpaid law firms. Among those creditors, the Office of the United States Trustee appointed a four-member Unsecured Creditors' Committee (the "Committee").[2] *See* 11 U.S.C. § 1102(a)(1), (b)(1). Throughout the bankruptcy proceedings, the Committee investigated Highland Capital's past and current operations, oversaw its continuing operations, and

[2] First, Redeemer Committee of the Highland Crusader Fund had obtained a $191 million arbitration award after a decade of litigation against Highland Capital. Second, Acis Capital Management, L.P. and Acis Capital Management GP, LLC had sued Highland Capital after facing an adverse $8 million arbitration award, arising in part from its now-extinguished affiliation. Third, UBS Securities LLC and UBS AG London Branch had received a $1 billion judgment against Highland Capital following a 2019 bench trial in New York. Fourth, discovery vendor Meta-E Discovery had $779,000 in unpaid invoices. The Committee members are not parties on appeal.

negotiated the reorganization plan. *See id.* § 1103(c). Upon the Committee's request, the court transferred the case to the Northern District of Texas in December 2019.

Highland Capital's reorganization did not proceed under the governance of a traditional Chapter 11 trustee. Instead, the Committee reached a corporate governance settlement agreement to displace Dondero, which the bankruptcy court approved in January 2020. Under the agreed order, Dondero stepped down as director and officer of Highland Capital and Strand to be an unpaid portfolio manager and "agreed not to cause any Related Entity . . . to terminate any agreements" with Highland Capital. The Committee selected a board of three independent directors to act as a quasi-trustee and to govern Strand and Highland Capital: James Seery Jr., John Dubel, and retired Bankruptcy Judge Russell Nelms (collectively, the "Independent Directors"). The order also barred any claim against the Independent Directors in their official roles without the bankruptcy court's authorizing the claim as a "colorable claim[] of willful misconduct or gross negligence." Six months later, at the behest of the creditors, the bankruptcy court appointed Seery as Highland Capital's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative. The order contained an identical bar on claims against Seery acting in these roles. Neither order was appealed.

Throughout summer 2020, Dondero proposed several reorganization plans, each opposed by the Committee and the Independent Directors. Unpersuaded by Dondero, the Committee and Independent Directors negotiated their own plan. When Dondero's plans failed, he and other creditors began to frustrate the proceedings by objecting to settlements, appealing orders, seeking writs of mandamus, interfering with Highland Capital's management, threatening employees, and canceling trades between Highland Capital and its clients. *See Highland Cap. Mgmt., L.P. v. Dondero (In*

re Highland Cap. Mgmt., L.P.), Ch. 11 Case No. 19-34054-SGJ11, Adv. No. 20-03190-SGJ11, 2021 WL 2326350, at *1, *26 (Bankr. N.D. Tex. June 7, 2021) (holding Dondero in civil contempt, sanctioning him $100,000, and comparing this case to a "nasty divorce"). In Seery's words, Dondero wanted to "burn the place down" because he did not get his way. The Independent Directors insisted Dondero resign from Highland Capital, which he did in October 2020.

Highland Capital, meanwhile, proceeded toward confirmation of its reorganization plan—the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the "Plan"). In August 2020, the Independent Directors filed the Plan and an accompanying disclosure statement with the support of the Committee. *See* 11 U.S.C. §§ 1121, 1125. The bankruptcy court approved the statement as well as proposed notice and voting procedures for creditors, teeing up confirmation. Leading up to the confirmation hearing, the Advisors and the Funds asked the court to bar Highland Capital from trading or disposing of CLO assets pending confirmation. The bankruptcy court denied the request, and Highland Capital declined to voluntarily abstain and continued to manage the CLO assets.

Before confirmation, Dondero and other creditors (including several non-appellants) filed over a dozen objections to the Plan. Like Dondero, the United States Trustee primarily objected to the Plan's exculpation of certain non-debtors as unlawful. Highland Capital voluntarily modified the Plan to resolve six such objections. The Plan proposed to create eleven classes of creditors and equity holders and three classes of administrative claimants. *See* 11 U.S.C. § 1122. Of the voting-eligible classes, classes 2, 7, and 9 voted to accept the Plan while classes 8, 10, and 11 voted to reject it.

C. Reorganization Plan

The Plan works like this: It dissolves the Committee, and creates four entities—the Claimant Trust, the Reorganized Debtor, HCMLP GP LLC,[3] and the Litigation Sub-Trust. Administered by its trustee Seery, the Claimant Trust "wind[s]-down" Highland Capital's estate over approximately three years by liquidating its assets and issuing distributions to class-8 and -9 claimants as trust beneficiaries. Highland Capital vests its ongoing servicing agreements with the Reorganized Debtor, which "among other things" continues to manage the CLOs and other investment portfolios. The Reorganized Debtor's only general partner is HCMLP GP LLC. And the Litigation Sub-Trust resolves pending claims against Highland Capital under the direction of its trustee Marc Kirschner.

The whole operation is overseen by a Claimant Trust Oversight Board (the "Oversight Board") comprised of four creditor representatives and one restructuring advisor. The Claimant Trust wholly owns the limited partnership interests in the Reorganized Debtor, HCMLP GP LLC, and the Litigation Sub-Trust. The Claimant Trust (and its interests) will dissolve either at the soonest of three years after the effective date (August 2024) or (1) when it is unlikely to obtain additional proceeds to justify further action, (2) all claims and objections are resolved, (3) all distributions are made, and (4) the Reorganized Debtor is dissolved.

Anticipating Dondero's continued litigiousness, the Plan shields Highland Capital and bankruptcy participants from lawsuits through an exculpation provision, which is enforced by an injunction and a gatekeeper

[3] The Plan calls this entity "New GP LLC," but according to the motion to dismiss as equitably moot, the new general partner was later named HCMLP GP LLC. For the sake of clarity, we use HCMLP GP LLC.

provision (collectively, "protection provisions"). The protection provisions extend to nearly all bankruptcy participants: Highland Capital and its employees and CEO; Strand; the Independent Directors; the Committee; the successor entities and Oversight Board; professionals retained in this case; and all "Related Persons"[4] (collectively, "protected parties").[5]

The Plan exculpates the protected parties from claims based on any conduct "in connection with or arising out of" (1) the filing and administration of the case, (2) the negotiation and solicitation of votes preceding the Plan, (3) the consummation, implementation, and funding of the Plan, (4) the offer, issuance, and distribution of securities under the Plan before or after the filing of the bankruptcy, and (5) any related negotiations, transactions, and documentation. But it excludes "acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct" *and* actions by Strand and its employees predating the appointment of the Independent Directors.

Under the Plan, bankruptcy participants are enjoined "from taking any actions to interfere with the implementation or consummation of the Plan" or filing any claim related to the Plan or proceeding. Should a party seek to bring a claim against any of the protected parties, it must go to the bankruptcy court to "first determin[e], after notice and a hearing, that such

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[4] The Plan generously defines "Related Persons" to include all former, present, and future officers, directors, employees, managers, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, heirs, agents, other representatives, subsidiaries, divisions, and managing companies.

[5] The Plan expressly excludes from the protections Dondero and Okada; NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P; their subsidiaries, managed entities, managed entities, and members; and the Dugaboy Investment Trust and its trustees, among others.

claim or cause of action represents a colorable claim of any kind." Only then may the bankruptcy court "specifically authoriz[e]" the party to bring the claim. The Plan reserves for the bankruptcy court the "sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable" and then to adjudicate the claim if the court has jurisdiction over the merits.

D. Confirmation Order

At a February 2021 hearing, the bankruptcy court confirmed the Plan from the bench over several remaining objections. *See* FED R. BANKR. P. 3017–18; 11 U.S.C. §§ 1126, 1128, 1129. In its later-written decision, the bankruptcy court observed that Highland Capital's bankruptcy was "not a garden variety chapter 11 case." The type of debtor, the reason for the bankruptcy filing, the kinds of creditor claims, the corporate governance structure, the unusual success of the mediation efforts, and the small economic interests of the current objectors all make this case unique.

The confirmation order criticized Dondero's behavior before and during the bankruptcy proceedings. The court could not "help but wonder" if Highland Capital's deficit "was necessitated because of enormous litigation fees and expenses incurred" due to Highland Capital's "culture of litigation." Recounting Highland Capital's litigation history, it deduced that Dondero is a "serial litigator." It reasoned that, while "Dondero wants his company back," this "is not a good faith basis to lob objections to the Plan." It attributed Dondero's bad faith to the Advisors, the Trusts, and the Funds, given the "remoteness of their economic interests." For example, the bankruptcy court "was not convinced of the[] [Funds'] independence" from Dondero because the Funds' board members did not testify and had "engaged with the Highland complex for many years." And so the bankruptcy court "consider[ed] them all to be marching pursuant to the orders of Mr. Dondero." The court, meanwhile, applauded the members of

the Committee for their "wills of steel" for fighting "hard before and during this Chapter 11 Case" and "represent[ing] their constituency . . . extremely well."

On the merits of the Plan, the bankruptcy court again approved the Plan's voting and confirmation procedures as well as the fairness of the Plan's classes. *See* 11 U.S.C. §§ 1122, 1125(a)–(c). The court held the Plan complied with the statutory requirements for confirmation. *See id.* §§ 1123(a)(1)–(7), 1129(a)(1)–(7), (9)–(13). Because classes 8, 10, and 11 had voted to reject the Plan, it was confirmable only by cramdown.[6] *See id.* § 1129(b). The bankruptcy court found that the Plan treated the dissenting classes fairly and equitably and satisfied the absolute-priority rule, so the Plan was confirmable. *See id.* § 1129(b)(2)(B)–(C). The court also concluded that the protection provisions were fair, equitable, and reasonable, as well as "integral elements" of the Plan under the circumstances, and were within both the court's jurisdiction and authority. The court confirmed the Plan as proposed and discharged Highland Capital's debts. *Id.* § 1141(d)(1). After confirmation and satisfaction of several conditions precedent, the Plan took effect August 11, 2021.

E. The Appeal

Dondero, the Advisors, the Funds, and the Trusts (collectively, "Appellants") timely appealed, objecting to the Plan's legality and some of

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[6] The bankruptcy court must proceed by nonconsensual confirmation, or "cramdown," 11 U.S.C. § 1129(b), when a class of unsecured creditors rejects a Chapter 11 reorganization plan, *id.* § 1129(a)(8), but at least one impaired class accepts it, *id.* § 1129(a)(10). A cramdown requires that the plan be "fair and equitable" to dissenting classes and satisfy the absolute priority rule—that is, dissenting classes are paid in full before any junior class can retain any property. *Id.* § 1129(b)(2)(B); *see Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441–42 (1999).

the bankruptcy court's factual findings.[7] Together with Highland Capital, Appellants moved to directly appeal the confirmation order to this court, which the bankruptcy court granted. *See* 28 U.S.C. § 158(d). A motions panel certified and consolidated the direct appeals. *See ibid.* Both the bankruptcy court and the motions panel declined to stay the Plan's confirmation pending appeal. Given the Plan's substantial consummation since its confirmation, Highland Capital moved to dismiss the appeal as equitably moot, a motion the panel ordered carried with the case.

* * *

We first consider equitable mootness and decline to invoke it here. We then turn to the merits, conclude the Plan exculpates certain non-debtors beyond the bankruptcy court's authority, and affirm in all other respects.

II. Standard of Review

A confirmation order is an appealable final order, over which we have jurisdiction. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 502 (2015); *see* 28 U.S.C. §§ 158(d), 1291. This court reviews a bankruptcy court's factual findings for clear error and legal conclusions *de novo*. *Evolve Fed. Credit Union v. Barragan-Flores (In re Barragan-Flores)*, 984 F.3d 471, 473 (5th Cir. 2021) (citation omitted).

III. Equitable Mootness

Highland Capital moved to dismiss this appeal as equitably moot. It argues we should abstain from appellate review because clawing back the implemented Plan "would generate untold chaos." We disagree and deny the motion.

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[7] The Trusts adopt the Funds' and the Advisors' briefs in full, and Dondero adopts the Funds' brief in full and the Advisors' brief in part. Fed. R. App. P. 28(i).

The judge-made doctrine of equitable mootness allows appellate courts to abstain from reviewing bankruptcy orders confirming "complex plans whose implementation has substantial secondary effects." *New Indus., Inc. v. Byman (In re Sneed Shipbuilding, Inc.)*, 916 F.3d 405, 409 (5th Cir. 2019) (citing *In re Trib. Media Co.*, 799 F.3d 272, 274, 281 (3d Cir. 2015)). It seeks to balance "the equitable considerations of finality and good faith reliance on a judgment" and "the right of a party to seek review of a bankruptcy order adversely affecting him." *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994) (quoting *First Union Real Estate Equity & Mortg. Inv. v. Club Assocs. (In re Club Assocs.)*, 956 F.3d 1065, 1069 (11th Cir. 1992)); *see In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008); *see also* 7 COLLIER ON BANKRUPTCY ¶ 1129.09 (16th ed.), LexisNexis (database updated June 2022) (observing "the equitable mootness doctrine is embraced in every circuit").[8]

This court uses equitable mootness as a "scalpel rather than an axe," applying it claim-by-claim, instead of appeal-by-appeal. *In re Pac. Lumber Co.(Pacific Lumber)*, 584 F.3d 229, 240–41 (5th Cir. 2009). For each claim, we analyze three factors: "(i) whether a stay has been obtained, (ii) whether the plan has been 'substantially consummated,' and (iii) whether the relief requested would affect either the rights of parties not before the court or the success of the plan." *In re Manges*, 29 F.3d at 1039 (citing *In re Block Shim*

[8] The doctrine's atextual balancing act has been criticized. *See In re Pac. Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009) ("Despite its apparent virtues, equitable mootness is a judicial anomaly."); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 438–54 (3rd Cir. 2015) (Krause, J., concurring); *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (banishing the term "equitable mootness" as a misnomer); *In re Cont'l Airlines*, 91 F.3d 553, 569 (3d Cir. 1996) (en banc) (Alito, J., dissenting); *see also* Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 AM. BANKR. L.J. 377, 393–96 (2019) (addressing the varying applications between circuits). *But see In re Trib. Media*, 799 F.3d at 287–88 (Ambro, J., concurring) (highlighting some benefits of the equitable mootness doctrine).

Dev. Co., 939 F.2d 289, 291 (5th Cir. 1991); and *Cleveland, Barrios, Kingsdorf & Casteix v. Thibaut*, 166 B.R. 281, 286 (E.D. La. 1994)); *see also, e.g.*, *In re Blast Energy Servs.*, 593 F.3d 418, 424–25 (5th Cir. 2010); *In re Ultra Petroleum Corp.*, No. 21-20049, 2022 WL 989389, at *5 (5th Cir. Apr. 1, 2022). No one factor is dispositive. *See In re Manges*, 29 F.3d at 1039.

Here, the bankruptcy court and this court declined to stay the Plan pending appeal, and it took effect August 11, 2021. Given the months of progress, no party meaningfully argues the Plan has not been substantially consummated.[9] *See Pacific Lumber*, 584 F.3d at 242 (observing "consummation includes transferring all or substantially all of the property covered by the plan, the assumption of business by the debtors' successors, and the commencement of plan distributions" (citing 11 U.S.C. § 1141; and *In re Manges*, 29 F.3d at 1041 n.10)). But that alone does not trigger equitable mootness. *See In re SCOPAC*, 624 F.3d 274, 281–82 (5th Cir. 2010). Instead, for each claim, the inquiry turns on whether the court can craft relief for that

[9] Since the Plan's effectuation, Highland Capital paid $2.2 million in claims to a committee member and $525,000 in "cure payments" to other counterparties. The independent directors resigned. The Reorganized Debtor, the Claimant Trust, HCMLP GP LLC, and the Litigation Sub-Trust were created and organized in accordance with the Plan. The bankruptcy court appointed the Oversight Board members, the Litigation Sub-Trust trustee, and the Claimant Trust trustee. Highland Capital assumed certain service contracts, including management of twenty CLOs with approximately $700 million in assets, and transferred its assets and estate claims to the successor entities. Highland Capital's pre-petition partnership interests were cancelled and cease to exist. A third party, Blue Torch Capital, infused $45 million in exit financing, fully guaranteed by the Reorganized Debtor, its operating subsidiaries, the Claimant Trust, and most of their assets. From the exit financing, an Indemnity Trust was created to indemnify claims that arise against the Reorganized Debtor, Claimant Trust, Ligation Sub-Trust, Claimant Trustee, Litigation Trustee, or Oversight Board members. The lone class-1 creditor withdrew its claim against Highland Capital. The lone class-2 creditor has been fully paid approximately $500,000 and issued a note of $5.2 million secured by $23 million of the Reorganized Debtor's assets. Classes 3 and 4 have been paid $165,412. Class 7 has received $5.1 million in distributions from the Claimant Trust, totaling 77% of class-7 claims filed.

claim that would not have significant adverse consequences to the reorganization. Highland Capital highlights four possible disruptions: (1) the unraveling of the Claimant Trust and its entities, (2) the expense of disgorging disbursements, (3) the threat of defaulting on exit-financing loans, and (4) the exposure to vexatious litigation.

Each party first suggests its own all-or-nothing equitable mootness applications. To Highland Capital, Appellants' broad requested remedy with only a minor economic stake demands mooting the entire appeal. To Appellants, the type of reorganization plan categorially bars equitable mootness, or, alternatively, Highland Capital's joining the motion to certify the appeal estops it from asserting equitable mootness. These arguments are unpersuasive and foreclosed by *Pacific Lumber*.

First, Highland Capital contends the entire appeal is equitably moot because Appellants, with only a minor economic stake and questionable good faith, "seek[] nothing less than a complete unravelling of the confirmed Plan." It claims the court cannot "surgically excise[]" certain provisions, as the Funds request, because the Bankruptcy Code prohibits "modifications to confirmed plans after substantial consummation." *See* 11 U.S.C. § 1127(b). Not so.

"Although the Bankruptcy Code . . . restricts post-confirmation plan modifications, it does not expressly limit appellate review of plan confirmation orders." *Pacific Lumber*, 584 F.3d at 240 (footnote omitted) (citing 11 U.S.C. § 1127). This court may fashion "fractional relief" to minimize an appellate disturbance's effect on the rights of third parties. *In re Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 328 (5th Cir. 2013) (denying dismissal on equitable mootness grounds because the court "could grant partial relief . . . without disturbing the reorganization"); *cf. In re Cont'l Airlines*, 91 F.3d 553, 571–72 (3d Cir. 1996) (en banc) (Alito, J., dissenting)

(observing "a remedy could be fashioned in the present case to ensure that the [debtor's] reorganization is not undermined"). In short, Highland Capital's speculations are farfetched, as the court may fashion the remedy it sees fit without upsetting the reorganization.

Second, Appellants contend that equitable mootness cannot apply—full-stop—because this appeal concerns a liquidation plan, not a reorganization plan. We reject that premise. *See infra* Part IV.A. Even if it were correct, however, this court has conducted the equitable-mootness inquiry for a Chapter 11 liquidation plan in the past. *See In re Superior Offshore Int'l, Inc.*, 591 F.3d 350, 353–54 (5th Cir. 2009). And other circuits have squarely rejected the categorical bar proposed by Appellants. *See In re Abengoa Bioenergy Biomass of Kan., LLC*, 958 F.3d 949, 956–57 (10th Cir. 2020); *In re BGI, Inc.*, 772 F.3d 102, 107–09 (2d Cir. 2014). We do the same.

Finally, Appellants assert that because Highland Capital and NexPoint Advisors, L.P. jointly moved to certify the appeal, it should be estopped from arguing the appeal is equitably moot. They cite no legal support for that approach. We decline to adopt it.

Instead, we proceed with a claim-by-claim analysis, as our precedent requires. Highland Capital suggests only two claims are equitably moot: (1) the protection-provisions challenge and (2) the absolute-priority-rule challenge. Neither provides a basis for equitable mootness.

For the protection provisions, Highland Capital anticipates that, without the provisions, its officers, employees, trustees, and Oversight Board members would all resign rather than be exposed to Dondero-initiated litigation. Those resignations would disrupt the Reorganized Debtor's operation, "significant[ly] deteriorat[ing] asset values due to uncertainty." Appellants disagree, offering several instances when this court has reviewed release, exculpation, and injunction provisions over calls for equitable

mootness. *See, e.g.*, *In re Hilal*, 534 F.3d at 501; *Pacific Lumber*, 584 F.3d at 252; *In re Thru Inc.*, 782 F. App'x 339, 341 (5th Cir. 2019) (per curiam). In response, Highland Capital distinguishes this case because the provisions are "integral to the consummated plans." *See In re Charter Commc'ns, Inc.*, 691 F.3d 476, 486 (2d Cir. 2012). We again reject that premise. *See infra* Part IV.E.1. In any event, Appellants have the better argument.

We have before explained that "equity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process." *In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008). That is so because "the goal of finality sought in equitable mootness analysis does not outweigh a court's duty to protect the integrity of the process." *Pacific Lumber*, 584 F.3d at 252. As in *Pacific Lumber*, the legality of a reorganization plan's non-consensual non-debtor release is consequential to the Chapter 11 process and so should not escape appellate review in the name of equity. *Ibid.* The same is true here. Equitable mootness does not bar our review of the protection provisions.

For the absolute-priority-rule challenge,[10] Highland Capital contends our review requires us to "rejigger class recoveries." *Pacific Lumber* is again instructive. There, the court declined to apply equitable mootness to a secured creditor's absolute-priority-rule challenge, as no other panel had extended the doctrine so far. *Id.* at 243. Similarly, Highland Capital fails to identify a single case in which this court has declined review of the treatment of a class of creditor's claims resulting from a cramdown. *See id.* at 252. Regardless, Appellants challenge the distributions to classes 8, 10, and 11. According to Highland Capital's own declaration, "Class 8 General

[10] While the issue is nearly forfeited for inadequate briefing, it fails on the merits regardless. *See Roy v. City of Monroe*, 950 F.3d 245, 251 (5th Cir. 2020).

Unsecured Claims have received their Claimant Trust Interests." But there is no evidence that classes 10 or 11 have received any distributions. *Contra Pacific Lumber*, 584 F.3d at 251 (holding certain claims equitably moot where "the smaller unsecured creditors" had already "received payment for their claims"). As a result, the relief requested would not affect third parties or the success of the Plan. *See In re Manges*, 29 F.3d at 1039. The doctrine of equitable mootness does not bar our review of the cramdown and treatment of class-8 creditors.

We DENY Highland Capital's motion to dismiss the appeal as equitably moot.

IV. Discussion

As to the merits, Appellants fire a bankruptcy-law blunderbuss. They contest the Plan's classification as a reorganization plan, the Plan's satisfaction of the absolute priority rule, the Plan's confirmation despite Highland Capital's noncompliance with Bankruptcy Rule 2015.3, and the sufficiency of the evidence supporting the court's factual finding that the Funds are "owned/controlled" by Dondero. For each, we disagree and affirm. We do, however, agree with Appellants that the bankruptcy court exceeded its statutory authority under § 524(e) by exculpating certain non-debtors, and so we reverse and vacate the Plan only to that extent.

A. Discharge of Debt

We begin with the Plan's classification as a reorganization plan, allowing for automatic discharge of the debts. The confirmation of a Chapter 11 restructuring plan "discharges the debtor from any [pre-confirmation] debt" unless, under the plan, the debtor liquidates its assets, stops "engag[ing] in [its] business after consummation of the plan," and would be denied discharge in a Chapter 7 case. 11 U.S.C. § 1141(d)(1), (3); *see In re Sullivan*, No. 99-11107, 2000 WL 1597984, at *2 (5th Cir. Sept. 26, 2000)

(per curiam). The bankruptcy court concluded Highland Capital continued to engage in business after plan consummation, so its debts are automatically discharged. The Trusts call foul because, in their view, Highland Capital's "wind down" of its portfolio management is not a continuation of its business. We disagree.

Whether a corporate debtor "engages in business" is "relatively straightforward." *Um v. Spokane Rock I, LLC*, 904 F.3d 815, 819 (9th Cir. 2018) (contrasting the more complex question for individual debtors); *see Grausz v. Sampson (In re Grausz)*, 63 F. App'x 647, 650 (4th Cir. 2003) (per curiam) (same). That is, "a business entity will not engage in business post-bankruptcy when its assets are liquidated and the entity is dissolved." *Um*, 904 F.3d at 819 (collecting cases).[11] But even a temporary continuation of business after a plan's confirmation is sufficient to discharge a Chapter 11 debtor's debt. *See In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 804 n.15 (5th Cir. 1997) (recognizing a debtor's "conducting business for two years following Plan confirmation satisfies § 1141(d)(3)(B)" (citation omitted)). That is the case here.

By the plain terms of the Plan, Highland Capital has and will continue its business as the Reorganized Debtor for several years. Indeed, much of this appeal concerns objections to Highland Capital's "continu[ing] to manage the assets of others." Because the Plan contemplates Highland Capital "engag[ing] in business after consummation," 11 U.S.C. § 1141(d)(1), the

[11] *See, e.g.*, *In re W. Asbestos Co.*, 313 B.R. 832, 853 (Bankr. N.D. Cal. 2003) (holding corporate debtor was not engaging in business by merely having directors and officers, rights under an insurance policy, and claims against it); *In re Wood Fam. Ints., Ltd.*, 135 B.R. 407, 410 (Bankr. D. Colo. 1989) (holding corporate debtor was not engaging in business when the plan called for liquidation and discontinuation of its business upon confirmation).

bankruptcy court correctly held Highland Capital was eligible for automatic discharge of its debts.[12]

B. Absolute Priority Rule

Next, we consider the Plan's compliance with the absolute-priority rule. When assessing whether a plan is "fair and equitable" in a cramdown scenario, courts must invoke the absolute-priority rule. 11 U.S.C. § 1129(b)(1); *see* 7 COLLIER ON BANKRUPTCY ¶ 1129.04. Under that rule, if a class of unsecured claimants rejects a plan, the plan must provide that those claimants be paid in full on the effective date *or* any junior interest "will not receive or retain under the plan . . . any property." 11 U.S.C. § 1129(b)(2)(B).[13]

Because class-8 claimants voted against the Plan, the bankruptcy court proceeded by nonconsensual confirmation. The court concluded the Plan was fair and equitable to class 8 and its distributions were in line with the absolute-priority rule. 11 U.S.C. § 1129(b)(2)(B). The Advisors claim the Plan violates the absolute priority rule by giving class-10 and -11 claimants a "Contingent Claimant Trust Interest" without fully satisfying class-8 claimants. We agree the absolute-priority rule applies, and the Plan plainly satisfies it.

The Plan proposed to pay 71% of class-8 creditors' claims with *pro rata* distributions of interest generated by the Claimant Trust and then *pro rata*

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[12] For the same reasons, we reject the Trusts' follow-on argument extending the same logic to the protection provisions.

[13] *See Pacific Lumber*, 584 F.3d at 244 (noting the rule "enforces a strict hierarchy of [creditor classes'] rights defined by state and federal law" to protect dissenting creditor classes); *see also In re Geneva Steel Co.*, 281 F.3d 1173, 1180 n.4 (10th Cir. 2002) ("[U]nsecured creditors stand ahead of investors in the receiving line and their claims must be satisfied before any investment loss is compensated." (citations omitted)).

distributions from liquidated Claimant Trust assets. Classes 10 and 11 received a *pro rata* share of "Contingent Claimant Trust Interests," defined as a Claimant Trust Interest vesting only when the Claimant Trustee certifies that all class-8 claimants have been paid indefeasibly in full and all disputed claims in class 8 have been resolved. Voilà: no interest junior to class 8 will receive any property until class-8 claimants are paid.

But the Advisors point to Highland Capital's testimony and briefs to suggest the Contingent Claimant Trust Interests (received by classes 10 and 11) are property in some sense because they have value. That argument is specious. Of course, the Contingent Claimant Trust Interests have some small probability of vesting in the future and, thus, has some *de minimis* present value. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207-08 (1988) (holding a junior creditor's receipt of a presently valueless equity interest is receipt of property). But the absolute-priority rule has never required us to bar junior creditors from ever receiving property. By the Plan's terms, no trust property vests with class-10 or -11 claimants "unless and until" class-8 claims "have been paid indefeasibly in full." *See* 11 U.S.C. § 1129(b)(2)(B)(ii). That plainly comports with the absolute-priority rule.

C. Bankruptcy Rule 2015.3

We turn to whether the failure to comply with Bankruptcy Rule of Procedure 2015.3 bars the Plan's confirmation. The Independent Directors failed to file periodic financial reports per Federal Rule of Bankruptcy Procedure 2015.3(a) about entities "in which the [Highland Capital] estate holds a substantial or controlling interest." The Advisors claim the failure dooms the Plan's confirmation because the Plan proponent failed to comply "with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). We disagree.

Rule 2015.3 cannot be an applicable provision of Title 11 because the Federal Rules of Bankruptcy Procedure are not provisions of the Bankruptcy Code. *See Bonner v. Adams (In re Adams)*, 734 F.2d 1094, 1101 (5th Cir. 1984) ("The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, provides that the Supreme Court may prescribe 'by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure' in bankruptcy courts."); *cf. In re Mandel*, No. 20-40026, 2021 WL 3642331, at *6 n.7 (5th Cir. Aug. 17, 2021) (per curiam) (noting "Rule 2015.3 implements section 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," which amended 28 U.S.C. § 2073). The Advisors' attempt to tether the rule to the bankruptcy trustee's general duties lacks any legal basis. *See* 11 U.S.C. §§ 704(a)(8), 1106(a)(1), 1107(a). The bankruptcy court, therefore, correctly overruled the Advisors' objection.

D. Factual Findings

One factual finding is in dispute, but we see no clear error. The bankruptcy court found that, despite their purported independence, the Funds are entities "owned and/or controlled by [Dondero]." The Funds ask the court to vacate the factual finding because it threatens the Funds' compliance with federal law and damages their reputations and values. According to the Funds, the characterization is unfair, as *they* are not litigious like Dondero and are completely independent from him. Highland Capital maintains Dondero has sole discretion over the Funds as their portfolio manager and through his control of the Advisors, so the finding is supported by the record.

"Clear error is a formidable standard: this court disturbs factual findings only if left with a firm and definite conviction that the bankruptcy court made a mistake." *In re Krueger*, 812 F.3d 365, 374 (5th Cir. 2016) (cleaned up). We defer to the bankruptcy court's credibility determinations.

See Randall & Blake, Inc. v. Evans (In re Canion), 196 F.3d 579, 587–88 (5th Cir. 1999).

Here, the bankruptcy court drew its factual finding from the testimony of Jason Post, the Advisors' chief compliance officer, and Dustin Norris, an executive vice president for the Funds and the Advisors. Post testified that the Funds have independent board members that run them. But the bankruptcy court found Post not credible because "he abruptly resigned" from Highland Capital at the same time as Dondero and is currently employed by Dondero. Norris testified that Dondero "owned and/or controlled" the Funds and Advisors. The bankruptcy court found Norris credible and relied on his testimony. The bankruptcy court also observed that none of the Funds' board members testified in the bankruptcy case and all "engaged with the Highland complex for many years." Because nothing in this record leaves us with a firm and definite conviction that the bankruptcy court made a mistake in finding that the Funds are "owned and/or controlled by [Dondero]," we leave the bankruptcy court's factual finding undisturbed.

E. The Protection Provisions

Finally, we address the legality of the Plan's protection provisions. As discussed, the Plan exculpates certain non-debtor third parties supporting the Plan from post-petition lawsuits not arising from gross negligence, bad faith, or willful or criminal misconduct. It also enjoins certain parties "from taking any actions to interfere with the implementation or consummation of the Plan." The injunction requires that, before any lawsuit is filed, the plaintiff must seek the bankruptcy court's approval of the claim as "colorable"—*i.e.*, the bankruptcy court acts as a gatekeeper. Together, the provisions screen and prevent bad-faith litigation against Highland Capital, its successors, and other bankruptcy participants that could disrupt the Plan's effectiveness.

The bankruptcy court deemed the provisions legal, necessary under the circumstances, and in the best interest of all parties. We agree, but only in part. Though the injunction and gatekeeping provisions are sound, the exculpation of certain non-debtors exceeds the bankruptcy court's authority. We reverse and vacate that limited portion of the Plan.

1. *Non-Debtor Exculpation*

We start with the scope of the non-debtor exculpation. In a Chapter 11 bankruptcy proceeding, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). Contrary to the bankruptcy court's holding, the exculpation here partly runs afoul of that statutory bar on non-debtor discharge by reaching beyond Highland Capital, the Committee, and the Independent Directors. *See Pacific Lumber*, 584 F.3d 251–53. We must reverse and strike the few unlawful parts of the Plan's exculpation provision.

The parties agree that *Pacific Lumber* controls and also that the bankruptcy court had the power to exculpate both Highland Capital and the Committee members. Appellants, however, submit the bankruptcy court improperly stretched *Pacific Lumber* to shield other non-debtors from breach-of-contract and negligence claims, in violation of § 524(e). Highland Capital counters that the exculpation provision is a commonplace Chapter 11 term, is appropriate given Dondero's litigious nature, does not implicate § 524(e), and merely provides a heightened standard of care.

To support that argument, Highland Capital highlights the distinction between a concededly unlawful release of all non-debtor liability and the Plain's limited exculpation of non-debtor post-petition liability. *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 246–47 (3d Cir. 2000) (describing releases as "eliminating" a covered party's liability "altogether" while exculpation provisions "set[] forth the applicable standard of liability" in

future litigation). According to Highland Capital, the Third and Ninth Circuits have adopted that distinction when applying § 524(e). *See Blixseth v. Credit Suisse*, 961 F.3d 1074, 1084 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1394 (2021); *In re PWS Holding*, 228 F.3d at 246–47. Under those cases, narrow exculpations of post-petition liability for certain critical third-party non-debtors are lawful "appropriate" or "necessary" actions for the bankruptcy court to carry out the proceeding through its statutory authority under § 1123(b)(6) and § 105(a). *See* 11 U.S.C. § 1123(b)(6) ("[A] plan may . . . include any other appropriate provision not inconsistent with the applicable provisions of this title."); *id* § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

Highland Capital reads *Pacific Lumber* as "in step with the law in [those] other circuits" by allowing a limited exculpation of post-petition liability. *Cf. Blixseth*, 961 F.3d at 1084. We disagree. As the Ninth Circuit acknowledged, our court in *Pacific Lumber* arrived at "a conclusion opposite [the Ninth Circuit's]." 961 F.3d at 1085 n.7. Moreover, the Ninth Circuit expressly disavowed *Pacific Lumber*'s rationale—that an exculpation provision provides a "fresh start" to a non-debtor in violation of § 524(e)—because, in the Ninth Circuit's view, the post-petition exculpation "affects only claims arising from the bankruptcy proceedings themselves." *Ibid.* We are not persuaded, as Highland Capital contends, that the Ninth Circuit was "sloppy" and simply "misread *Pacific Lumber*." *See* O.A. Rec. 19:45–21:38.

The simple fact of the matter is that there is a circuit split concerning the effect and reach of § 524(e).[14] Our court along with the Tenth Circuit

[14] Amicus's contention that failing to adopt the Ninth Circuit's holding "would generate a clear circuit split" is wrong. There already is one. *See* Petition for Writ of

hold § 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code. *Pacific Lumber*, 584 F.3d at 252–53; *Landsing Diversified Props. v. First Nat'l Bank & Tr. Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990) (per curiam). By contrast, the Ninth Circuit joins the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits in reading § 524(e) to allow varying degrees of limited third-party exculpations. *Blixseth*, 961 F.3d at 1084; *accord In re PWS Holding*, 228 F.3d at 246–47 (allowing third-party releases for "fairness, necessity to the reorganization, and specific factual findings to support these conclusions"); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005); *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *In re Airadigm Commc'ns., Inc.*, 519 F.3d 640, 657 (7th Cir. 2008); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015).

Our *Pacific Lumber* decision was not blind to the countervailing view, as it twice cites the Third Circuit's contrary holding in other contexts. *See* 584 F.3d at 241, 253 (citing *In re PWS Holding*, 228 F.3d at 236–37, 246). But we rejected the parsing between limited exculpations and full releases that Highland Capital now requests. We are obviously bound to apply our own precedent. *See Hidalgo Cnty. Emergency Serv. Found. v. Carranza (In re Hidalgo Cnty. Emergency Serv. Found.)*, 962 F.3d 838, 841 (5th Cir. 2020) ("Under our well-recognized rule of orderliness, . . . a panel of this court is bound by circuit precedent." (citation omitted)).

Under *Pacific Lumber*, § 524(e) does not permit "absolv[ing] the [non-debtor] from any negligent conduct that occurred during the course of the

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Certiorari, *Blixseth v. Credit Suisse*, 141 S. Ct. 1394 (No. 20-1028) (highlighting the circuits' divergent approaches to the non-debtor discharge bar under § 524(e)).

bankruptcy" absent another source of authority. 584 F.3d at 252–53; *see also In re Zale Corp.*, 62 F.3d 746, 760 (5th Cir. 1995). At oral argument, Highland Capital pointed only to § 1123(b)(6) and § 105(a) as footholds. *See* O.A. Rec. 16:45–17:28. But in this circuit, § 105(a) provides no statutory basis for a non-debtor exculpation. *In re Zale*, 62 F.3d at 760 (noting "[a] § 105 injunction cannot alter another provision of the code" (citing *In re Oxford Mgmt., Inc.*, 4 F.3d 1329, 1334 (5th Cir. 1993))). And the same logic extends to § 1123(b)(6), which allows a plan to "include any other appropriate provision *not inconsistent with the applicable provisions of this title*." 11 U.S.C. § 1123(b)(6) (emphasis added).

Pacific Lumber identified two sources of authority to exculpate non-debtors. *See* 584 F.3d at 252–53. The first is to channel asbestos claims (not present here). *Id.* at 252 (citing 11 U.S.C. § 524(g)). The second is to provide a limited qualified immunity to creditors' committee members for actions within the scope of their statutory duties. *Pacific Lumber*, 584 F.3d at 253 (citing 11 U.S.C. § 1103(c)); *see In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1069 (5th Cir. 2012). And, though not before the court in *Pacific Lumber*, we have also recognized a limited qualified immunity to bankruptcy trustees unless they act with gross negligence. *In re Hilal*, 534 F.3d at 501 (citing *In re Smyth*, 207 F.3d 758, 762 (5th Cir. 2000)); *accord Baron v. Sherman (In re Ondova Ltd.)*, 914 F.3d 990, 993 (5th Cir. 2019) (per curiam). If other sources exist, Highland Capital failed to identify them. So we see no statutory authority for the full extent of the exculpation here.

The bankruptcy court read *Pacific Lumber* differently. In its view, *Pacific Lumber* created an additional ground to exculpate non-debtors: when the record demonstrates that "costs [a party] might incur defending against suits alleging such negligence are likely to swamp either [it] or the consummated reorganization." 584 F.3d at 252. We do not read the decision that way. The bankruptcy court's underlying factual findings do not alter

whether it has statutory authority to exculpate a non-debtor. That is the holding of *Pacific Lumber*.

That leaves one remaining question: whether the bankruptcy court can exculpate the Independent Directors under *Pacific Lumber*. We answer in the affirmative. As the bankruptcy court's governance order clarified, nontraditional as it may be, the Independent Directors were appointed to act together as the bankruptcy trustee for Highland Capital. Like a debtor-in-possession, the Independent Directors are entitled to all the rights and powers of a trustee. *See* 11 U.S.C. § 1107(a); 7 COLLIER ON BANKRUPTCY ¶ 1101.01. It follows that the Independent Directors are entitled to the limited qualified immunity for any actions short of gross negligence. *See In re Hilal*, 534 F.3d at 501. Under this unique governance structure, the bankruptcy court legally exculpated the Independent Directors.

In sum, our precedent and § 524(e) require any exculpation in a Chapter 11 reorganization plan be limited to the debtor, the creditors' committee and its members for conduct within the scope of their duties, 11 U.S.C. § 1103(c), and the trustees within the scope of their duties, *see Baron*, 914 F.3d at 993. And so, excepting the Independent Directors and the Committee members, the exculpation of non-debtors here was unlawful. Accordingly, the other non-debtor exculpations must be struck from the Plan. *See Pacific Lumber*, 584 F.3d at 253.[15]

[15] Highland Capital, like the bankruptcy court, claims the *res judicata* effect of the January and July 2020 orders appointing the independent directors and appointing Seery as CEO binds the court to include the protection provisions here. We lack jurisdiction to consider collateral attacks on final bankruptcy orders even when it concerns whether the court properly exercised jurisdiction or authority at the time. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009); *In re Linn Energy, L.L.C.*, 927 F.3d 862, 866–67 (5th Cir. 2019) (quoting *Bailey*, 557 U.S. at 152). To the extent Appellants seek to roll back the protections

As it stands, the Plan's exculpation provision extends to Highland Capital and its employees and CEO; Strand; the Reorganized Debtor and HCMLP GP LLC; the Independent Directors; the Committee and its members; the Claimant Trust, its trustee, and the members of its Oversight Board; the Litigation Sub-Trust and its trustee; professionals retained by the Highland Capital and the Committee in this case; and all "Related Persons." Consistent with § 524(e), we strike all exculpated parties from the Plan except Highland Capital, the Committee and its members, and the Independent Directors.

2. *Injunction & Gatekeeper Provisions*

The injunction and gatekeeper provisions are, on the other hand, perfectly lawful. Appellants object to the bankruptcy court's injunction as vague and the gatekeeper provision as overbroad. We are unpersuaded.

First, Appellants' primary contention—that the Plan's injunction "is broad" by releasing non-debtors in violation of § 524(e)—is resolved by our striking the impermissibly exculpated parties. *See supra* Part IV.E.1.

Second, Appellants dispute the permanency of the injunction for the legally exculpated parties by enjoining conduct "on and after the Effective

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in the bankruptcy court's January 2020 and July 2020 orders (which is not clear from their briefing), such a collateral attack is precluded.

As a result, the bankruptcy court was correct insofar as *those* orders have the effect of exculpating the Independent Directors and Seery in his executive capacities, but it was incorrect that *res judicata* mandates their inclusion in the Plan's new exculpation provision. Despite removal from the exculpation provision in the confirmation order, the Independent Directors' agents, advisors, and employees, as well as Seery in his official capacities are all exculpated to the extent provided in the January and July 2020 orders, given the orders' ongoing *res judicata* effects and our lack of jurisdiction to review those orders. But that says nothing of the effect of the Plan's exculpation provision.

Date." Even assuming the issue was preserved,[16] permanency alone is no reason to alter a bankruptcy court's otherwise-lawful injunction on appeal. *See In re Zale*, 62 F.3d at 759–60 (recognizing the bankruptcy court's jurisdiction to issue an injunction in the first place allowed it to issue a permanent injunction).

Third, the Advisors argue that the injunction is "overbroad and vague" because it does not define what it means to "interfere" with the "implementation or consummation of the Plan." That is unsupported by the record. As the bankruptcy court recognized, the Plan defined what constitutes interference: (i) filing a lawsuit, (ii) enforcing judgments, (iii) enforcing security interests, (iv) asserting setoff rights, or (v) acting "in any manner" not conforming with the Plan. The injunction is not unlawfully overbroad or vague.

Finally, Appellants maintain that the gatekeeper provision impermissibly extends to unrelated claims over which the bankruptcy court lacks subject-matter jurisdiction. *See In re Craig's Stores of Tex., Inc.*, 266 F.3d 388, 390 (5th Cir. 2001) (noting a bankruptcy court retains jurisdiction post-confirmation only over "matters pertaining to the implementation or execution of the plan" (citations omitted)). While that may be the case, our precedent requires we leave that determination to the bankruptcy court in the first instance.

Courts have long recognized bankruptcy courts can perform a gatekeeping function. Under the "*Barton* doctrine," the bankruptcy court may require a party to "obtain leave of the bankruptcy court before initiating an action in district court when the action is against the trustee or other

[16] *See Roy*, 950 F.3d at 251 ("Failure adequately to brief an issue on appeal constitutes waiver of that argument." (citation omitted)).

bankruptcy-court-appointed officer, for acts done in the actor's official capacity." *Villegas v. Schmidt*, 788 F.3d 156, 159 (5th Cir. 2015) (emphasis added) (quoting *Carter v. Rodgers*, 220 F.3d 1249, 1252 (11th Cir. 2000)); *accord Barton v. Barbour*, 104 U.S. 126 (1881).[17] In *Villegas*, we held "that a party must continue to file with the relevant bankruptcy court for permission to proceed with a claim against the trustee." 788 F.3d at 158. Relevant here, we left to the bankruptcy court, faced with pre-approval of a claim, to determine whether it had subject matter jurisdiction over that claim in the first instance. *Id.* at 158–59; *see, e.g.*, *Carroll v. Abide*, 788 F.3d 502, 506–07 (5th Cir. 2015) (noting *Villegas* "rejected an argument that the *Barton* doctrine does not apply when the bankruptcy court lacked jurisdiction"). In other words, we need not evaluate whether the bankruptcy court would have jurisdiction under every conceivable claim falling under the widest interpretation of the gatekeeper provision. We leave that to the bankruptcy court in the first instance.[18]

* * *

In sum, the Plan violates § 524(e) but only insofar as it exculpates and enjoins certain non-debtors. The exculpatory order is therefore vacated as to all parties *except* Highland Capital, the Committee and its members, and the

---

[17] The Advisors also maintain that Highland Capital is neither a receiver nor a trustee, so *Barton* has no application here. We disagree. Highland Capital, for all practical purposes, was a debtor in possession entitled to the rights of a trustee. *See* 7 COLLIER ON BANKRUPTCY ¶ 1101.01 ("The debtor in possession is generally vested with all of the rights and powers of a trustee as set forth in section 1106 . . . ."); *see also Carter*, 220 F.3d at 1252 n.4. (finding no distinction between bankruptcy court "approved" and bankruptcy court "appointed" officers).

[18] For the same reasons, we also leave the applicability of *Barton*'s limited statutory exception to the bankruptcy and district courts in the first instance. *See* 28 U.S.C. § 959(a) (allowing suit, without leave of the appointing court, if the challenged acts relate to the trustee or debtor in possession "carrying on business connected with [their] property").

Independent Directors for conduct within the scope of their duties. We otherwise affirm the inclusion of the injunction and the gatekeeper provisions in the Plan.[19]

V. Conclusion

Highland Capital's motion to dismiss the appeal as equitably moot is DENIED. The bankruptcy court's judgment is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

[19] Nothing in this opinion should be construed to hinder the bankruptcy court's power to enjoin and impose sanctions on Dondero and other entities by following the procedures to designate them vexatious litigants. *See In re Carroll*, 850 F.3d 811, 815 (5th Cir. 2017) (per curiam). But non-debtor exculpation within a reorganization plan is not a lawful means to impose vexatious litigant injunctions and sanctions.

Appendix Exhibit 125

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE:	.	Case No. 19-34054-11(SGJ)
	.	
HIGHLAND CAPITAL	.	Earle Cabell Federal Building
MANAGEMENT, L.P.,	.	1100 Commerce Street
	.	Dallas, TX 75242-1496
	.	
Debtor.	.	Monday, September 12, 2022
. . . . .	.	9:40 a.m.

TRANSCRIPT OF HEARING ON MOTION TO WITHDRAW PROOF OF CLAIM #146 BY HCRE PARTNERS, LLC (3443) AND REORGANIZED DEBTOR'S (A) OBJECTION TO MOTION TO QUASH AND FOR PROTECTION [DOCKET NO. 3464] AND (B) CROSS-MOTION TO ENFORCE SUBPOENAS TO ENFORCE SUBPOENAS AND TO COMPEL A DEPOSITION (3484)

BEFORE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT CHIEF JUDGE

TELEPHONIC APPEARANCES:

For Highland Capital Management, L.P.:	Pachulski Stang Ziehl & Jones LLP BY: JOHN MORRIS, ESQ. 780 3rd Avenue, 34th Floor New York, New York 10017
For NexPoint Real Estate Partners LLC f/k/a HCRE Partners LLC:	Hoge & Gameros, L.L.P. BY: CHARLES W. GAMEROS, JR., ESQ. 6116 North Central Expressway Suite 1400 Dallas, Texas 75206
Audio Operator:	Michael F. Edmond

Proceedings recorded by electronic sound recording, transcript produced by a transcript service.

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REORGANIZED DEBTOR'S (A) OBJECTION TO MOTION TO QUASH AND FOR PROTECTION [DOCKET NO. 3464] AND (B) CROSS-MOTION TO ENFORCE SUBPOENAS TO ENFORCE SUBPOENAS AND TO COMPEL A DEPOSITION (3484)

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(Proceedings commenced at 9:40 a.m.)

THE COURT: All right. We have a setting this morning in Highland Capital, Case Number 19-34054. We have both a motion to withdraw proof of claim of HCRE Partners, LLC, as well as the reorganized debtor's objection to a motion to quash and cross-motion to enforce subpoenas.

All right. So let's start by getting lawyer appearances, please. For HCRE, who do we have appearing?

Let me get appearances first from the main parties. For the debtor this morning, who is appearing?

MR. GAMEROS: Good morning, Your Honor. Bill Gameros for NexPoint Real Estate Partners f/k/a HCRE.

THE COURT: All right. Thank you.

For Highland, who do we have appearing this morning?

MR. MORRIS: Good morning, Your Honor. John Morris, Pachulski Stang Ziehl & Jones for Highland Capital Management, L.P.

THE COURT: Good morning.

All right. I'm guessing these are our only appearances. These are the only parties involved who filed pleadings. If there is anyone who felt the need to appear, go ahead.

(No audible response)

THE COURT: All right. Well, I don't know if you all have talked about the sequence we are going to take things this

morning. Obviously, the first filed motion is HCRE's motion to withdraw proof of claim. But we have a discovery dispute and I think -- well, we've got Highland objecting to the motion to withdraw the proof of claim, but I think the backup argument is at the very least let us take discovery before you rule on the motion to withdraw proof of claim.

So have you all talked about who's going to go first on this one?

MR. GAMEROS: Your Honor, we haven't spoken about it, but it makes sense to me that if we withdraw the proof of claim, it moots everything else. And I think that's really what we ought to do, take it all at one time.

THE COURT: All right. Mr. Morris, do you agree on that sequence?

MR. MORRIS: I'm happy to cede the podium and let Mr. Gameros go first since he filed the first motion, but I do think that Your Honor had your finger on the pulse that before -- either the motion should be denied for the reasons set forth in our papers or we should be permitted discovery.

THE COURT: All right.

With that, Mr. Gameros, I'll hear your opening statement and hear what your evidence is going to be.

MR. GAMEROS: We didn't file any evidence today. We just simply want to withdraw the proof of claim. I think that we've satisfied the Manchester factors.

Quite frankly, there's only been the filing of the proof of claim and a scheduling order entered. Since I've been involved in it, we've only had the scheduling order entered. Anything else that's happened in this case was a motion to disqualify that precipitated our appearance. We filed the motion to withdraw. There's no summary judgments pending, no dispositive motions pending.

Quite frankly, we've looked at it as the company continued to operate. The things we were worried about happening didn't happen. And as a result, we decided we don't need the proof of claim, we don't want to continue it because I think we satisfy Manchester. If the Court has any concerns at all, A, the debtor's reorganized so proceeding with our proof of claim or withdrawing it doesn't affect it and, B, you can conditionally withdraw with a forecredudous [*sic*] order withdrawing the proof of claim.

But, quite frankly, I don't think we could amend it and we passed the claims bar date. So the Court should simply allow NexPoint Real Estate Partners to discontinue pursuing a proof of claim that they don't want to continue anymore. Everything else falls after that. That's it.

THE COURT: All right. Well, assuming the Manchester factors apply here, you're not going to have any evidence on any of these factors?

MR. GAMEROS: I don't believe that we need to have

evidence on those. The only one that could possibly be at issue is one that the debtor might be able to bring but they haven't, and that's actual legal prejudice.

The withdrawal of the proof of claim here essentially says they win. And they've objected to our proof of claim, and now we're withdrawing it. So the proof of claim is resolved in their favor except we're withdrawing it instead of going through all of the exercise to get to a hearing where we don't want to pursue the proof of claim anymore.

THE COURT: All right. But is it a withdrawal that you seek with prejudice with any bells and whistles about future preclusion of litigation?

MR. GAMEROS: Your Honor, the proof of claim -- I know the Court knows this, it's its own type of proceeding. This isn't a adversary proceeding or a different kind of lawsuit. It's simply a proof of claim, and we know we're not going to be able to amend it, we're not going to be able to re-assert it because it's after the bar date. That's why the Court should allow the withdrawal and, to the extent the Court wishes to condition it, condition it with prejudice. That's it.

THE COURT: Mr. Morris, I'll hear from you.

MR. MORRIS: Thank you, Your Honor.

Before I begin, I'd like to move into evidence Exhibits 1 through 6 that appear at Docket 3485 and 3486.

They're mirror images of each other. They're duplicates of each other, Your Honor.

But because our motion -- our objection to the motion for a protective order and the cross-motion to compel were filed as one document, the Court had us file it basically twice so that one is serving as the objection to the motion for the protective order and the other is serving as the cross-motion to compel. And so you'll see at Dockets 3485 and 3486 duplicate declarations from me with Exhibits 1 through 6.

THE COURT: All right. Any objections?

MR. GAMEROS: Your Honor?

THE COURT: Any objection?

MR. MORRIS: And then -- and then, Your Honor?

THE COURT: I'm sorry, I did not hear what Mr. Gameros said.

MR. GAMEROS: Your Honor, we don't object.

THE COURT: All right.

MR. GAMEROS: We don't necessarily believe it's relevant, but we don't object to its admission.

THE COURT: All right. They'll --

MR. MORRIS: And then, Your Honor, we've got --

THE COURT: Docket -- Exhibits 1 through 6 are admitted.

Go ahead.

(Debtor's Exhibits 1 through 6 admitted into evidence)

MR. MORRIS: And then at Docket 3488 we have another declaration under my signature with Exhibits 1 through 16, which are offered in opposition to HCRE's motion to withdraw their proof of claim.

THE COURT: Any objection?

MR. GAMEROS: No, Your Honor.

THE COURT: Okay. Those exhibits and that declaration are admitted, as well.

(Debtor's Exhibits 1 through 16 admitted into evidence)

MR. MORRIS: So, Your Honor, if I may, please, you know, the lack of evidence and the dismissiveness with which HCRE is approaching this proceeding is alarming.

We have litigated for two years. We were forced to move and litigate vigorously a motion to disqualify our prior counsel even though we put into evidence a document that said Wick Phillips represents Highland Capital Management. We were still forced to do that. We were forced to engage in expert. We were forced to have a hearing on this.

We have gone through discovery not once but twice. We have fulfilled every single obligation that were were required to fulfill under the scheduling orders. We have engaged in two rounds of written discovery. We have offered up every witness that has been noticed. We have produced thousands of pages of documents.

We took discovery from third parties, and this is

really important for a number of reasons, Your Honor. We served subpoenas on BH Equities. BH Equities is not subject to the jurisdiction in Dallas, so we served the subpoena. We took the deposition.

They can't be compelled to testify at a hearing. HCRE chose not to ask any questions. The accounting firm, they chose not to ask any questions. Discovery is over, okay. I hear Counsel talk about the proof of claim. We need -- and this is where the prejudice comes in. We need an order on the merits. We need to know that HCRE is never going to challenge again Highland's 46.06 percent interest in SE Multifamily. That's what we need, because that's what we were about to get and they know that. And that's why they're folding their tent.

We informed them that we were moving for summary judgment. In fact, just seven days before they filed their motion, we negotiated a stipulation in order to extend the expert discovery deadline so that they could file an expert report while preserving Highland's ability to move for summary judgment. HCRE knew this when it filed its motion.

Discovery is now closed. There's only three things left to do. There's four things left to do: take the deposition of Mr. Dondero, Mr. McGraner (phonetic) and HCRE and have a hearing on the merits.

I want to say right now, Your Honor, Highland is willing to forego its right to move for summary judgment. We

don't need to take that step. Let's just proceed. This motion should be denied. They offer no evidence whatsoever. Let's just proceed with the three depositions because discovery is otherwise closed and let's have a one-day trial live in your courtroom, Your Honor. We could have this done in six weeks.

The legal prejudice is enormous. We've set it out in our papers. Our evidence supports it. But I want to just highlight a few things. Again, I hear vagueness here. I hear you can dismiss the proof of claim with prejudice, but somehow I get the feeling from their papers from the cases that they cited to, from the quotations that say just because we get a tactical advantage doesn't mean that the motion should be denied, just because we may choose to file this in a different forum.

And that's the question that I really hope the Court will ask Mr. Gameros. Is HCRE waiving its right to ever challenge this again because if you can't get an unambiguous answer to that question, the motion must be denied because that's the prejudice.

But there's more prejudice, too. They've taken our deposition and based on what Mr. Gameros just told you, based on what's in their papers, they perceive something that happened in that deposition as being advantageous to them. If this Court were to consider dismissing this case with prejudice, it should do so on the condition that that

transcript cannot be used for any purpose at any time anywhere because otherwise it's not fair, otherwise we've been prejudiced by them being permitted to take our deposition but foreclosing us from taking their deposition. Either the playing field needs to be level or that deposition transcript should never see the light of day.

That's condition number two, not just the dismissal with prejudice here, we need an ironclad commitment that HCRE is irrevocably waiving its right to challenge Highland's interest in SE Multifamily because that would be the result if this went to trial. And that transcript of Mr. Seery as Highland's 30(b)(6) witness should never see the light of day because they're playing games. They want to use that for some other purpose. And if they want to do that, that's fine, but I get to take their depositions. The playing field has to be level, Your Honor.

We have spent hundreds of thousands of dollars on this case. The excuse that they're giving, the reason that they're giving for dismissing the case at this time makes no sense whatsoever. There's nothing in the proof of claim, nothing in the pleadings. There will never be any evidence.

There's no affidavit suggesting that Highland was interfering with SE Multifamily, that Highland threatened to interfere with SE Multifamily, that until this motion was filed that HCRE had any concerns whatsoever that Highland would be

engaging in wrongful conduct. There will never be any evidence whatsoever that HCRE ever took any steps to protect itself from this so-called interference that they're now so fearful of.

And I do want to -- I have to ask this question, Your Honor. If HCRE believed that they were at risk on Wednesday, August 10th, so that they had to take Mr. Seery's deposition, what happened after that that caused them 48 hours later to file this motion with no notice whatsoever?

It's not right, Your Honor. So let me get to the substance. This is not a motion under Rule 41. Under Rule 41, plaintiffs sometimes have the right, the unilateral right to withdraw a pleading. HCRE has no right to that today. Rule 3006 is very clear. When there is a proof of claim that is contested, the proof of claim can only be withdrawn with court approval after a hearing and subject to whatever conditions the Court decides are appropriate.

And that's to protect the integrity of the process. And that's what we're asking the Court to do, to protect the integrity of the claims resolution process.

It is a fact-intensive inquiry. In this district, as HCRE has pointed out, there is precedent, the Manchester case, that sets forth a long list of factors that a court could consider in the face of such a motion. As we explain in our opposition, we believe that every single one of those factors weighs in favor of denying the motion.

I'm going to go through just a bit of it, Your Honor, because I think it's very important that everybody see exactly what's happening. In contrast to the lack of evidence by HCRE, we have all of the exhibits that have just been admitted into evidence here. The claims stated, the proof of claims, start with the proof of claim, stated that some or all of Highland's interest in SE Multifamily might be the property of HCRE.

It's a proof of claim that was signed by Jim Dondero. It was signed under the penalty of perjury. There is no good-faith basis for that proof of claim to have been filed, none whatsoever. If you take a look at their response to Highland's initial objection which can be found at Exhibit 7 on the initial docket, we'll put it up on the screen jut -- here's Exhibit 7 from Docket Number 3488.

And this is HCRE's response. And if we can go to Paragraph 5. This is the -- this is really their response here. And it says:

> "After reviewing what documentation is available to HCRE with the debtor, HCRE believes the organizational documents relating to SC Multifamily improperly allocates the ownership percentages of the members thereto due to mutual mistake, lack of consideration, and/or the failure of consideration. As such, HCRE has a claim to reform, rescind, or modify the agreement."

This is their proof of claim, that there was some mistake that happened in the drafting of the SE Multifamily documents. There is no good-faith basis for this proof of claim. There is no good-faith basis for this response that's up on the screen. And let me show you why.

If Your Honor had an opportunity to review BH Equities' deposition transcript, at least the portions that we specifically cited to, BH Equities is a truth third party. They're the only third party that is a member of SE Multifamily. I took their deposition. They retained Dentons. They produced documents. They acted professionally.

And their witness testified up, down, and sideways that from their perspective, it was a bilateral negotiation with them on one side and the grand Highland on the other side and that Highland drafted the ultimate agreement, the amended and restated LLC agreement.

It's an issue that is not in dispute. Highland drafted the document. People working on the Highland platform in the spring of 2019 when Mr. Dondero was in control, solely in control of Highland and HCRE.

So they say in that response and in the proof of claim that the allocation, the allocation is the allocation of the membership interest in SE Multifamily, they say, oh my goodness, that allocation was wrong because Highland only put in $49,000. And Mr. Dondero signed the agreement.

Let's take a look just quickly at Exhibit 5, and let's see how it's possible that Mr. Dondero could swear under oath that he made a mistake. If we can go to Schedule A.

Take a look at this, Your Honor. This is Schedule A. It's about a page or two after Mr. Dondero's signature. It has the percentage interest that he says was a mistake as if he didn't know the capital contribution that Highland put in. And if we got to a trial, Your Honor, we would show that Highland actually reached into its pocket for the $49,000. HCRE, in contrast, borrowed all the money, even though Highland was on the hook for the obligations to Key Bank.

But, nevertheless, here it is. It's in plain, plain, plain terms. The numbers are next to each other. It's not just the percentage interest. It shows the capital contribution. I'd be really interested in asking Mr. Dondero did he review this. I suspect he'll say no because that's what he usually says. But doesn't that scream fraud? How do you say you made a mistake when the numbers are on that page? I don't understand it.

Yet, we've spent two years and hundreds of thousands of dollars litigating this case. But here's the thing, Your Honor, it's not just in Schedule A. If we could go to Section 1.7 earlier in the agreement.

And remember, this is a document that BH Equities says was drafted by Highland. Look at 7; 7 is company

ownership. That's the name of the section. Again, HCMLP has 46.06 percent. Is that a mistake? How did this -- somebody should explain how this mistake happened.

Let's go to Section 6.1. Section 6.1 is critical, and we'll see this in a moment. This is what's known as the waterfall. It shows how the distributions of cash from SE Multifamily are going to be made to its members. And you'll see in Section 6.1A that after certain things occur, cash is going to be distributed 46.06 percent to Highland. Another mistake, I guess, without explanation.

Section 9.3. Section 9 deals with liquidation and termination, and 9.3 is effectively the waterfall that's supposed to be in place upon a liquidation. And at the bottom of the waterfall in 9.3(e), not surprisingly, you see the exact same allocation.

So the allocation that Mr. Dondero swore under oath was the result of a mutual mistake was an allocation that appears in four separate places in a document that was drafted by people under his authority. Think about that. It's extraordinary. We spent two years litigating this case, and now they just want to go home.

But wait, there's so much more, Your Honor. I'm not going to go through all of it, but I want to just show you two other documents because these numbers are not in this document by accident. They're there on purpose.

If we could go to Exhibit Number 11.

So if you've seen from our papers and at all, Your Honor, Highland presented an initial draft of the amended and restated agreement to BH Equities on March 14th. It had to be completed by March 15th in order t make it retroactive to the prior August because that's for tax reasons. And you'll see up on the screen there's an email exchange from Mr. Broaddus at Highland to a fellow named Dusty Thomas at BH Management.

And it's two emails. The first one is sent on the afternoon of March 15th. And the important point is a little bit down where he says: "The contributions schedule in the attached needs to be updated with the actual contribution numbers."

So this is Highland telling BH Equities that the contribution schedule, which is Schedule A, needs to be updated so that the actual contribution numbers are in it. This is the mistake. This is the mistake, right. And notice that Mr. McGraner, I'm told is one of the Apex employees, he's got notice of this. He know exactly what's happening, right.

And Mr. Broaddus follows up. He follows up the next day and says the contribution schedule is attached. Well, let's take a look at what the contribution schedule is, if we can go to the next page. Look at that.

It's the same contribution schedule that appears in the final agreement. And this is just critical, Your Honor,

because this shows that Highland, people working at the direction of Highland are preparing this document and it's a stand-alone document. So it's not as if somebody can say, gee, you know, it got lost in the sauce, it was deep in the details, deep in the weeds and I just missed it.

The very purpose of the sending of this document was to show the other counterparty, BH Equities, exactly what the capital contribution and percentage interest were going to be, not just the percentage interest but the capital contributions.

Later on that day, if we can go the next document, Exhibit 13. BH Equities was very concerned about the waterfall. They wanted to make sure that they were going to get back their capital before other distributions were made. And you can see here this is an email from Mr. Thomas back to Mr. Broaddus where he raises this issue, and I'll just kind of cut to the chase. Attached to Mr. Thomas' email was a proposal that BH Equities had made the prior fall with respect to the waterfall.

There's no dispute that Mr. Broaddus on behalf of Highland, the big Highland, rejected BH Equities' proposal. And if we can go the prior page and see exactly what they did in response. Instead, you can see Mr. Chang, Freddie Chang, another member of the Highland complex, with a very private email to Mr. Broaddus, right, BH Equities isn't even copied on it. And he comes up, it's labeled 6.1, but this is what

becomes -- it's labeled 1.1, but this is what becomes 6.1 in the actual agreement. This is the waterfall. This is Mr. Chang and Mr. Broaddus exchanging an email with a new version of the waterfall that they wanted. And the new version that they wanted shows in Section 1.1(a) here that Highland was going to get 46.06 percent of the distributable cash as set forth therein.

A mistake? A mutual mistake when people working under Mr. Dondero's direction drafted these documents in specific -- as part of a negotiation? This is about the only thing that was the subject of a negotiation.

And, of course, there's more because if you take a look at the deposition transcript that we cited from BH Equities from BH Equities' perspective, Section 1.7, 6.1, and 9.3 and Schedule A all reflects the parties' intent. And that deposition is closed, right. I mean they chose not to ask any questions. They didn't challenge that. There is no good-faith basis for this proof of claim to have ever been filed. And that, Your Honor, is the definition of vexatiousness, and that is one of the Manchester factors.

Another one of the factors is the extent to which the suit has progressed. Other than the depositions that they unilaterally shut down, the only thing left was either a summary judgment motion or a trial. Again, discovery is over. Highland has fulfilled its obligations. There is nothing left

to do here except to take three depositions and have a trial on the merits. So the suit has progressed far.

Duplicate of expense of re-litigation, are we really going to do this again? Are they really going to get the benefit of new discovery in a new lawsuit somewhere else that's not a proof of claim but that somehow tries to recraft it because we've seen stuff like this before from Mr. Dondero. He's going to say, oh, that was just a proof of claim, that's a different standard that somehow, you know, I can bring a different claim in a different court at a different time. We're going to do this again? I hope not.

How about the adequacy of the explanation? They concluded that Highland wasn't interfering. Where was the evidence that Highland ever interfered? Where was the evidence that Highland ever threatened to interfere? Where was the evidence that HCRE ever expressed a concern that Highland would interfere? Where's their application to the Court for some kind of protective order or some type of protection, some type of injunction relief to prevent us from interfering? There's nothing.

HCRE filed this -- and I'll have to speculate here because they're not -- I don't thing they're being candid with the Court. They filed it because they hoped to do this trial in a different forum at a different time elsewhere.

They're shutting it down because they know that their

witnesses are going to be asked questions that are going to further buttress Highland's claims to breach of contract, going to get into some serious tax questions where even BH Equities wouldn't even rely on the K-1s that HCRE caused to be prepared. Really tough questions.

I know they want to get out now, but they never should have filed the proof of claim. And forcing Highland to go down this path to incur this expense, to take our deposition and then try to shut the door, can't think of a better fact scenario for the denial of a 3006 motion than we have here.

Look at just what happened in the seven days before they filed their motion because it is extraordinary, and I didn't even put everything in the papers because one of the things I forgot to put in is Mr. Gameros sent to me seven days before the motion the 30(b)(6) notice for Highland. So that's sent on August 5th.

On August 5th, we finish negotiating and sign a stipulation that extends the expert discovery deadline to allow them to call an expert which we think had no merit which is why we reserve the right on the motion to strike because we don't think -- as described to us at the time, but nevertheless, we reserved our right to either make a motion to strike or to proceed right to summary judgment. It's all in the stipulation that we negotiated, that we signed on behalf of the clients, and that Your Honor's approved just two days before this is

filed.

I think Mr. Seery's deposition was the 10th. At 4:00 on the 9th, HCRE produced over 4,000 pages of documents like six weeks after the deadline, right. And Counsel and I spent the next 24 hours -- you know, I was pretty upset, I'll admit it, but you've got -- you know, it's in the record, you know, what my written responses were. And I tried very hard to avoid motion practice, and I tried very hard as I always do to try to come to a reasonable resolution. And we actually got to that point just moments before Mr. Seery's deposition. And then they take Mr. Seery's deposition.

So think about it. They serve a 30(b)(6) notice, they take a deposition, they produce 4,000 pages of documents, they negotiate and sign a stipulation to extend the discovery deadline, the Court takes the time to review the stipulation, orders it. All of this happens within seven days of their motion, two days after they take Mr. Seery's deposition and just two days before I'm scheduled to take their client's depositions.

Based on the complete lack of evidence on HCRE's part and the evidence that I've just shown the Court, we believe the Court should simply deny the -- deny all three motions, you know what I mean? Let's just cut to the chase, let's take three substantive depositions, and let's set a trial date. That, I believe, is the most appropriate result here.

If the Court is not inclined to rule on the motion to withdraw, the Court should then deny the motion for a protective order and grant our cross-motion to compel the depositions on this motion. I assure the Court that if the Court decides to follow that path, my questioning will be limited to the Manchester factors. And I won't get into the substance because that wouldn't be ripe.

The first question is whether or not they have a right to -- whether the Court should grant their motion to withdraw, and I will limit my questioning if we go down, you know, option B to those questions, to the Manchester questions, right. There's no question that we have the right to discovery. They filed a motion. We filed an objection. We now have a contested matter under the bankruptcy rules. We're entitled to discovery.

I want to address, I guess, on this topic some of the issues that were raised in the motion for the protective order. They say, oh, we didn't serve the witnesses. That's easily -- well, first, I would point out that if you looked at Exhibit 1, you know, Counsel previously accepted service of subpoenas on Mr. Dondero and Mr. McGraner's behalf. Maybe he's got an explanation why he did it before but he won't do that now. But if that's the way HCRE wants to do it, we'll hire professional process servers that can -- that give us a couple of weeks and we'll find them. We'll find them. And if not, we'll get the

adverse inference.

They said we didn't give enough time, that we didn't take into account their scheduling. Just look at Exhibit 4, Your Honor. I specifically wrote to Counsel, it's there in writing. You know, it's there in writing. If you need an accommodation, let me know. Let me know if the dates and times work. I have flexibility. I told him that in writing. And yet, the reason the Court should enter a protective order is because we didn't give them sufficient time or we wouldn't take into account their schedules.

We've got all the time now, Your Honor. I'm actually not available next week, but after that, I can take these depositions any time the last week of September, the first week of October, whatever is convenient for them. That is no reason to grant a protective order.

And then, finally, this notion that, you know, Mr. McGraner and Mr. Dondero are some Apex employees, Your Honor, HCRE has no employees. None. Mr. Dondero signed the original LLC agreement. He signed the amended LLC agreement. He signed the proof of claim. Who else should I be deposing? Mr. McGraner owns a substantial interest of HCRE. He's on the emails that show he had contemporaneous knowledge that people working in the Highland complex were drafting Schedule A in a manner that was ultimately accepted not just by Highland and HCRE but by a third party, BH Equities.

There's nobody to depose other than Mr. McGraner and Mr. Dondero. I mean I guess Mr. Ellington, I haven't thought about that. He is a five percent owner. But for a company with no employees, who else am I supposed to depose?

Finally, Your Honor, I've taken probably enough time here. But option C, right, I think this just be denied outright. If not, we should at least be permitted to get some discovery before the Court rules on the motion. Option C, if the Court really wants to dismiss this -- grant the motion in any respect, there ought to be severe conditions on it.

It has to be a dismissal on the merits. It has to be a dismissal that pays Highland its reasonable legal fees incurred for this waste of time. And it has to be conditioned on the fact that Mr. Seery's deposition transcript will be barred from use in any proceeding going forward or they have got to show up for the depositions to level the playing field.

So that's where we are, Your Honor. Three choices. You know, they're in the order that we think are most appropriate. But I've got nothing further at this point, Your Honor.

THE COURT: All right. A couple of questions for you.

You've represented as an officer of the Court that your client, the estate, has incurred hundreds of thousands of dollars of attorneys' fees and costs relating to this proof of

claim. Is that correct?

MR. MORRIS: Yes, Your Honor.

THE COURT: Okay. And I'm just curious, did this claimant, HCRE, file other pleadings during the Highland case, like objections to the plan or -- I remember discovery disputes when Wick Phillips was involved in the main case. But I'm just curious, did you look at other times they may have participated as a party, a creditor?

MR. MORRIS: In all candor, Your Honor, I haven't --

THE COURT: Okay.

MR. MORRIS: -- looked at that. My memory, which could be wrong, my memory is that they did file other things, although it's possible I'm just confusing it with Wick Phillips representing different entities of Mr. Dondero. But I believe that Wick Phillips was involved in other matters. I think HCRE filed other things, but I don't know off the top of my head.

THE COURT: Okay. So the representation that hundreds of thousands of dollars were spent on this proof of claim dispute, I mean you're zeroing in on this proof of claim dispute. Is that correct?

MR. MORRIS: One hundred percent limited to this proof of claim.

I mean think about what we did here, Your Honor. We had a whole litigation over Wick Phillips. Both sides retained experts. We took fact discovery. We participated in written

discovery, something that never ever should have happened. But we were forced to do that, and I do include that as part of this.

What else have we done? Because I think it's -- I think Your Honor's asking a fair question, like how do you get to that number. Before the Wick Phillips' disqualification motion and the reason that we got to that point is we had engaged in written discovery. And this is back in the spring of 2021. We served, you know, document requests, we served requests to admit, we served interrogatories. All of that was answered.

We produced thousands of pages of documents at that time. And it was in preparing for the depositions that were then scheduled that we saw in the documents the conflict that Wick Phillips had. So we went though that whole process throughout the rest of 2021, completely unnecessary. Just completely unnecessary, but nevertheless, we did. We prevailed.

New counsel came in in January and did nothing, right. It took us six months to get to a scheduling order. It took me almost three months to get them to respond at all. But we did the whole thing again, and we went through more written discovery and more interrogatories and more requests to admit and more document requests. And we produced more documents.

We served subpoenas on Mark Patrick, on BH Equities,

on Baker Vigotto, the accounting firm that prepares the tax returns at the direction of HCRE on behalf of SE Multifamily. There's lots of negotiations in there. There's -- I mean Your Honor can see just how many times depositions were scheduled and rescheduled and rescheduled again to accommodate everybody's summer and business, right.

So we took the deposition of Mr. Patrick. We took the deposition of Barker Vigotto. We took the deposition of BH Equities. We defended Mr. Seery and his deposition. We took the time to prepare for that. We were reviewing the 4,000 documents that they produced belatedly, right. We're marshaling our evidence, getting ready for our summary judgment motion. We're negotiating amendments to scheduling orders at HCRE's request.

Yeah, we spent several hundred thousand dollars, Your Honor, for sure.

THE COURT: Okay.

All right, Mr. Gameros, do you have cross-examination of Mr. Morris?

MR. GAMEROS: I don't have cross-examination of Mr. Morris. I'd just like to respond to a few points if I could.

Is that permitted, Your Honor?

THE COURT: Oh, yes. I mean this was your chance to cross-examine Mr. Morris since he submitted a declaration with exhibits. But if you decline to do that, I think Mr. Morris --

MR. GAMEROS: Cross-examine Mr. Morris, Your Honor?

THE COURT: Just -- Mr. Morris, the reorganized debtor rests, right? I got the impression you were resting?

MR. MORRIS: Yes, Your Honor.

THE COURT: All right.

MR. MORRIS: Yes.

THE COURT: Mr. Gameros, now your chance for rebuttal.

MR. GAMEROS: All right.

First, in terms of hundreds of thousands of dollars of fees and the activity level since my firm appeared in January of 2022, I think we need to look back at the disqualification proceeding and remember that the estate was denied its request for attorneys' fees on the disqualification and that's in this Court's order.

If we proceed to trial, they won't be entitled to attorneys' fees for winning, if they do. There's no claim here that entitles the estate to shift its attorneys' fees to NexPoint. None.

And I think that's important. The relief that he's asking for, Your Honor, if you listen to what the estate's requesting, it wants to limit the use of Mr. Seery's deposition. It wants to have a trial. Now apparently they may not move for summary judgment. Okay. Things that they would like, but all they get is a ruling on a proof of claim. And

we've already said the Court should allow us to withdraw the proof of claim and condition it with prejudice.

There is no other lawsuit out there. There is no other position being taken anywhere. Frankly, Your Honor, the reason why I said admit the exhibits and I question their relevance is because none of them go to actual legal prejudice. Can't show it, hasn't shown it, hasn't demonstrated it. It says they did a lot of work, gave you the greatest hits of some email, but quite frankly, Your Honor, that goes to merit, not legal prejudice. That goes to, I believe, part of their story as to what happened.

The story that matters to me is we think things were going to happen during the estate, he's right. We didn't move for them. We looked back at it and said we don't need the proof of claim anymore, we should withdraw it. That's the only thing that's happened, and that's why we're here. We don't think he's entitled to discovery as to why we withdrew the proof of claim.

It's his burden to show legal prejudice. He can show it or he can't. He hasn't.

THE COURT: Okay.

MR. GAMEROS: The estate hasn't.

THE COURT: Mr. Gameros?

MR. GAMEROS: (Indiscernible) Mr. Dondero.

THE COURT: I have a question. I mean I'm looking at

your pleading, your motion to withdraw the proof of claim, and I'm looking at this wonderful chart you have on Page 7 saying here are the standards under Bankruptcy Rule 3006, you, Court, should consider. They were articulated in the Manchester case.

And it's not merely about is there any prejudice to the estate. I mean you set forth five factors. One is "reason for dismissal." One is diligence in bringing the motion to withdraw. One is undue vexatiousness. One is the matter's progression including trial preparation. One is duplication of expense of relitigation.

This is your own authority, which I believe actually is correctly articulating the standards. It's not just about prejudice. Yes, I agree that some of the case law has zeroed in on that one in particular. But I mean you say yourself reason for dismissal is a factor the Court must consider.

MR. GAMEROS: That's correct, Your Honor. Those are the factors, and I think our analysis on them is correct.

If we go all the way to trial and the result is that our proof of claim is denied, we're in the same position we are right now. So why should the parties, the estate, and the Court go through that exercise?

THE COURT: Okay. Well, that's another issue, I think, other than the reason for dismissal. But a follow-up question to what you just said is this.

Would you agree to a condition on the withdrawal of

your proof of claim that your client agrees that Highland has a 46-point whatever it was percent interest in SE Multifamily Holdings and your client waives any right in the future to challenge that interest?

MR. GAMEROS: Your Honor, if that's what the Court wants to put in an order and I have a chance to confer with my client on it, I'm pretty sure that would be agreeable.

THE COURT: Today's the day. I'm not going to continue. I've got, you know, the whole day booked if I needed it because I wasn't sure what you all were going to want to put on.

MR. GAMEROS: Your Honor, we'd agree with that.

MR. MORRIS: Your Honor, I'm sorry to interrupt, but a waiver of any appeal, too. I just hard that if that's what you want to put in the order, that's okay. But this case has to end, and that's what we're looking for.

We're a post-confirmation estate that will not go forward with the possibility hanging over its head that it may be divested of this asset. That is what this proof of claim and this dispute is about.

And what the debtor needs in order to avoid legal prejudice is the complete elimination of any uncertainty that it owns 46.06 percent of SE Multifamily. And if HCRE is not willing to give that comfort today, we again renew our request for a direction that the three HCRE witnesses appear for

substantive depositions and we get this on the trial calendar.

MR. GAMEROS: Your Honor, we'll agree to it.

THE COURT: Well, you know what, this is such a big deal I really need a client representative to say that. It would be that --

MR. GAMEROS: I don't have one here today, but I can get you one.

THE COURT: How soon --

MR. GAMEROS: Do you want me to file a stipulation or an affidavit?

THE COURT: Pardon?

MR. GAMEROS: Do you want me to file an affidavit?

THE COURT: Well, let's be a hundred percent clear. Your client would state that with the granting of the motion to withdraw proof of claim number 146, HCRE is irrevocably waiving the right to ever challenge Highland Capital Management's 46 percent interest -- and I know it's 46-point something -- 46 percent interest in SE Multifamily Holdings, LLC and is, likewise, waiving the right to appeal or challenge the order to this effect.

MR. MORRIS: Your Honor, if I may, perhaps we can take a ten-minute recess and allow him to consult with his client and perhaps get a client representative on the phone who can make that representation?

THE COURT: All right. Mr. Gameros, you think you

can get a client rep on the WebEx?

MR. GAMEROS: I'm pretty sure I can, Your Honor.

THE COURT: All right. Well, how about we take a 15-minute recess. Does that sound a reasonable amount of time? We've got, you know, two dozen people --

MR. GAMEROS: It does, Your Honor.

THE COURT: Two dozen people on the WebEx. I don't know if maybe one is a client representative, but we'll take a 15-minute break and I'll come back. Okay.

THE CLERK: All rise.

(Recess at 10:33 a.m./Reconvened at 10:50 a.m.)

THE CLERK: All rise.

THE COURT: Please be seated.

We're back on the record in Highland.

Mr. Gameros, how did you want to proceed now?

MR. GAMEROS: Your Honor wanted me to get a representative of NexPoint Real Estate Partners to state that they agree that the estate has its 46 percent interest in the company agreement subject to the company agreement. And I've got Mr. Sauter here who has authority to speak on behalf of NexPoint Real Estate Partners.

THE COURT: All right. Well, so what is his position with HCRE?

MR. SAUTER: Your Honor, I don't have -- this is DC Sauter. I don't have an official position with HCRE, but I

have spoken with Mr. Dondero and he has authorized me to appear here today and agree to the conditions that Mr. Gameros just outlined.

THE COURT: All right. Well, it sounds like hearsay to me. I don't know -- Counsel, let me have you both respond. You know, I worry about this will fall apart the minute Mr. Dondero is instructing a lawyer, I never agreed to that. I mean I just don't know. This is highly unusual.

First --

MR. GAMEROS: Your Honor, if I might?

THE COURT: Please.

MR. GAMEROS: Mr. Sauter is an officer of the Court. He works, you know, with Mr. Dondero at his business at NexPoint; certainly an authorized agent on behalf of NexPoint Real Estate Partners to make this agreement on behalf of NexPoint Real Estate Partners.

To the extent that the condition that you originally described as a conclusory matter, in other words, how to end the withdrawal, we already agreed to that, that we also can agree on the record to waive any appeal. Mr. Sauter is authorized to agree to that, as well.

So I think as an agent and a lawyer on behalf of NexPoint Real Estate Partners, he's fully able to do that.

THE COURT: How do I know he's able to do that?

And, by the way, if Mr. Dondero is in I guess the

last 15 minutes given him authority to testify before the Court, why couldn't Dondero just get on the WebEx himself?

MR. SAUTER: Your Honor, I think he felt more comfortable with me being a lawyer agreeing to those terms so that he wouldn't misstate something. He has been listening. I believe he's still on, although I'm not certain.

THE COURT: Mr. Morris, do you want to respond? I mean I'm not sure, frankly, I care what you say, no offense. I don't think I have a person with clear authority here.

MR. MORRIS: I'll just be quick and say I agree.

THE COURT: Okay. Mr. Gameros --

MR. GAMEROS: As an attorney for NexPoint Real Estate Partners, I have the authority to make that agreement on the record and it be binding. Mr. Sauter is confirming that authority having spoken with Mr. Dondero about it.

I think that the Court is fully --

THE COURT: Mr. Gameros --

MR. GAMEROS: -- capable of doing that --

THE COURT: Mr. Gameros, come on. You know this is the client's decision to make. Okay. I don't have a client representative. I don't have an officer or controlling equityholder as evidence here of --

MR. MORRIS: Mr. Dondero --

THE COURT: -- the willingness to make the agreement. Pardon?

MR. MORRIS: Can Mr. Dondero make the representation on the record to the Court that he is authorizing Mr. Sauter to waive any claim that HCRE has to Highland's 46.06 percent interest in SE Multifamily along with any appeal? This is just step one. But if Mr. Dondero was on the phone, let him speak up and make it crystal clear that he is delegating the full authority to Mr. Sauter to negotiate and enter into this consensual order on behalf of HCRE.

THE COURT: All right. Mr. Gameros, do you want to give your client authority to speak up? Your client representative, someone who's actually an officer or a controller or equity owner?

MR. GAMEROS: Your Honor, if Mr. Dondero can do that, that would be great. I don't know if he's in a place where he can do that.

THE COURT: All right. Mr. Dondero, if you can hear us, are you willing to give some quick testimony in that regard?

(No audible response)

MR. DONDERO: I can't see the box --

UNIDENTIFIED SPEAKER: Surprising that -- surprising he was on the phone before, but now he's not after delegating. Just I'm not --

MR. SAUTER: Your Honor, he's on the phone. I'm just -- if you will give me a minute, I got to run around the corner

and try to make sure he knows how to unmute himself.

THE COURT: Star 6. If he's on a phone, star 6 is the way to unmute himself. But I want to see video, too.

THE OPERATOR: There we go. Try again.

MR. DONDERO: Hello?

THE COURT: All right.

MR. DONDERO: Hello?

THE COURT: Mr. Dondero, is that you?

MR. DONDERO: It's me. I've been on the entire time.

THE COURT: All right. Can you turn your video on, please?

MR. DONDERO: I am on my cell phone.

THE COURT: Okay. Well, so I guess you just called in on your cell phone, you don't have a WebEx connection on your cell phone?

MR. DONDERO: I don't have a WebEx.

THE COURT: Okay. Well -- yeah, it sounded like you were in the same office as Mr. Sauter. Is that -- did I misunderstand?

MR. DONDERO: We work in the same office. I'm in my car. I just stepped out of my car.

THE COURT: All right. Well, this is not ideal, you know, without us seeing you. But I'll go ahead and swear you in. All right. Can you hear me okay? I need to swear you in.

MR. DONDERO: Yes.

THE COURT: All right.

JAMES DONDERO, HCRE'S WITNESS, SWORN

THE COURT: All right.

Mr. Gameros, do you want to ask him the questions we need to hear answers on, please?

MR. GAMEROS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. GAMEROS:

Q Mr. Dondero, on behalf of HCRE, do you agree as a condition for withdrawing the proof of claim that HCRE will not challenge the estate's ownership or equity interest in SE Multifamily subject to the company agreement?

A Yes.

Q Do you agree that you will not appeal and that, therefore, HCRE is waiving any appeal right to that determination as a condition of withdrawing the proof of claim?

A Yes.

MR. GAMEROS: Those are the questions for Mr. Dondero.

MR. MORRIS: Your Honor, if I may?

THE COURT: Mr. Morris, you may.

MR. MORRIS: I'm very uncomfortable. I'm very uncomfortable with the inclusion of the language subject to the company agreement. It sounds like a very conditional waiver. We need an irrevocable unconditional admission by HCRE that

Highland owns 46.06 percent of SE Multifamily, period, full stop. If they want to keep conditions in there and make it conditional and make it subject to other things, let's please deny the motion and proceed to trial.

THE COURT: All right. Well, Mr. --

MR. GAMEROS: The equity that they own is part of the company agreement. It's not modifying the company agreement by saying.

THE COURT: Well --

MR. MORRIS: Our ownership is not subject to the agreement. We either have an ownership interest or we don't. Our rights and obligations as a member of SE Multifamily are subject to the agreement, but our ownership interest is not. And that's the ambiguity that we need to remove.

THE COURT: Okay. Well, Mr. Gameros, do you want to rephrase the question or are you not willing to make the agreement as specific as Mr. Morris says he needs it?

MR. GAMEROS: That's what I'm -- I guess I don't understand what his complaint is. If the estate owns 46 percent of the equity of SE Multifamily, it owns that subject to the company agreement. It's not a separate ownership interest. So I don't know what the problem is.

THE COURT: Okay. Let me try to phrase it as I understand it.

What I understand has been asserted in the proof of

claim is that what was set forth in the agreement was a mistake, okay. A mistake. And it sounds like you're using language that says we'll agree the agreement, you know, they have a 46 percent interest pursuant to the agreement. But that doesn't change -- that does not really zero in on the argument made in the proof of claim that there was a mistake in the agreement, right?

So you'd have to go broader to completely resolve the issues raised in your proof of claim and say we agree, Highland has a 46.06 interest in SE Multifamily and we agree that is correct and we waive any right to challenge it in the future and we waive any right to appeal this order.

MR. GAMEROS: And, Your Honor, if that's the condition, I guess my concern is that the 46 percent is still part of the company agreement. We agree not to challenge it on the basis of anything asserted in the proof of claim, that being mistake, lack of consideration, or failure of consideration. Their 46 percent is their ownership interest in SE Multifamily and HCRE won't challenge that.

Is that sufficient?

THE COURT: Well, I need to hear from your client. I mean he needs to be asked every which way from Sunday whether he is waiving the right to challenge Highland's 46.06 interest from now until eternity, okay. That's basically, you know, we either have that agreement or we'll just have a trial.

CONTINUED DIRECT EXAMINATION

BY MR. GAMEROS:

Q Mr. Dondero, do you agree that NexPoint Real Estate Partners will not challenge in any way the estate's interest in SE Multifamily, its 46-point whatever percent interest that is?

A I think the nuance is that agreement is okay in current as of today. But it's part of an operating agreement, and that percentage ownership can change due to capital calls and other things. And it could change over time. It's never in a partnership agreement fixed into perpetuity. And so no businessman can agree to that.

If the Court wants it fixed into perpetuity, that would be very odd.

MR. MORRIS: Can we go to trial, Your Honor? Can we just deny the motion and go to trial? Let me have my depositions and go to trial. This is -- if Mr. Dondero wants to take that position, he's welcome to do that. But I'm entitled to finality, and I'd like to get there.

THE COURT: All right. Well, Mr. Gameros, anything else you want to ask your client that you think might be helpful?

BY MR. GAMEROS:

Q Mr. Dondero, you desire to withdraw the proof of claim. Correct?

A Yes.

Q And you agree to an order denying the proof of claim with prejudice. Correct?
A Yes.
Q And can you agree that HCRE will not challenge the equity ownership of its member in SE Multifamily of the estate?
A Yes.

MR. GAMEROS: Your Honor, I think there it is.

THE COURT: Mr. Morris, do you have any --

MR. GAMEROS: He agrees.

THE COURT: -- do you have any follow-up questions --

MR. MORRIS: The waiver of the right to --

THE COURT: -- Mr. Dondero?

MR. MORRIS: The waiver of the right to any appeal whatsoever. And I do have -- you know, there are the other conditions that we mentioned earlier, right? Either they have to also agree that Mr. Seery's deposition transcript shall never be used for any purpose at any time or they need to level the playing field and submit their witnesses to examination.

The playing field needs to be level here. Either if they want to use that deposition transcript for some purpose, I have no problem with that. Just let me take my depositions. If they don't want to submit their witnesses to depositions, then they also have to agree that that transcript will never be used for any other purpose. It's as if this proof of claim has never been filed, right, for that purpose, right. Because

that's just not fair. That's the legal prejudice.

How do you take my client's deposition on Wednesday and file this motion on Friday knowing your client's supposed to be deposed on Tuesday? Level the playing field. That's conditional number two.

And condition number three, frankly, Your Honor, this proof of claim was fraudulent. I mean my client has been damaged. My client has spent an enormous amount of money on this, and I'd like them to agree to if not make us whole, you know, do something because it's wrong. It's just wrong that Mr. Dondero files proofs of claim under penalty of perjury that have absolutely no basis in fact.

It's distressing. I'd like those two last issues addressed, as well.

MR. GAMEROS: Your Honor, in terms of the Court's questions in terms of finality with respect to the membership interest in SE Multifamily, Mr. Dondero agrees with the Court. He's already said that he won't waive -- that he waives, rather -- I'm sorry, let me start again.

He has said very clearly that he has waived appeal of this order allowing the withdrawal of the proof of claim with the conditions that you asked for. I think you should grant the motion to withdraw and we can put an end to all of this.

THE COURT: Okay.

MR. MORRIS: Here's the thing, Your Honor. We know

there's going to be more litigation with HCRE. We know they've breached the contract. We know because the evidence is in the record. We know that Highland demanded access to books and records as is its contractual right back in June. We know that that notice was sent to all of Mr. Dondero's lawyers and HCRE's lawyers. And we know that that request has been absolutely categorically ignored. Okay?

We are going to --

MR. GAMEROS: This has nothing to do with the proof of claim.

MR. MORRIS: We are going to get -- well, no.

To be clear, Your Honor, that is what's driving this concern is because we know that there's going to be additional litigation. We know the tax forms are not accurate. We know there's already an existing breach of contract.

And what we're trying to make sure is that HCRE is not able to resurrect this concept that we don't have an ownership interest, that it's not 46.06 percent, that Mr. Seery made some admission that they're going to use in some future litigation. That's the prejudice, okay.

So I think step one is (indiscernible), but then we need either an agreement that the transcript isn't going to be used elsewhere or that I get the deposition of the HCRE witnesses because it's unfair prejudice to use this process to take that deposition on Wednesday, August 10th and to file this

motion on Friday, August 12th. That is unfair prejudice for them to have taken my client's sworn testimony and then shut it down before I could take theirs.

So either eliminate it all or let it all in, right? It can't be. They can't possibly benefit from this.

THE COURT: Let me understand something, Mr. Morris, you just said. We know we're going to have future litigation. I mean I'm not asking for revelation of attorney-client privilege, but -- communications, but you kind of dangled it out there.

You're saying that the reorganized debtor intends to file litigation against HCRE because of what you think are breaches by it as manager of SE Multifamily of the existing agreement.

MR. MORRIS: The evidence is already in the record, Your Honor. We have -- Highland as a member of SE Multifamily has the contractual right to obtain access to inspect and copy -- those are the words, inspect and copy SEC *[sic]* Multifamily's books and records.

We made that request at the end of June. It's one of the exhibits that's attached that's in the record now. I made probably three different follow-up emails, and it's been completely ignored, okay.

HCRE is the manager of SE Multifamily, right. They're in control. They're the ones who dictate how the

accounting is done. They're the ones who dictate how distributions are made. They're the ones who dictate how tax forms are prepared. They have an obligation under the amended and restated agreement to cause SE Multifamily to prepare the tax returns. They're the ones who are in direct contact with Barker Vigotto.

There's a whole host of issues we're going to examine, but the one thing that I do know for certain, Your Honor, is that they are in breach of the agreement today because they have refused for three months now to give us what we're entitled to. And that is access to inspect and copy SE Multifamily's books and records.

So unless they agree to do that, and I mean pretty soon, we're not going to have any alternative. If you recall, Your Honor, Mr. Dondero's trust, the Dugaboy Trust, filed this valuation motion which we'll address in due course. I don't know where they got the number, but according to Mr. Dondero's trust, Highland's interest in SE Multifamily is worth $20 million. This is not a small asset. This is not harassment.

But they're not complying with their contractual obligation to give us access to inspect and copy SE Multifamily's books and records. For a $20-million asset where it's -- I mean they're conceding now that we're the owner of those membership interest. How can they deny us access?

And if they don't give us that access so that we can

verify the value of this asset, so that we can verify whether or not we've gotten the distributions that we're entitled to, so that we can verify that the profits and losses that have been allocated to Highland were actually proper and consistent with the agreement, I'm afraid that there will be further litigation, and that's why we need to -- we need to nail this down right now because I don't want to get a counterclaim that says we left the deal open to challenging Highland's interest in SE Multifamily. That door needs to close today.

THE COURT: Okay. All right. Well, I'm going to start out by saying we're in a very unusual procedural posture.

Before I forget, Mr. Gameros, I meant to mention this at the very beginning. The motion to withdraw the proof of claim of your client, you had an odd way of signing it. I wonder if this was a mistake or you always sign this way. You signed the pleading signature Charles W. Gameros, Jr., PC.

Is that -- was that inadvertent or do you always sign that way? I mean a lawyer's supposed to personally sign under Rule 11 a pleading. Was that just inadvertent or do you think that's fine?

MR. GAMEROS: I've used that signature block for over 20 years, and I've never -- no one has ever asked. I thought it was fine.

THE COURT: Okay. Well, no one's ever asked and you think it's fine. I think you need to go back and do some

research on that, okay. I'm not sure it's fine. I'm not sure it's fine.

I mean you would agree that you're personally bound under Rule 11 when you file a pleading, right?

MR. GAMEROS: Yes, Your Honor.

THE COURT: I mean I know it feels a little different if you're -- well, I don't know. You're not a -- you have a firm, Hoge & Gameros, L.L.P. I mean it wouldn't be appropriate for Mr. Morris to sign a pleading Pachulski Stang, right? He has to sign his name personally on a pleading, right?

MR. GAMEROS: Your Honor, I'll make that change.

THE COURT: Okay.

Well, so we're in an unusual procedural context. We I think all agree that Bankruptcy Rule 3006 is the applicable authority, and it provides that, you know, a creditor can't just withdraw a claim when there's been an objection filed to it. There has to be notice and an order from the Court.

And so we don't run into this situation very often, but I have seen it before. And as someone or both correctly noted, it is a rule that sort of goes to the integrity of the system. Filing a proof of claim is obviously a very significant act in the context of a bankruptcy case.

You file a proof of claim under penalty of perjury so it's a big deal from, you know, a criminal exposure standpoint

but it's also a big deal because we want to make sure only parties with legitimate claims are given a seat at the table, so to speak, in bankruptcy as far as, you know, their right to a distribution, their right to be heard in a case.

So, you know, that's the reason for the rule. We don't see it come into play very often, but it's there because we want to make sure that we protect the integrity of the bankruptcy process. And if someone files a proof of claim and it's pending and, you know, activity happens in the bankruptcy case as a result of it, that we don't just let a party say never mind.

So the Manchester case, which you both cited in your pleadings, has set forth fact-intensive factors -- fact-intensive inquiry. And, again, I'm just looking at HCRE's motion, Page 7. There was a chart and it sets forth the Manchester factors. Factor number one, diligence in bringing the motion to withdraw the proof of claim.

In Mr. Gameros' chart, his response to that factor is that HCRE brought its motion to withdraw immediately after conferring with debtor's counsel. I don't even know what that means, okay. But what I do know is in looking at diligence of bringing the motion, the proof of claim was filed April 8th, 2020. It was objected to, the proof of claim, July 30th, 2020. And then on August 12th, 2022, this motion to withdraw the proof of claim was filed.

So two years and one month after the objection was filed to the proof of claim HCRE withdraws it. So that doesn't seem very diligent. It's not diligent at all, to be honest.

Your second factor, you cited, Mr. Gameros, undue vexatiousness, and you say HCRE has not been vexatious in pursuing its proof of claim. And outside the motion to disqualify previous counsel, which is not substantive, everything in the matter has proceeded by agreement and there have been no hearings set or held.

Okay. Well, debtor has represented in its pleadings and today through counsel on the record that it has spent hundreds of thousands of dollars litigating this. It has mentioned that four depositions have been taken. It was Mr. Mark Patrick. It was the tax accounting firm. We had the B -- the entity -- BH Equities, LLC, their representative. And then Mr. Seery. So four depositions, and I'm told a lot of written discovery.

And on the day before the -- well, the day after, day or two after the Seery deposition, the motion to withdraw the proof of claim was filed after 5:00 in the evening on a Friday, August 12th, and I guess a couple of business days before the depositions were to occur of Mr. Dondero and the fellow, Mr. McGraner, and I feel like there was one other deposition. I'm losing track of those.

But --

THE CLERK: The 30(b)(6).

THE COURT: Oh, the 30(b)(6). The 30(b)(6) representative.

So on top of all of that, you know, Highland argues there was just simply no good-faith basis for the proof of claim. Proof of claim asserted the membership interest, Highland's 46.06 interest, set forth in the Multifamily LLC agreement were the result of mistake.

Mr. Dondero signed the agreement for both parties, HCRE and Highland. And then now the motion to withdraw says something to the effect of the anticipated issues have not materialized. So anyway, the undue vexatiousness factor I think weighs -- because of these factors I've mentioned, weighs in favor of there has been undue vexatiousness.

Factor number three, according to HCRE's motion to withdraw the proof of claim, is matter's progression including trial preparation. Again, four depositions, thousands of pages of written discovery. We were days away from the last depositions occurring, those of HCRE's potential witnesses and we have trials set. We have a trial set in November. So that factor, again, seems to weigh heavily in favor of Highland's objection here.

Duplication of expense of relitigation, here's why we got Mr. Dondero on the phone or wanted to have a witness with authority. Highland is saying we are concerned about

relitigation of this ownership interest issue. And as part of its argument, Highland has said we've got claims, we've got our own claims for breach of agreement and different things that are going to cause us to have to drill down on terms of the LLC agreement.

And we can't -- we don't want to face exposure on this issue of, well, you don't have the ownership interest or the rights you say you do, Highland. So, you know, if we could get ironclad language here of, you know, we waive the right, we agree that Highland has the 46.06 interest and we waive the right to challenge that, then I don't think we'd have to worry about relitigation of the issues in the proof of claim. But it feels like we had a little bit of reluctance to say it as forcefully as we would need to have it said to avoid relitigation.

Reason for dismissal, I don't know. I don't know what the reason for dismissal. Again, to quote HCRE's pleading on Page 7, the reason for dismissal is, "The operation of the company" -- I think that means SE Multifamily -- "during the case and the anticipated issues therewith have not materialized and NREP no longer desires to proceed in the matters raised in the proof of claim."

I mean that's just not in sync with the theory espoused in the proof of claim that we think there was a mistake made in the LLC agreement. So, again, looking at these

legal factors, I do not think that the correct result is to grant the motion to withdraw the proof of claim under Rule 3006 under the Manchester factors. I will throw in that I think there is potential for prejudice here of the debtor.

I mean not even considering that hundreds of thousands of dollars have been spent over two-plus years on this issue, you know, I remember very well the disqualifying motion. And I said Wick Phillips should be disqualified. I didn't shift fees because I just wasn't sure at the time that, frankly, HCRE should be imposed with the fees attributable to its lawyers, not recognizing the conflict of interest when they saw one. It was just a little fuzzy in my mind.

But I'm just letting you know that now that we are here many years later, many months later and we have all the sudden, okay, never mind, this is just a situation where I have some regrets I didn't shift fees, to be honest. But -- so the motion is denied. The depositions shall go forward. I'm not sure, you know, if the dates that have been proposed are still workable, but if someone wants to speak up now about those deposition dates to avoid an emergency hearing, I'm willing to hear that.

I think what I heard was, well, I don't know what -- have you talked about dates at all? Probably not, Mr. Morris, in light of this hearing today.

MR. MORRIS: We have not, Your Honor. But I do think

that Counsel and I can work that out. I'm not available until the week of the 26th. So it won't be early that week but sometime between let's say the 28th of September and the 7th of October, I'll be prepared to take these depositions. And I would respectfully request, and we can work with Ms. Ellison to try to find a trial date sometime the last week of October, first week of November so we can get this finished.

THE COURT: Okay. Did I dream up that there was a trial set already in November?

MR. MORRIS: You know what?

You know what, let's just keep that date, Your Honor. Let's just keep that date.

THE COURT: All right. Traci, are you still on the line? Can you confirm my memory? I thought we had a two-day trial set aside for this in November.

MS. ELLISON: Is this on the merits of HCRE's claims, Judge Jernigan? I have a note holding November 1 and 2.

THE COURT: Okay.

MR. MORRIS: Yeah.

THE COURT: So we'll go ahead and mark that down.

Now the last -- so you'll work on an a mutually agreeable date for these three remaining depositions sometime, you know, late September, early October. And I trust you will --

MR. MORRIS: Yeah. I would respectfully request that

Counsel just propose dates for the depositions. I'll wait to hear from him. But I think -- I'm representing to the Court that any time between September 28th and let's just give it two full weeks, October 12th. That's plenty of time in advance of the trial.

THE COURT: All right. Mr. Gameros, anything you want to add on that?

MR. GAMEROS: No, Your Honor. I'm sure we can work with Mr. Morris to get those scheduled.

THE COURT: All right. And here's actually the last thing I wanted to say.

You know, I had thought about, you know, waiting 24 hours to give you a ruling on this motion to withdraw the proof of claim and directing you all to kind of talk and see if maybe you could work out language, you know, without the pressure of the Court hovering over you that could make both of your clients satisfied.

I still encourage you to do that, but I'm going to pick on our U.S. Trustee. I see she's observing today, and I'm not going to ask you to say anything, Ms. Lambert. But if you all do agree, if you all in the next, you know, 24 hours come to some sort of agreement, I don't mean to be alarming, but I want it run by the U.S. Trustee because, you know, I've heard some things that have troubled me about the, you know, lack of good faith with regard to the proof of claim and, you know,

alleged gamesmanship.

And, you know, I talked earlier about this goes to the integrity of the system, you know, filing a proof of claim under penalty of perjury. Anyway, I'm feeling a little bit uncomfortable about signing off on an agreed order where there may be quid pro quos that went back and forth in connection with withdrawing a proof of claim. I mean at some point -- well, that's why we have scrutiny of these things under Rule 3006, right?

Again, there are integrity issues. And so I just -- you know, if you were to work out language, I want you to run it by Ms. Lambert and I want to hear that either she was okay with it or she wasn't okay with it or maybe she declines to comment. You know, I'm not going to tell her how to do her job, but I feel like that needs to happen, okay?

It's just something uncomfortable going on in my brain about, you know, again a proof of claim being on file two, almost two and a half years and then, you know, okay, never mind, okay, I agree to never mind as long as you agree to XYZ.

And I have no idea what's in the Seery transcript. I don't have it before me. But, you know, I don't even know what that's all about. I don't even know if I care what that's all about. I just know if there are quid pro quos I feel like, you know, maybe I need to have the U.S. Trustee, you know, not per

se signing off on any agreed order but at least kind of looking at it and telling me either U.S. Trustee's fine with it, U.S. Trustee is not fine with it, or U.S. Trustee declines to comment. Just I know that I've gone through the drill, okay?

So just letting you know I am still, you know, all open to an agreed resolution of this, okay. But we're going forward as if you can't get there, okay?

All right. I'll look for -- what am I going to look for? I'm going to look for an order denying the motion to withdraw proof of claim. I'm going to look for an order granting the -- well, an order resolving the objection to motion to quash and cross-motion for subpoenas saying that these three witnesses are going to appear at a mutually agreeable time either late September or early October.

All right. We're adjourned.

THE CLERK: All rise.

MR. MORRIS: Thank you, Your Honor.

(Proceedings concluded at 11:35 a.m.)

* * * * *

C E R T I F I C A T I O N

I, DIPTI PATEL, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Dipti Patel

DIPTI PATEL, CET-997

LIBERTY TRANSCRIPTS DATE: September 13, 2022

Appendix Exhibit 126

The following constitutes the ruling of the court and has the force and effect therein described.

Signed September 15, 2022

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
Reorganized Debtor.	§	

AMENDED ORDER DENYING MOTION TO WITHDRAW PROOF OF CLAIM [DOCKET NO. 3443]

This matter having come before the Court on the *Motion to Withdraw Proof of Claim* [Docket No. 3443] (the "Motion to Withdraw") filed by NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC ("HCRE") in the above-captioned chapter 11 case, pursuant to which HCRE sought to withdraw its proof of claim number 146; and the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that this is a core

[1] The last four digits of Highland's taxpayer identification number are 8357. The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

proceeding pursuant to 28 U.S.C. § 157(b)(2); and venue in this District being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having considered (a) the Motion to Withdraw, (b) *Highland Capital Management, L.P.'s Objection to Motion to Withdraw Proof of Claim* [Docket No. 3487], (c) the *Declaration of John A. Morris in Support of Highland Capital Management, L.P.'s Objection to Motion to Withdraw Proof of Claim* [Docket No. 3488], including Exhibits 1-16 annexed thereto, (d) HCRE's *Reply in Support of Motion to Withdraw Proof of Claim* [Docket No. 3505], and (e) the arguments presented by counsel during the hearing conducted on September 12, 2022 (the "Hearing"); and adequate notice of the Motion to Withdraw having been given; and after due deliberation and good cause appearing therefor, it is hereby **ORDERED** that:

1. The Motion to Withdraw is **DENIED** for the reasons set forth on the record during the Hearing.

2. HCRE and Highland are directed to confer in good faith to complete the depositions of Mr. James Dondero, Mr. Matt McGraner, and HCRE at mutually convenient times between September 28 and October 12, 2022.

3. HCRE and Highland shall otherwise comply with items 8, 9, and 10 in the *Order Approving Amended Stipulation and Proposed Scheduling Order Concerning Proof of Claim 146 Filed by HCRE Partners, LLC* [Docket No. 3368], including appearing for an evidentiary hearing on November 1 and 2, 2022.

4. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

END OF ORDER

Appendix Exhibit 127

Hearing held on 11/1/2022. (RE: related document(s)[906] Objection to claim(s) of Creditor(s) Daniel Sheehan and Associates, PLLC; Dun & Bradstreet; Eastern Point Trust Company, Inc.; Collin County Tax Assessor/Collector; Collin County Tax Assessor/ Collector; Dallas County; Opus 2 International Inc.; Andrew Parmentier; 4CAST Inc.; Advent Software Inc.; ConvergeOne, Inc.; Denton County; Internal Revenue Service; Kaufman County; Maples and Calder; McLagen Partners, Inc.; Microsoft Corporation and Microsoft Licensing GP, a Subsidiary of Microsoft Corporation; Moodys Analytics, Inc.; Quintairos, Prieto, Wood & Boyer; Advisors Equity Group, LLC; Eagle Equity Advisors, LLC; HCRE Partner, LLC; Highland Capital Management Fund Advisors; Highland Capital Management Fund Advisors; Highland Capital Management Services, Inc.; Highland Capital Management Services, Inc.; Highland Energy MLP Fund; Highland Fixed Income Fund; Highland Floating Rate Fund; Highland Funds I; Highland Funds II; Highland Global Allocation Fund; Highland Healthcare Opportunities Fund; Highland iBoxx Senior Loan ETF; Highland Income Fund HFRO; Highland Long/Short Equity Fund; Highland Merger Arbitrage Fund; Highland Opportunistic Credit Fund; Highland Small-Cap Equity Fund; Highland Socially Responsible Equity Fund; Highland Tax-Exempt Fund; Highland Total Return Fund; NexBank SSB; NexPoint Advisors, L.P.; NexPoint Advisors, L.P.; NexPoint Capital, Inc.; NexPoint Capital, Inc.; NexPoint Discount Strategies Fund; NexPoint Energy and Material Opportunities Fund; NexPoint Event-Driven Fund; NexPoint Healthcare Opportunities Fund; NexPoint Latin America Opportunities Fund; NexPoint Real Estate Strategies Fund; NexPoint Strategic Opportunities Fund; The Dugaboy Investment Trust; The Dugaboy Investment Trust; Bentley Callan; City of Garland; Clay Callan; Eastern Point Trust Company, Inc.; Garland Independent School District; Grayson County; HarbourVest 2017 Global Fund L.P.; HarbourVest 2017 Global AIF L.P.; HarbourVest Partners L.P. on behalf of funds and accounts under management; HarbourVest Dover Street IX Investment L.P.; HarbourVest Skew Base AIF L.P.; Hartman Wanzor LLP; Irving ISD; John Morris; John R. Watkins; Linear Technologies, Inc.; Mass. Dept. of Revenue; Mediant Communications Inc.; Oklahoma Tax Commission; Jun Park; Paul N. Adkins; Paul N. Adkins; Tarrant County; Theodore N. Dameris; Theodore N. Dameris; Weijun Zang; Anish Tailor; Mollie Boyce-Field; Charles Byrne; Donald Salvino; Ericka Garcia; Garman Turner Gordon; Joe Kingsley; Frederic Mason; TDA Associates, Inc.; Wilkinson Center.. Filed by Debtor Highland Capital Management, L.P.) (Appearances: J. Morris and H. Winograd for Reorganized Debtor; C. Gamores and W. Carvell for Claimant, HCRE. Evidentiary hearing. Matter taken under advisement.) (Edmond, Michael)

Appendix Exhibit 128

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 (SGJ)
Debtor.	JAMES DONDERO, HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P., NEXPOINT ADVISORS, L.P., THE DUGABOY INVESTMENT TRUST, THE GET GOOD TRUST, and NEXPOINT REAL ESTATE PARTNERS, LLC, F/K/A HCRE PARTNERS, LLC, A DELAWARE LIMITED LIABILITY COMPANY'S REPLY IN SUPPORT OF THEIR AMENDED RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

MOVANTS' REPLY IN SUPPORT OF AMENDED RENEWED MOTION TO RECUSE PURSUANT TO 28 U.S.C. § 455

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I. INTRODUCTION

The Objection to Renewed Motion to Recuse ("Objection") filed by Highland Capital Management, L.P. ("HCMLP" or the "Debtor") only underscores why recusal is not just warranted but necessary in this case. HCMLP devotes only nine pages of its Objection to actual legal argument. But that argument fails to address or distinguish much of the case law cited in Movants' Amended Renewed Motion to Recuse (the "Renewed Motion") [Doc. 3570] and relies on a litany of irrelevant cases that are easily distinguishable. The remaining 41 pages of the Objection consist of procedural background (critical parts of which are wrong) and "additional background," which is largely rhetoric designed to exploit the Court's existing bias.

The main thrust of HCMLP's Objection is that the Renewed Motion is untimely and that the Court's rulings are correct and final. But HCMLP cites the wrong legal standard for timeliness and relies on cases that have nothing to do with the posture of *this* case. HCMLP's other refrain—that all of the Court's rulings discussed in the Renewed Motion are correct and final—is both ironic (given HCMLP's argument that the Court's order on recusal cannot be considered "final") and irrelevant to the ultimate issue of whether the Court's treatment of Movants is objectively biased such that recusal is appropriate. HCMLP's only answer to that key question is that the Court has said it is not biased, and so it must be true. That is not the standard for recusal and provides no basis to deny Movants' Renewed Motion. The Renewed Motion should be granted.

II. HCMLP'S ITERATION OF THE "FACTS" IS IRRELEVANT AND WRONG

HCMLP's 41-page recitation of "facts" is laden with unsubstantiated assertions, misinformation, and irrelevant arguments that appear largely designed to distort rather than educate. Movants see little utility in addressing many of those statements, which are irrelevant to the underlying question of whether the Court bears an objective bias against Movants requiring recusal. Instead, Movants address only the most egregious examples of factual misstatements.

A. HCMLP Misrepresents The Procedural History Of This Case

Although not relevant to the legal question of whether recusal is warranted, HCMLP devotes substantial space in its Objection to discussing actions supposedly taken by Mr. Dondero early in the bankruptcy case and seeking to hold those actions against him. *See, e.g.*, Opp., ¶¶ 1, 30-32, 34. That is surprising, given that HCMLP's counsel, Pachulski Stang Ziehl & Jones LLP ("Pachulski"), was advising Mr. Dondero before the bankruptcy case was even filed and recommending each of the actions that Mr. Dondero took, starting with its recommendation that he file a chapter 11 bankruptcy on HCMLP's behalf in Delaware. *See* Supplemental Appendix ("Supp. App'x") Ex. X, Declaration of James D. Dondero ("Dondero Decl."), ¶ 2. At the time, Pachulski advised Mr. Dondero that there was less than a one percent chance the case would get transferred to this Court. *Id.* Incredibly, HCMLP now accuses Mr. Dondero of forum shopping by electing to follow Pachulski's advice. *See* Obj., ¶¶ 30-31. Pachulski also mounted a lively argument against transferring the case to this Court based on some of the very same concerns Movants have raised in their recusal motion. Renewed Mot. at 5 & nn.20-22.[1]

HCMLP also says Mr. Dondero is in no position to complain about the transfer of HCMLP's bankruptcy to this Court because he did not appeal that ruling, but omits the fact that Mr. Dondero did not appeal because *Pachulski advised him he could not to do so. Id.* It is exceptionally misleading for *the very counsel that advised these early actions* to argue that Mr. Dondero did something wrong or otherwise sat on his hands.

HCMLP likewise alleges that Mr. Dondero "voluntarily surrendered control of Highland to an independent board of directors" and failed to object to or appeal (and to the contrary,

[1] HCMLP argues that Mr. Dondero "controlled Highland and directed its counsel to oppose the Transfer Motion" (Obj., ¶ 34), but that argument rings very hollow when it was Pachulski that advised Mr. Dondero to file the chapter 11 petition in Delaware bankruptcy court in the first place and opposed the motion to transfer at a time when Pachulski (as Debtor's counsel) owed fiduciary duties to the estate to take actions in the best interest of the estate.

"affirmatively approved") the language of the related Settlement Order restricting Mr. Dondero's actions and allowing the Court to sanction him. Obj., ¶¶ 38-39.[2] But again, *Pachulski advised Mr. Dondero* to cede control to an independent board, saying his resignation would expedite the exit from bankruptcy, *Pachulski advised Mr. Dondero* to approve the language of the Settlement Order, and *Pachulski assured Mr. Dondero* that his continued cooperation would work to ensure HCMLP emerged from bankruptcy as a going concern. Dondero Decl., ¶ 3. Importantly, at the time, Mr. Dondero reasonably believed Pachulski was acting as his individual counsel in part because Pachulski never advised him that he (or Strand, for that matter) should obtain separate counsel before taking these significant (and as it turns out, highly disadvantageous) steps. *Id.* ¶¶ 3-4.[3]

Finally, in an effort to justify the Court's treatment of Movants, HCMLP repeatedly invokes the supposed "history and culture of litigiousness" at HCMLP under Mr. Dondero's leadership as well as the "plethora" of rulings and other judgments issued against both Mr. Dondero and his affiliates prior to bankruptcy. *See* Obj., ¶¶ 1, 26, 42. Although Movants dispute HCMLP's characterization of the company's culture prior to bankruptcy, it is worth noting that the decisions made by Highland regarding litigation prior to bankruptcy were not "propagated" solely by Mr. Dondero but were often conceived of and approved by other "human beings," including Thomas Surgent, HCMLP's former and current Chief Compliance Officer, its former

[2] Mr. Dondero surrendered his positions at Strand, not HCMLP. *See* Settlement Order, Dkt. 339. Notably, while HCMLP argues that Mr. Dondero "voluntarily surrendered" his positions, HCMLP at the same time argues confusingly and contradictorily that Mr. Dondero was "forced to resign." *Compare* Obj., ¶ 38, *with* Obj., ¶ 32.

[3] HCMLP partially waived the attorney-client privilege as part of its settlement with the Unsecured Creditors Committee. *See* Dkt. 281, ¶ 13; Supp. App'x, Ex. Y, January 21, 2020 Hr'g Tr. at 96:7-13 (Mr. Pomerantz: "The settlement also granted standing to the Committee to investigate and prosecute certain insider claims, along with broad access to the Debtor's books and records, including attorney-client privileged information necessary to prosecute those claims."). At the time, this decision was directly adverse to the interests of Mr. Dondero and Strand, notwithstanding that Pachulski simultaneously advised them to accept the settlement and execute various documents to effectuate it. Under these circumstances, neither HCMLP nor Pachulski may hide behind the attorney-client privilege to avoid disclosure of facts that are directly relevant to the issues raised by HCMLP in its Opposition.

Deputy General Counsel, and its current General Counsel. *See* Obj., ¶ 42. HCMLP conveniently buries Mr. Surgent's significant role in the company's past. Further, HCMLP fails to cite a single pre-bankruptcy ruling or judgment *against Mr. Dondero*, and Movants are aware of none. Nonetheless, HCMLP is content to make this statement repeatedly as though it is fact, which is consistent with what HCMLP has done throughout these bankruptcy proceedings.

B. HCMLP Misreads The Court's Order On Movants' Motion To Supplement

At the outset of its Objection, HCMLP argues that Movants' Renewed Motion should be rejected because it was filed in violation of the Court's order denying Movants' Motion for Final, Appealable Order and Supplement to Motion to Recuse ("Motion to Supplement"). Obj., ¶ 23 & n.21. That order directed Movants to either (1) file a "simple motion," seeking only a "revised and amended recusal order" but removing language that Movants perceived to impede their appellate rights, or (2) "file a new motion . . . based on alleged new evidence or grounds for recusal" not previously considered by the Court. Order, Dkt. 3479 at 3. Importantly, however, the Court's order on the Motion to Supplement came on the heels of a hearing in which the Court specifically told Movants they could file a "new motion to recuse . . . to start this over *and* supplement the record." App'x at 0210 (emphasis added).[4] HCMLP now argues that what Movants were supposed to file was a motion to recuse limited to new record evidence of bias and nothing more. That argument is both nonsensical and irrelevant.

The entire point of Movants' Motion to Supplement was to ensure that an appellate court, when reviewing Movants' request for recusal, has the benefit of the *entire* record supporting recusal, as Movants made clear in their Motion to Supplement and at the hearing on that motion. *See* Dkt. 3470 at 4; App'x at 0207. If the Court's order were read in the manner suggested by

[4] All references to "App'x" are to Movants' Appendix filed concurrently with their Renewed Motion. *See* Dkt. 3542-1 and 3571-1.

HCMLP, that would mean an appellate court could only consider a small portion of the record on appeal from the Court's denial of Movants' Renewed Motion, which would give the appellate court only a fraction of the relevant picture. That makes no sense, and adopting HCMLP's reading of the order would only further impede Movants' due process right to build an appellate record based on all salient evidence, which is all Movants have been trying to do. In fact, HCMLP acknowledges that such attempt to restrict the record would be improper, as it admits that the Court must focus on the "entirety of the proceedings." Obj., ¶ 120.

In any event, HCMLP's argument makes no difference to whether the Court should grant or deny Movants' Renewed Motion. Movants' basis for recusal is not a single fact or an isolated incident. Instead, Movants seek recusal based on a pattern of treatment throughout the bankruptcy proceedings that, taken as a whole, demonstrate both the appearance of bias and actual animus toward Movants. There is no procedural or statutory bar to filing a motion to recuse at any time under these circumstances, based on any record evidence the moving party deems relevant to the issue. The Court may disagree that the evidence cited supports the relief requested, but Movants' mere inclusion of prior evidence is not a reason to deny the Renewed Motion.

C. HCMLP's Arguments About The Outcome Of Various Rulings Are Irrelevant

HCMLP also spends much of its time arguing that various rulings by the Court are final, were not appealed or have been upheld on appeal, or were otherwise correct. *See*, *e.g.*, Obj., ¶¶ 6, 12 n.11, 35, 39, 45, 64, 69, 71, 80. That is irrelevant. As Movants acknowledged in their Renewed Motion, recusal ordinarily should not be used as a mechanism to challenge the outcome of rulings issued by the courts. *See* Renewed Mot. at 20. And that is not what Movants seek to do. Instead, Movants seek recusal because the Court's *process*—including its overt negative rhetoric, its departure from usual procedures, and its general treatment of Movants—reflects the type of deep-

seeded animosity that would cause any objective observer to question the Court's impartiality.[5]

In short, it does not matter whether the Court "got it right" or not. Recusal is required where, as here, the Court has acted in a manner that is partial, or at the very least appears partial.

D. HCMLP Distorts The Factual Record And Fails To Cite Relevant Evidence

HCMLP spills a lot of ink describing (in a manner rife with misstatements and distortions but often lacking citations or evidentiary support) what happened at various hearings cited by Movants in the Renewed Motion as evidence of bias. Again, the outcome of various motions and hearings makes little difference to this analysis. *How* those results came to be, on the other hand, makes all the difference. Thus, in addition to clarifying some of the more egregious misstatements made by HCMLP in the Objection, Movants will also clarify its use of the Court's hearing and rulings to demonstrate the Court's bias.

The June 2020 CLO Holdco Hearing. HCMLP argues the Court's statements and actions at the CLO HoldCo hearing are not evidence of bias because "neither CLOH nor the DAF are Movants." Obj., ¶ 47. HCMLP further argues that Movants have the facts wrong because, HCMLP insists, "the $2.5 million was deposited into the court registry *at CLOH's request*." Obj., ¶ 48 (emphasis in original). Both of these arguments are wrong.

First, it makes no difference that CLOH and the DAF are not Movants in the Renewed Motion. Both HCMLP and the Court have repeatedly argued that every entity remotely connected

[5] In any event, it is ironic that HCMLP argues so strenuously that any order on recusal cannot be final when it argues that various other interlocutory orders of this Court are necessarily final. *See* Obj., ¶¶ 3, 67. Notably, the issue of finality in this context is not as simple as HCMLP would have this Court think. In chapter 11 cases, there typically is no "final judgment" the way there is in an ordinary civil case in federal district court. For that reason, courts have held that the order confirming the chapter 11 plan of reorganization is the "final judgment" in bankruptcy. *See, e.g.*, *In re Shank*, 569 B.R. 238, 249 (Bankr. S.D. Tex. 2017) (citing *United Student Aid Funds, Ins. v. Espinosa*, 559 U.S. 260, 269 (2010)). The Plan was confirmed and became effective more than a year ago in this case. The vast majority of HCMLP's assets have been liquidated. Unsecured creditors have been paid a significant percentage of their claims. Yet HCMLP would seemingly have the courts conclude that that the case still is not "final" for purposes of appeal.

to Mr. Dondero is "controlled" by him, including CLOH and the DAF.[6] Moreover, the whole point is that the Court's animus toward Mr. Dondero results in the Court treating all of Mr. Dondero's affiliates (or presumed affiliates) as inherently suspicious, leading to rulings that are at odds with the evidence and the law. This is precisely what happened at the CLO Holdco hearing.[7]

Second, HCMLP's argument that CLOH's money was deposited into the Court registry because CLOH wanted it there is disingenuous at best. Indeed, even the Debtor argued to the Court at the hearing that the money should be released to CLOH. *See* March 4, 2020 Hr'g Tr. at 17:8-22, HCMLP App'x at 3234. However, when it became apparent that the Court was disinclined to release the money, Mr. Dondero's counsel proposed that, in the event the Court denied the motion, the funds at issue should be distributed into the registry of the Court as an alternative to permitting HCMLP to retain them. *See id.* at 3260. CLOH and the DAF certainly did not request that the Court retain the funds in its registry indefinitely, nor did they argue that depositing the funds in the Court's registry was the correct course of action.

HCMLP also argues that the Court's actions were not biased because CLOH sought a release of its money from the Court's registry less than a month later, something HCMLP deems "evidence of CLOH's bad faith." Obj., ¶ 19. Accusing Mr. Dondero and any entity connected to him of "bad faith" is another favorite tactic of HCMLP, likely because the Court has demonstrated

[6] Indeed, one of the reasons that the Court refused to release CLOH's money, despite the Debtor's argument that it should do so, is because Matt Clemente, on behalf of the Unsecured Creditors Committee, argued at the hearing that the Court should disallow the distributions to CLOH and the DAF because those entities were "owned and/or controlled by Mr. Dondero." HCMLP App'x, at 3245.

[7] HCMLP argues that "Movants cannot have it both ways" and "[e]ither CLOH and the DAF are controlled by Mr. Dondero or they are not." Obj., ¶ 18. They are not "related" but are "connected." But it is HCMLP that is trying to have it both ways: it has argued throughout the bankruptcy proceedings that CLOH and the DAF, like many other entities, are "controlled" by Mr. Dondero, but they take the position in their Objection that the Court's treatment of CLOH and the DAF has nothing to do with him. In any event, the Plan (a document drafted by HCMLP) identifies CLOH and the DAF as "Related Parties," meaning that HCMLP views Mr. Dondero, CLOH, and the DAF as operating in lock-step. *See* Plan at 14.

its receptiveness to accusations of bad faith against Mr. Dondero, even when there is no valid basis for or evidence supporting the accusation. But in this particular instance, the Court did not find that CLOH was acting in bad faith by seeking a release of money that indisputably belonged to it. And again, CLOH never agreed that its money could remain in the Court's registry indefinitely. In any event, HCMLP's argument in this regard is particularly misleading because HCMLP agreed to the release of CLOH's money. It did so because *there was no good faith reason* to refuse to do so. Notably, although the parties objecting to the release of CLOH's funds indisputably had no legal basis to object and no right to the funds (i.e., *zero* ownership interest in the funds), at no time did the Court comment that their objections were "Rule 11 frivolous" or threaten the objectors with sanctions.

The December 2020 Restriction Motion. HCMLP also argues at length about why the Court's actions at the hearing on the Restriction Motion do not support recusal. Obj., ¶¶ 51-56. In particular, HCMLP cites a string of "admissions" from one of HCMLP's former Executive Vice Presidents, Dustin Norris, to argue that Mr. Norris provided "all of the evidence the Court needed to reach its conclusion" that Mr. Dondero was the sole person responsible for filing the Restriction Motion (which sought to prevent the liquidation of certain CLO assets). Obj., ¶¶ 54-55. But HCMLP conveniently fails to include all of the testimony Mr. Norris provided regarding the decision by the Retail Funds and the Advisors to file the Restriction Motion.[8] Mr. Norris actually testified that, while Mr. Dondero vocalized concern about HCMLP's decision to liquidate the CLO assets, the Advisors' internal legal team, compliance team, and Mr. Norris working with outside

[8] The "Retail Funds" are Highland Income Fund, NexPoint Strategic Opportunities Fund, and NexPoint Capital, Inc. The "Advisors" are Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. Renewed Mot. at 19-20. Although there is no evidence of record that these entities are or were owned or controlled by Mr. Dondero (and HCMLP cites to none), in keeping with its tactic of arguing that every entity is "controlled" by Mr. Dondero, HCMLP labels the Retail Funds and Advisors the "Dondero Parties" and argues that the Retail Funds are "controlled" by him. Obj., ¶¶ 53, 63. They are not.

counsel, along with senior management of Highland Capital Management Fund Advisors decided to pursue filing the Restriction Motion. *See* December 16, 2020 Hr'g Tr. at 29:21-30:1, HCMLP App'x at 3368. This is the critical testimony, and the Court simply ignored because it did not fit the narrative that Mr. Dondero is the bad actor behind every legal motion made in HCMLP's bankruptcy proceeding and nobody around him is able to make their own informed decision.

The January 2021 Injunctive Relief Hearing. Drawing on one of its favorite unsupported themes (i.e., Mr. Dondero as puppet master), HCMLP next argues that the Court's treatment of the Retail Funds and Advisors at the January 2021 injunctive relief hearing was appropriate because "Mr. Dondero caused the Advisors and Retail Funds to continue interfering with, and unjustifiably threatening, Highland." Obj., ¶ 57. Of course, HCMLP cites no evidence for this accusation. Then HCMLP doubles down and it accuses Movants of "failing to disclose key facts" relating to the hearing. Obj., ¶ 59. The first such "fact" is HCMLP's argument that Movants "now admit" the K&L Gates Letters were improper. Obj., ¶ 60. In support of this argument, HCMLP quotes a short-hand description of the K&L Gates Letters from Movants' original recusal motion. *Id.*, ¶ 60 n.40. Movants most certainly did not and do not admit that the K&L Gates Letters were improper. Those letters did nothing more than tell the Debtor that the Retail Funds and Advisors intended to *seek the Court's permission* to lift the automatic stay to exercise their contractual rights.

HCMLP nonetheless argues (again, under the guise of "fact") that the K&L Gates Letters were "quintessentially vexatious and sanctionable conduct" because they sought previously denied relief through alternative means. Obj., ¶ 60 (citing *Nix v. Major League Baseball*, 2022 U.S. Dist. LEXIS 104770, at *58-65 (S.D. Tex. June 13, 2022)). It is unclear how a letter explaining the Retail Funds' and Advisors' intent to seek Court permission to act could possibly be considered vexatious, and the case cited by HCMLP does not clear up that mystery. In *Nix*, the plaintiff filed

multiple repetitive lawsuits in various jurisdictions and also lawsuits in the same jurisdiction alleging slightly different causes of action. 2022 U.S. Dist. LEXIS, at *58-65. That is vastly different from the situation involved here, where the Retail Funds and Advisors took non-judicial action by asking the Debtor not to liquidate CLO assets at below market value and advising the Debtor that they would seek Court intervention if necessary.

The January 2021 Examiner Motion. HCMLP also argues that the Court's disenfranchisement of Movants makes no difference because Movants "admit" they acted for an improper purpose in seeking the appointment of an examiner in advance of the February 2021 confirmation hearing. Obj., ¶ 67 (citing Movants' original recusal motion). Specifically, according to HCMLP, Movants "admit" that they filed a motion for an examiner "to force a delay of the long-scheduled Confirmation Hearing." *Id.* But the quote HCMLP cites (which is from Movants' original recusal motion as opposed to the Renewed Motion) is taken out of context. The very next sentence of the original recusal motion explains that Movants sought to have the examiner motion heard on an *expedited basis* to *prevent* delay of the confirmation hearing, which might occur if the motion was heard on an ordinary schedule. *See* Original Recusal Mot., Dkt. 2061, ¶ 37.[9] Rather than provide expedited relief—something the Court has done many times at HCMLP's request—the Court set the hearing on Movants' motion on a date *after* the scheduled confirmation hearing, ensuring that Movants could not be meaningfully heard because, as the Court knew, an examiner cannot be appointed after plan confirmation.[10]

Orders Requiring Mr. Dondero to Appear. HCMLP does not meaningfully dispute that

[9] Notwithstanding that HCMLP ignores the context of the quote it relies on (which actually shows that Movants' intent was the opposite of delay), HCMLP deems Movants' act of filing the examiner motion "quintessentially vexatious." Obj., ¶ 67.

[10] For that reason, HCMLP's observation that "[n]o party appealed the denial of the Examiner Motion" makes no sense. As HCMLP's counsel is no doubt aware, an examiner cannot be appointed after plan confirmation, so any appeal of the Court's order would have been futile and no doubt would have been labeled by HCMLP as "vexatious."

the Court took the extraordinary measure of requiring Mr. Dondero to appear at all hearings, including hearings that had nothing to do with him. Instead, HCMLP argues (without citation) that Mr. Dondero proved that the Court's order was appropriate when he "subsequently failed to appear at a hearing thereby validating the Court's concerns." Obj., ¶ 76. This accusation is highly disingenuous. As Mr. Dondero's counsel explained on the record at that hearing, the motion at issue (a motion to continue) was set on an expedited basis, Mr. Dondero's counsel was not aware that Mr. Dondero needed to attend non-evidentiary hearings in the main bankruptcy case and, therefore, counsel failed to coordinate with Mr. Dondero to apprise him of the hearing and his need to appear, which counsel admitted was an "oversight" on counsel's part.[11] In other words, there is no evidence that Mr. Dondero deliberately flouted the Court's order. Notwithstanding counsel's admission that the mistake was his, the Court *sua sponte* issued a new order requiring Mr. Dondero to appear at every hearing going forward, whether substantive or not, and whether he took a position on the issue to be heard or not. *See* Order dated May 24, 2021, Dkt. 2362.

HCMLP also strenuously argues that the Court "*never* ordered Nancy Dondero to appear at any hearings." Obj., ¶ 77. But HCMLP admits that the Court *did* order the trustee of The Dugaboy Investment Trust ("Dugaboy") and Get Good Trust to attend any hearings involving those entities or hearings at which those entities took a position. Order, Dkt. 2458. And the Court knew at that point that Mr. Dondero's sister, Nancy Dondero, was the acting trustee of Dugaboy. The Court only ordered the trustees to appear because it "ha[d] concerns whether these Trusts [were] simply acting at the direction of Mr. Dondero and are not independent parties." *Id.* at 3. In other words, the Court's order intentionally targeted Mr. Dondero.[12] In the more than three years

[11] *See* Supp. App'x, Ex. Z, May 20, 2021 Hr'g Tr. at 17:20-22:26.

[12] HCMLP also argues that the Court's order requiring the trustees for Dugaboy and Get Good to appear at hearings was much narrower than the order regarding Mr. Dondero. Obj., ¶ 77. While the Court did not order the trustees to attend all hearings, the order was nonetheless incredibly broad. It required Ms. Dondero as trustee to attend "all future

since this bankruptcy proceeding began, the Court has not ordered any other party to attend all hearings.

Other Supposed "Facts". In addition to these factual misstatements and distortions, HCMLP also fails to cite evidence and, on numerous occasions, couches allegations as fact. By way of example only:

- HCMLP makes numerous statements of supposed "fact" without citing any evidence to support the allegation, including, but not limited to: Obj., ¶¶ 28 (Mr. Dondero and his entities are legion), 30 (chapter 11 filed in Delaware because Mr. Dondero thought it would be a more hospitable forum), 37 (settlement was necessary due to Dondero entities' history of self-dealing), 42 (Mr. Dondero and his entities have a history of litigiousness supported only by a footnote that is further factual argument rather than evidence to support such an allegation), 57 (Mr. Dondero continued to cause advisors to interfere with HCMLP), 63 (Mr. Dondero controls all of the Dondero entities and causes them to attempt to reassert control over HCMLP), 82 (Movants filed the HV Complaint).

- HCMLP repeatedly attributes actions to the Movants that the Movants did not take and calls every party it describes a "Dondero party," again without citation to any evidence of ownership, control, or even involvement. *See, e.g.*, Obj., ¶ 1, 53, 63, 82, 85.

- In describing the Court's "experience with Mr. Dondero," HCMLP cites (as one example of Mr. Dondero's prior "bad acts") that "Mr. Dondero allegedly orchestrated a fraudulent transfer of assets that left the Acis debtors judgment proof." Obj., ¶ 29. It is unclear how an unsubstantiated "allegation" could support this Court's opinions of Mr. Dondero, but this highlights the problem.

HCMLP's recitation of supposed facts falls well short of providing any viable reason to reject Movants' Renewed Motion.

E. HCMLP's Factual Arguments Only Underscore Why Recusal Is Necessary

What is perhaps most telling about HCMLP's recitation of "facts" is its tendency to repeatedly emphasize those points that it believes will resonate with this Court, even where the

hearings in th[e] Bankruptcy Case in which the Trusts have taken or are taking a position." Order, Dkt. 2458, at 3. The order further clarified: "This directive does not apply merely to evidentiary hearings or "substantive" hearings, and [sic] it applies to the underlying bankruptcy case as well as related adversary proceedings in which the Trusts are parties or take positions." *Id.*

point is untethered to fact.

Most notably, HCMLP repeats its allegations that the problem here is not judicial bias but "the never-ending, meritless, vindictive, and vexatious litigation strategy that Mr. Dondero stubbornly clings to regardless of the burdens imposed on the judicial system, the havoc wrought, and the damages inflicted on himself, Highland's creditors, and even his own steadfast loyalists." Obj., ¶ 2. That statement is remarkably ironic, for a number of reasons. First, as HCMLP acknowledges, "[t]his Court did *not* find or conclude that Movants are 'vexatious litigants.'" *Id.*, ¶ 71 n. 43 (emphasis in original).[13] Nonetheless, HCMLP uses that adjective to describe Mr. Dondero no less than *12 times* in its Objection alone.[14] HCMLP goes as far as using an out-of-context quote to describe Movants as "quintessentially vexatious."[15] "Vexatious" is also the adjective most used by HCMLP and its counsel to describe Mr. Dondero when arguing before this Court.[16] Consequently, it only makes sense that the adjective: (1) found its way into the Court's order confirming HCMLP's Fifth Amended Plan of Reorganization (as Modified) (the "Plan"), (2) provided the purported justification for the Court to adopt a sweeping channeling provision, and

[13] Under Texas law, a Court "'may find a *plaintiff* a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant' and one of three additional prerequisites has occurred within the last seven years … These additional elements include (1) the filing of at least five suits as a *pro se* litigant that have been dismissed against the plaintiff; (2) relitigating a case *pro se* after having previously received an adverse and final determination; and (3) a prior finding in state or federal court that the plaintiff is a vexatious litigant in an action concerning the same or substantially similar facts." *Baldwin v. Zurich Am. Ins. Co.*, 2017 WL 2963515, *4 (W.D. Tex. July 11, 2017) (citing Tex. Civ. Prac. & Rem. Code § 11.054).

[14] Obj., ¶¶ 2, 60, 67, 70, 71, 95, 97, 100; *see also id.*, ¶ 42 (describing the "culture of litigiousness" under Mr. Dondero's control).

[15] Obj., ¶¶ 67.

[16] *See, e.g.*, Dkt. 1828, ¶ 22 ("Exculpation is particularly appropriate in this case to stem the tide of frivolous and vexatious litigation against the Exculpated Parties which Dondero and his Related Entities are seeking so desperately to continue to pursue."); Dkt. 3487 at 2 ("abruptly moving to withdraw its Dondero-signed proof of claim after two years of litigation, and after taking Highland's deposition but days before its own Witnesses were to be deposed, is a textbook example of vexatiousness—and is just the latest instance of Mr. Dondero bringing motions, or asserting claims, or filing objections, only to withdraw them after forcing Highland to spend time, money, and effort addressing them."); Dkt. 3550, ¶ 22 ("The Gatekeeper was created to give Highland, among others, breathing room to consummate the Plan and manage Highland's assets free from Mr. Dondero's vexatious and harassing litigation for the benefit of all creditors.").

(3) has been subsequently regurgitated by appellate courts, as if there has been some finding or legal basis to declare Mr. Dondero "vexatious."[17] There has not, which is why the Court's ubiquitous use of the term is so problematic and so emblematic of the Court's bias.

HCMLP likewise repeats the same tired accusation that a myriad of "courts and arbitration panels" in various states and foreign jurisdictions have adjudicated claims or ruled against Mr. Dondero. Obj., ¶¶ 1, 6.[18] HCMLP does not cite any examples of such judgments or rulings, because there are none.[19] That reality does not seem to bother HCMLP; instead, HCMLP merely argues that the actual parties involved in those legal battles were controlled by Mr. Dondero, so the Court should attribute any bad findings to him. Obj., ¶ 28 n.7. Despite being legally and factually unsupported, the Court has previously adopted that logic, which is why HCMLP employs it here.

More importantly, it makes no difference whether *other* courts have ruled against parties controlled by Mr. Dondero on other issues. The Due Process Clause of the United States Constitution requires an impartial and disinterested tribunal. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877 (2009) ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."). Section 455 was enacted because litigants "ought not have to face a judge where there is a reasonable question of impartiality." H. Rep. No. 1453, 93rd Cong., 2d Sess. 1 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6355. Movants are entitled to fair treatment in *this* Court on the evidentiary record actually before it.

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[17] *See, e.g., NexPoint Advisors, L.P. et al. v. Highland Cap. Mgmt., L.P.*, No. 21-10449 (5th Cir. Aug. 19, 2022), Opinion at 8, 14.

[18] *See also id.*, ¶ 28 (claiming that "[t]he adverse rulings *against Mr. Dondero* and his entities are legion," but citing none).

[19] The only actual examples cited by HCMLP are the arbitration award issued in favor of the Redeemer Committee against HCMLP, and a discovery ruling issued by the Delaware Chancery Court in a totally separate proceeding. Obj., ¶¶ 26-27 & nn.25-26. But again, neither the arbitration award or the discovery ruling were issued against Mr. Dondero.

III. HCMLP'S LEGAL ARGUMENTS ARE MERITLESS

A. HCMLP's Argument Regarding Timeliness Is Wrong

Throughout its Objection, HCMLP repeatedly references the timing of Movants' Renewed Motion, arguing that the length of time that has passed since various rulings issued by the Court makes the Renewed Motion "per se" untimely. Obj., ¶¶ 102, 108. HCMLP's argument misstates the law and misses the point.

As a preliminary matter, the Fifth Circuit Court of Appeals has never adopted a "*per se* untimeliness" rule. To the contrary, the Fifth Circuit has expressly "declined" to do so. *United States v. Sanford*, 157 F.3d 987, 988 (5th Cir. 1998). Indeed, even in *Hill v. Schilling*, 495 F. App'x 480, 483 (5th Cir. 2012)—the case cited by HCMLP for its "per se untimeliness" argument—the Fifth Circuit did not adopt or apply a per se rule. Instead, the Court, faced with *a single alleged act* of judicial impropriety, explained that "*the closest thing to* per se untimeliness" occurs "when a party already knows the facts purportedly showing an appearance of impropriety but waits until after an adverse decision has been made by the judge before raising the issue of recusal." *Hill*, 495 F. App'x at 483 (emphasis added). In *Hill*, unlike here, the movants sought recusal based solely on their allegation that the trial judge's spouse held an economic interest in one of the parties. *Id.* Despite knowing about the economic interest for some time, the movants proceeded through trial and did not move to recuse the judge until after receiving an unfavorable judgment. *Id.* In that very different circumstance, the Fifth Circuit agreed that the motion to recuse was untimely.[20]

[20] The entirety of the case law cited by HCMLP is similarly inapposite. In each of those cases, there was a single alleged basis for recusal, either the judge's personal relationship with one of the parties or the judge's economic interest in the outcome of the litigation. *See Sanford*, 157 F.3d at 988 (recusal based on fact that one party's counsel previously testified against judge); *United States v. Olis*, 571 F. Supp. 2d 777, 783 (5th Cir. 2008) (recusal based on judge's alleged social contacts with interested parties); *Grambling Univ. Nat'l Alumni Ass'n v. Bd. of Supervisors for La. System*, 286 F. App'x 864, 867 (5th Cir. 2008) (recusal based on court's prior working relationship with counsel, a former judge of the same court); *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994)

The Fifth Circuit's reasoning in *Hill* (and the remaining cases cited by Movants) has no application to this case, where Movants assert a *pattern of conduct* that, taken as a whole, reveals both the appearance of bias and actual animus towards Movants. *See Davis v. Board of School Com'rs of Mobile Cnty.*, 517 F.2d 1044, 1051 (5th Cir. 1975) (grounds for recusal exist "where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party"). Nor is this a situation where Movants have employed a "wait and see" approach and only sought recusal after an adverse judgment. As HCMLP itself argues, nothing in this case is "final," the Kirschner litigation (which the Court has recommended it should retain through trial) is in its nascent stages, the Court continues to preside over several other adversary proceedings involving Movants, and the Plan allows the Court to sit as gatekeeper over any potential disputes even touching upon the Plan. Movants seek recusal now because the Court's bias and animus represents a *continuing and ongoing harm* that can only be remedied if a non-biased fact-finder presides over the myriad proceedings still before the Court. There is no timing issue under these circumstances.

Further, HCMLP's contention that concerns of judicial economy render the Renewed Motion untimely is also wrong. As Movants explained in their opening brief, the goal of 28 U.S.C. § 455 is to promote public confidence in the judicial system by avoiding *even the appearance* of partiality. *See* Renewed Mot. at 19-20; *see also Levitt v. Univ. of Texas at El Paso*, 847 F.2d 221, 226 (5th Cir. 1988). For that reason, courts addressing this issue have consistently chosen impartiality over judicial economy, including in cases where recusal was sought only on remand after trial. *See* Renewed Mot. at 23 & n.122 (citing cases). As these courts have explained, "the

(recusal based on judge's social contacts with interested parties); *United States v. York*, 888 F.2d 1050, 1055 (5th Cir. 1989) (recusal based on judge's knowledge of extrajudicial facts as a result of familial relationship with one party); *Delesdernier v. Porterie*, 666 F.2d 116, 122 (5th Cir. 1982) (recusal based on court's prior working relationship with counsel).

gain in protecting against actual bias, prejudice, or conflict of interest outweighs the loss to judicial economy . . ." *See, e.g.*, *York*, 888 F.2d at 1055. Judicial economy is not more important than impartial justice and certainly is no reason to deny the Renewed Motion.

B. Movants Do Not Rely On Extrajudicial Bias, Nor Is It Required For Recusal

HCMLP next contends that the "core" of the Renewed Motion is extrajudicial bias, which it claims does not exist. Obj., ¶ 113. This is a gross mischaracterization of Movants' arguments. Movants expressly do not rely on extrajudicial bias as the basis for recusal, nor is extrajudicial bias a prerequisite to recusal, as Movants explained in their opening brief. *See* Renewed Mot. at 20 n.102, 103. Rather, in *Liteky*, a case on which HCMLP principally relies, the Supreme Court clarified that extrajudicial bias, while a common basis for establishing grounds for recusal, is not the exclusive means. *Likeky v. United States*, 510 U.S. 540, 551, 554 (1994) ("The fact that an opinion held by a judge derives form a source outside judicial proceedings is not a *necessary* condition for 'bias or prejudice' recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice."). It bears repeating that "judicial remarks during the course of a trial" that "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible," *will* support a bias or partiality challenge. *Id.* at 555; Renewed Mot. at 21. The Fifth Circuit recognized this "pervasive bias" exception to the extrajudicial bias doctrine even before *Liteky*. *See Davis*, 517 F.2d at 1051.

In any event, as HCMLP acknowledges, Movants do point to at least one instance in which the Court relied on an extrajudicial source—a news article that the Judge read—to make inquiries about whether HCMLP applied for or received COVID-related Payroll Protection Plan ("PPP") loans. Obj., ¶ 46 n. 64. HCMLP nonetheless argues that the Court's reliance on an extrajudicial source is not evidence of bias because the Court took no action against Mr. Dondero or Movants and only required HCMLP to respond to the Court's inquiries. *Id.* HCMLP misses the point. The

reason that Movants cite this particular example is because the Court raised the issue of PPP loans only because of the Court's unfavorable perception (untethered to any factual basis) of Mr. Dondero. Specifically, the Court stated that it had "extrajudicial knowledge thanks to keeping up with current events" and openly questioned in Court whether "Mr. Dondero or Highland affiliates" *improperly* obtained PPP loans.[21] An exchange then occurred between the Court and HCMLP's counsel in which HCMLP's counsel represented that the Debtor had not obtained a PPP loan but that he had "no way of answering" whether "Mr. Dondero, or any of his affiliated funds" had done so.[22] As a result, the Court required Debtor's counsel to investigate whether any such loan had been obtained and to report back to the Court, explaining "you can probably imagine the different things going through my brain," and clarifying, "I'm not expecting it to be Highland Capital Management, LP."[23] In short, the Court directed HCMLP to investigate Mr. Dondero and his affiliates for suspected wrongdoing based on an admittedly extrajudicial source. That is evidence of bias based on an extrajudicial source that weighs in favor of recusal.

C. There Can Be No Doubt Of The Court's Antagonism For Movants

HCMLP next argues that there is no basis to find that the Court has demonstrated the degree of favoritism or antagonism necessary for recusal. Obj., ¶ 22. However, in making this argument, HCMLP cites little more than the Court's own subjective denial of bias. *See* Obj., ¶ 12 (quoting Court's statements that it has "the utmost respect for [Movants]" and "no disrespect for Mr. Dondero"); *id.* at ¶ 119 (noting the Court's characterization of its statements as mere "clashes between a court and counsel" that are "simply insufficient" for recusal). That cursory response ignores the substantial body of statements made by the Court throughout these proceedings,

[21] Movants' App'x, Ex. E at 42:10-20.

[22] *Id.* at 42:25-43:22.

[23] *Id.* at 43:13-22.

including statements where the Court accuses Mr. Dondero and his affiliates of wrongdoing (often based on little more than suspicion), describes them as bad actors, and determines that they lack credibility in virtually every situation in which they are called to give testimony.[24]

HCMLP's response also ignores the substantial body of case law cited in Movants' opening brief, which contain examples of bias warranting recusal that were far less egregious than what has occurred in this case. If, as HCMLP insists, the Court focuses on the "entirety of the proceedings" (Obj., ¶ 120), there can be no doubt that the Court's statements amount to much more than mere "clashes between a court and counsel." The Court's negative statements about Mr. Dondero and his affiliates are so consistent and pervasive that they have been regurgitated ad nauseum by his detractors, adopted by HCMLP as a method of bolstering almost every argument it makes before this Court, and repeated by appellate courts even when this Court's statements do not amount to true "findings" of fact. By way of summary, the Court has:

- admitted that the negative opinions the Court formed about Mr. Dondero during the Acis Bankruptcy cannot be excised from the Court's mind;
- made repeated references to proceedings in the Acis Bankruptcy to justify findings in the HCMLP proceedings that are not otherwise supported by this bankruptcy record;
- made repeated negative statements about Mr. Dondero, as well as entities and individuals that the Court perceives to have some relationship to Mr. Dondero, in connection with the Court's ruling;
- repeatedly threatened Mr. Dondero and his counsel with sanctions, questioned Movants' good faith, or concluded Movants were acting in bad faith for simply: (1) defending lawsuits and motions; (2) asserting valid legal positions; and/or (3) preserving their rights, including in the exact manner in which others have been permitted to do so (e.g., the US Trustee's objections to the Plan);

[24] *See, e.g.*, January 26, 2021 H'rg Tr. at 240:14-20 (The Court to Mr. Dondero: "But the more I hear, the more I feel you're just trying to burn the house down. Okay? Maybe it's an either/or proposition with you: I'll either get my company back or I'll burn the house down. That's what it feels like."); Confirmation Order, Dkt. 1943 at ¶ 19 ("[T]he Bankruptcy Court questions [the objectors'] good faith. Specifically, the Bankruptcy Court considers them all to be marching pursuant to the orders of Mr. Dondero.").

- sanctioned Mr. Dondero in connection with a motion that he and others testified he had no role in filing or responsibility for authorizing;

- prophylactically sanctioned Mr. Dondero and other entities and counsel if and when they assert their lawful appellate rights;

- disregarded the presumption that related corporations have institutional independence and concluded, without supporting evidence, that any entity the Court demes to be connected to or controlled by Mr. Dondero (i.e., including highly regulated, publicly-traded funds governed by independent boards) is essentially no more than a tool of Mr. Dondero;

- disregarded the testimony of any witness with a connection to Mr. Dondero as per se less credible, which includes attorneys and persons who owe fiduciary duties and ethical obligations; and

- ruled against Mr. Dondero and Movants at ever possible opportunity, regardless of the evidence and the testimony before the Court.

In its Renewed Motion, Movants cited the Court to several cases in which the courts held that the same type of obvious antagonism displayed here was sufficient to require recusal. Renewed Mot. at 7 n.32, 9 n.40, 22 n.114. HCMLP does not attempt to address those cases, much less distinguish them. And many of those cases involve much less antagonism than what is at issue here. *See e.g.*, *Johnson v. Sawyer*, 120 F.3d 1307, 1334-38 (5th Cir. 1997) (appearance of bias found based on judicial remarks like: the court had a "bone to pick" with the Internal Revenue Service; questioning the witness's integrity because the testimony contradicted the court's prior order; expressing concern post-trail about the conduct of the lawyers; attributing assertions to the wrong counsel); *Sentis Grp., Inc., Coral Grp., Inc. v. Shell Oil Co*, 559 F.3d 888, 904-05 (8th Cir. 2009) (a "sufficiently high degree of antagonism" was found where the court directed profanities at Plaintiffs or Plaintiffs' counsel, denied Plaintiffs a meaningful opportunity to respond to Defendants' argument that misconstrued the court's prior orders, and dismissed Plaintiff's attempt to explain those orders); *see also United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995) (noting "the district judge's failure to accord any weight to Microsoft's interests in making

its determination adds to the appearance of bias in this case").

The test for disqualification is simple: would it appear to a reasonable person that the court's impartiality may be questioned? 28 U.S.C. § 455(a); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (2001). A cursory review of the record from these proceedings makes the answer to that question an easy "yes" here. The Court's orders targeting Mr. Dondero (and those the Court deems associated with him) compromise the appearance of justice. *Rorrer v. City of Stow*, 743 F.3d 1025, 1049-50 (6th Cir. 2014) (finding the appearance of impartiality from the court's issuance of a one-sided discovery order that limited the number of witness plaintiff may call without explanation or apparent rationale). So do the Court's consistent expressions suggesting it has already decided Mr. Dondero is a bad actor. *See Matter of Johnson*, 921 F.2d 585, 587 (5th Cir. 1991) (judge abused discretion in declining to recuse where the record included statements that the judge "all but made up [his] mind as to what he was going to do in the case and that he was "not in the least inclined to be neutral"); *United States v. Bergrin*, 682 F.3d 261, 283-84 (3d Cir. 2012) (the court's repeated expressions of discomfort with the manner in which an indictment was plead allowed the court's impartiality to reasonably be questioned); *United States v. Whitman*, 209 F.3d 619, 625-26 (6th Cir. 2000) (the court's impromptu lecture of defendant's counsel's attitude during proceedings "had the unfortunate effect of creating the impression that the impartial administration of the law was not his primary concern"). Viewed wholistically, this record is more than sufficient to raise the appearance of partiality.

D. HCMLP Mischaracterizes The Alternative Relief Sought By Movants

Finally, HCMLP argues that this Court has no authority to grant Movants' request to issue a ruling on Movants' Renewed Motion that eliminates the retention of jurisdiction language that appeared in the Court's prior order denying recusal. According to HCMLP, "it is not for this Court to determine whether its orders are final and appealable," and the Court "has no authority" to enter

an order of the type requested by Movants. Again, HCMLP mischaracterizes the relief sought by Movants and is wrong.

Contrary to HCMLP's argument, Movants do not expect (and do not ask) this Court to make any *ruling* that its order on recusal is final, or to otherwise include language of finality. Movants merely ask the Court to *eliminate* any existing "reservation" language that could be construed by an appellate court as rendering the order non-final on the issue. As Movants have now explained multiple times, when Movants appealed this Court's denial of their original motion to recuse, the District Court held it lacked jurisdiction to consider the appeal because the Bankruptcy Court's ruling was non-final. *See* Renewed Mot. at 2 & n.6; *see also* Movants' App'x, Ex. U at 5:11-6:9. In describing the Bankruptcy Court's order, the District Court expressly noted the last sentence of that order, in which the Bankruptcy Court "reserve[d] the right to supplement or amend th[e] ruling." *Id.*; *see also Dondero v. Hon. Stacey G. Jernigan*, Civ. Action No. 3-21-CV-0879-K, Dkt. 39 at 2. HCMLP itself argued on appeal that this reservation of rights language was important and impeded finality because "Judge Jernigan's potential future supplementation or amendment of the Recusal Order 'might change the calculus' of the order." *See id.*, Dkt. 31 at 5. Movants simply ask this Court to remove any perceived impediment to appellate review.

For that reason, HCMLP's argument that the Court does not have authority to give the alternative relief requested by Movants makes no sense. This Court can obviously craft its orders using whatever language (or eliminating any language) it sees fit. That is all Movants ask the Court to do. HCMLP's final argument should be rejected.

IV. CONCLUSION

It is time to put motion practice relating to recusal to an end. Movants respectfully request that the Court consider the *entirety* of the record supporting recusal and issue an order on Movants' motion that accounts for the lengthy history of this case and the whole body of evidence presented.

Movants also request that the Court issue an order that does not contain reservation of rights or other limiting language that could be later interpreted by an appellate court as an impediment to appellate jurisdiction.

Dated: November 14, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 14, 2022, a true and correct copy of the above and foregoing document was served on all parties and counsel set to receive notice by the Court's ECF system.

/s/ Michael J. Lang
Michael J. Lang

Appendix Exhibit 129

No.

In the Supreme Court of the United States

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Petitioner,

v.

NEXPOINT ADVISORS, L.P., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 524(e) of the Bankruptcy Code states that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." According to the Fifth Circuit, even though the text refers to the effect of a discharge rather than to the powers of a bankruptcy court, section 524(e) "categorically bars" a court from confirming any chapter 11 plan of reorganization that releases third parties from liability, either in full or through their limited exculpation for negligence claims relating to the administration of the bankruptcy estate as in this case.

In the opinion below, the Fifth Circuit acknowledged that, by contrast, the Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits "read[] § 524(e) to allow varying degrees of limited third-party exculpations."

The question presented is whether section 524(e), as its text suggests, states only the effect of a discharge on third parties' liability for a debtor's own debts or instead, as the Fifth Circuit holds, constrains the power of a court when confirming a plan of reorganization.

PARTIES TO THE PROCEEDING

Petitioner is Highland Capital Management, L.P., the reorganized chapter 11 debtor in the bankruptcy proceedings below, and the appellee in the court of appeals.

Respondents are NexPoint Advisors, L.P., NexPoint Asset Management, L.P., Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, NexPoint Capital, Incorporated, James Dondero, The Dugaboy Investment Trust, and Get Good Trust. Respondents were the appellants in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Highland Capital Management, L.P., has no parent corporation, and no publicly held company owns 10% or more of its stock.

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals (5th Cir.):

Highland Capital Management Fund Advisors, L.P., et al. v. *Highland Capital Management, L.P.*, No. 22-10189

NexPoint Advisors, L.P. v. *Pachulski Stang Ziehl & Jones, L.L.P., et al.*, No. 22-10575

The Dugaboy Investment Trust v. *Highland Capital Management, L.P.*, No. 22-10831

James Dondero v. *Highland Capital Management, L.P.*, No. 22-10889

The Dugaboy Investment Trust v. *Highland Capital Management, L.P.*, No. 22-10960

The Charitable DAF Fund, L.P., et al. v. *Highland Capital Management, L.P.*, No. 22-11036

DIRECTLY RELATED PROCEEDINGS—Cont'd

The Dugaboy Investment Trust v. *Highland Capital Management, L.P.*, No. 22-10983

United States District Court (N.D. Tex.):

Highland Capital Management, L.P., et al. v. *Highland Capital Management Fund Advisors L.P.*, No. 3:21-cv-881 (consolidated cases: 3:21-cv-880, 3:21-cv-1010, 3:21-cv-1378, 3:21-cv-1379)

The Charitable DAF Fund, L.P., et al. v. *Highland Capital Management, L.P.*, No. 3:21-cv-1585

NexPoint Advisors, L.P., et al. v. *Highland Capital Management, L.P.*, No. 3:22-cv-02170

The Charitable DAF Fund, L.P., et al. v. *Highland Capital Management, L.P.*, No. 3:22-cv-02280

United States Bankruptcy Court (N.D. Tex.):

In re: Highland Capital Management, L.P., No. 19-34054

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-38a) is reported at 48 F.4th 419. The order of the bankruptcy court confirming the plan of reorganization (App., *infra*, 39a-160a) is unreported.

JURISDICTION

The court of appeals entered judgment on August 19, 2022. App., *infra*, 161a. On September 7, 2022, the court issued a revised opinion without entering a new judgment. On November 8, 2022, Justice Alito extended the time to file a petition for a writ of certiorari to and including January 5, 2023.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 524 of the Bankruptcy Code, 11 U.S.C. § 524, provides in relevant part:

(a) A discharge in a case under this title—

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1192, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1192, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

* * *

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

STATEMENT

The court below, on direct appeal from the bankruptcy court, reversed in part an order confirming a chapter 11 plan of reorganization because the plan contained an exculpation clause that included non-debtors. That clause established that specified persons and entities that guided petitioner during its bankruptcy case would be held to a standard of care excluding their liability for simple

negligence.[1] Following circuit precedent—with which most other courts of appeals have disagreed—the Fifth Circuit held that section 524(e) of the Bankruptcy Code, 11 U.S.C. § 524(e), prohibits chapter 11 reorganization plans from exculpating or releasing non-debtors from liability, except as is specifically authorized by some other provision of the Bankruptcy Code. As the court of appeals acknowledged, "[t]he simple fact of the matter is that there is a circuit split" on that issue. App., *infra*, 30a.

The Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits all disagree with the Fifth. In those circuits, section 524(e) is not understood to constrain bankruptcy courts from limiting the liability of non-debtors under a chapter 11 plan in appropriate circumstances.

The Fifth and Tenth Circuits, however, read section 524(e) as prohibiting chapter 11 plans from protecting almost all non-debtors from liability in almost any circumstance, even if doing so is vital to the success of the plan and viability of the reorganized debtor.

This deep and intractable dispute among the circuits turns on what section 524(e) means when it

[1] "Exculpation clauses" are distinct from third-party releases. Whereas a non-debtor release "eliminat[es]" a non-debtor's liability "altogether," *In re PWS Holding Corp.*, 228 F.3d 224, 247 (3d Cir. 2000), an exculpation clause is a *limited* release that sets a standard of care, *id.* at 245. Petitioner's plan contained a non-debtor exculpation, not a third-party release. As explained below, however, the Fifth Circuit treats 11 U.S.C. § 524(e) as equally prohibiting exculpation clauses and third-party releases, except as applied to a narrow set of parties. For the question presented by this petition, therefore, the distinctions between exculpation clauses and non-debtor releases matter little.

states that the "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). The seven-circuit majority view is that section 524(e) merely confirms the effect of a discharge under subsection (a) of the same section, *id.* § 524(a): such a discharge does not automatically affect creditors' rights against any other persons or entities also liable on the same debt.

Section 524(e) does not, under the majority view, impose any independent restriction on the bankruptcy court's broad, equitable authority. Among other sources granting that authority, the Bankruptcy Code explicitly empowers a court confirming a plan of reorganization to "include any other appropriate provision not inconsistent with the applicable provisions of" the Bankruptcy Code. 11 U.S.C. § 1123(b)(6).

By contrast, the two-circuit minority view, applied by the court of appeals below, is that section 524(e) states not just the effect of a discharge itself but also a broad limitation of the courts' power to protect non-debtors in any way except under a specific grant of authority elsewhere in the Code.

The majority view is correct, and the decision below is wrong. Section 524(e) simply states that the discharge of a debtor's liability on a debt does not *itself* affect any other creditor's liability *on that same debt*. Section 524(e) uses no mandatory language at all; it does not tell the court or the parties what provisions a plan "shall" or "shall not" include. In other words, section 524(e) is simply a saving clause intended to clarify that a debtor's statutorily defined discharge is limited in scope to the debtor itself.

This is an important and recurring issue of bankruptcy law, as is demonstrated by the depth and duration of the circuit split. The facts of this case further demonstrate that importance.

Petitioner is an SEC-registered investment advisor that, during its bankruptcy, continued to manage billions of dollars of financial assets. Petitioner's professionals and related entities now face a barrage of litigation about their bankruptcy-related conduct from petitioner's ousted founder—a "serial litigator," as the bankruptcy court accurately called him—who objected to petitioner's reorganization and threatened to "burn the place down" when he did not get his way before the bankruptcy court.

In these circumstances, the bankruptcy court found that exculpation—a limitation of liability commonplace in corporate law and routinely afforded to the directors and officers of financial companies outside of bankruptcy—was necessary to prevent the post-effective-date estate from being swamped with frivolous litigation arising from conduct that occurred during the bankruptcy case. Petitioner's reorganization plan thus exculpated certain parties, including petitioner and specified non-debtors, from liability other than for acts or omissions constituting bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct.

The court of appeals struck most non-debtors from the confirmed plan's exculpation provision, holding that section 524(e) "categorically bars" their exculpation. The court of appeals acknowledged the bankruptcy court's findings that those exculpations were necessary to the success of petitioner's

reorganization plan. Nevertheless, it concluded that circuit precedent bound it to strike certain of those exculpations from the plan. That incorrect holding merits review by this Court.

A. Legal Background

A principal goal of bankruptcy law is to afford the debtor a "fresh start." The bankruptcy discharge, which releases the debtor from obligations on its pre-petition debts, is an important tool for accomplishing that goal. Each of the Bankruptcy Code chapters under which debtors can seek relief contains a specific provision for how and when the debtor's discharge occurs under that chapter. See 11 U.S.C. §§ 727, 944, 1192, 1228, 1328. Section 524 provides general provisions, applicable across all chapters, about the effect of a discharge.

Under section 524, discharge does not itself extinguish the debtor's underlying debt. Rather, discharge voids the debtor's (and only the debtor's) liability on the debt and enjoins creditors from pursuing actions against the debtor on any claims arising from that debt. 11 U.S.C. § 524(a). The debt otherwise remains valid and enforceable. Judgments on that debt against any non-debtors are unaffected, and creditors may pursue further recovery from any such liable non-debtors. See 4 *Collier on Bankruptcy* ¶ 524.05 (16th ed. 2022).

Section 524(e) makes this point explicit. It states that, "[e]xcept as provided in subsection (a)(3) of this section," which deals with certain community-property debts, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the

property of any other entity for, such debt." 11 U.S.C. § 524(e).

B. Factual and Procedural Background

1. The Parties

Petitioner Highland Capital Management, L.P., is the reorganized chapter 11 debtor. Highland, a global investment adviser founded in 1993, provided investment management and advisory services, managing billions of dollars of assets, both directly and through affiliates.

Respondent James Dondero is petitioner's co-founder and former CEO. NexPoint Advisors, L.P., and NexPoint Asset Management, L.P. (f/k/a as Highland Capital Management Fund Advisors, L.P.) are registered investment advisors owned or controlled by Dondero. They, in turn, manage Highland Income Fund, NexPoint Strategic Opportunities Fund (n/k/a NexPoint Diversified Real Estate Trust), Highland Global Allocation Fund, and NexPoint Capital Incorporated, which are investment vehicles also controlled by Dondero. The Dugaboy Investment Trust and Get Good Trust are Dondero's family trusts.

2. Petitioner's Chapter 11 Bankruptcy

Petitioner's path to bankruptcy was far from typical. It did not suffer a business calamity, have problems with its vendors or landlords, or default on payments to its lenders. Rather, petitioner's chapter 11 case was brought on by "a myriad of massive, unrelated, business litigation claims that it faced * * * after a decade or more of contentious litigation in multiple forums all over the world" instigated by Dondero when he was petitioner's CEO.

App., *infra*, 52a. As the bankruptcy court found, Dondero is a "serial litigator" whose litigiousness caused petitioner to file for bankruptcy and strapped it with more than a billion dollars in claims. See *id.* at 52a-55a.

Petitioner filed for chapter 11 bankruptcy on October 16, 2019. Its creditors' committee consisted of three entities holding litigation claims against petitioner, and one of petitioner's litigation discovery vendors. Concerned about Dondero's ability to serve as an estate fiduciary, the U.S. Trustee moved to appoint a chapter 11 trustee to manage petitioner's estate. Petitioner ultimately avoided the appointment of a trustee by entering into a settlement agreement with the creditors' committee (the "Governance Settlement"). That settlement—approved by the bankruptcy court—changed petitioner's management and governance during the pendency of the bankruptcy case.

The Governance Settlement removed Dondero from all control positions at petitioner. It appointed three outside, independent directors to manage petitioner and its reorganization. The bankruptcy court later approved one of petitioner's independent directors, James P. Seery, Jr., to be petitioner's new CEO and Chief Restructuring Officer ("CRO").

To induce the independent directors' service, the Governance Settlement (a) limited their and their agents and advisors' prospective liability to claims asserting willful misconduct or gross negligence, and (b) required the bankruptcy court to act as a gatekeeper by screening for colorability any claims against the protected parties. The order appointing Seery as CEO and CRO included similar protections

for Seery in his additional role. The bankruptcy court found as fact that, without the exculpation and gatekeeper provisions, "none of the independent directors would have taken on the role" because of the "litigation culture that enveloped Highland historically." App., *infra*, 60a.

The bankruptcy court found that "this [Governance 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." App., *infra*, 58a. Once appointed, Seery and the other independent directors began to negotiate settlements with petitioner's principal creditors, paving the way for approval of the resulting reorganization plan by creditors holding 99.8% in dollar amount of the claims against petitioner.

Petitioner's chapter 11 plan is an "asset monetization plan" in which distributions to creditors will result from the orderly winddown and sale of petitioner's holdings and other assets over the course of several years. App., *infra*, 48a. The bankruptcy court described this plan, and its overwhelming creditor support, as "nothing short of a miracle." *Id.* at 62a.

Dondero, by contrast, had advocated for a reorganization plan that would reinstall him as CEO of an ongoing enterprise. After petitioner and other stakeholders rejected those proposals, Dondero explicitly threatened to "burn the place down." App., *infra*, 111a.

It was no idle threat. Dondero and entities under his control have attempted to frustrate petitioner's reorganization by, among other things, objecting to nearly every settlement between petitioner and its

creditors, challenging nearly every motion, appealing from nearly every order, obstructing petitioner's trading activity, and threatening petitioner's employees. To date, these various obstructions have resulted in two contempt findings against Dondero and one against certain of his controlled entities, including one arising from an attempted meritless lawsuit against Seery in violation of the order appointing him CEO and CRO, and nine separate appeals to the Fifth Circuit.

In recognition that such attacks on petitioner and its reorganization were not going to stop, petitioner's confirmed chapter 11 plan provided three "Plan Protections" to certain persons and entities whose efforts were going to be vital to the plan's success:

First, the plan exculpates certain persons and entities—defined as the "Exculpated Parties"—for conduct relating to the administration of the case (including the negotiation and implementation of the plan) from liability other than for bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct. App., *infra*, 106a-111a, 139a. The Exculpated Parties are, among others, petitioner and its agents, the independent directors, the creditors' committee and its members, and service professionals retained by petitioner and the committee. *Id.* at 34a.

Second, the plan enjoins certain persons—defined as the "Enjoined Parties"—from taking actions to interfere with the implementation and consummation of the plan. App., *infra*, 112a. The Enjoined Parties include Dondero and his related entities.

Third, the plan has a gatekeeper provision, which precludes the Enjoined Parties from commencing claims against any defined "Protected Party" without first obtaining the bankruptcy court's determination that the proposed claim is colorable. App., *infra*, 112a-117a.

The bankruptcy court found that all three Plan Protections were necessary to the success of petitioner's plan. Most pertinently for present purposes, the bankruptcy court found "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." App., *infra*, 111a. That finding, as will be explained below, was undisturbed on appeal, but the court of appeals reversed in part despite that finding.

The bankruptcy court confirmed the plan, which then took effect. The Fifth Circuit authorized a direct appeal under 28 U.S.C. § 158(d).

3. The Appeal

The court of appeals affirmed the confirmation order in its entirety except for the plan's exculpation provision, which it found partly violated 11 U.S.C. § 524(e). The court held that "§ 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code." App., *infra*, 30a (citing *In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009)). The court concluded that "the exculpation here partly runs afoul of that statutory bar on non-debtor discharge by reaching beyond Highland Capital, the Committee, and the Independent Directors." *Id.* at 28a. Those three

entities, the court held, were entitled to exculpation from liability under other provisions of the Bankruptcy Code. See *id.* at 32a-34a.

By contrast, the court of appeals held that other persons or entities—whose exculpation was not, in the court's view, grounded in a specific provision of the Bankruptcy Code—could not be exculpated from any liability because of section 524(e). App., *infra*, 28a-35a. Those persons and entities include petitioner's officers and agents and certain retained service professionals—even though the bankruptcy court had found protection of each to be indispensable to the plan's success.

The court of appeals acknowledged that "[t]he simple fact of the matter is that there is a circuit split concerning the effect and reach of § 524(e)," and that the Fifth Circuit had adopted the minority position in that split. App., *infra*, 30a. The court rejected petitioner's invitation to distinguish its prior decision on this issue. See *id.* at 30a-33a.

Certain respondents sought panel rehearing, asking the court to hold that the persons and entities it had struck from the plan's exculpation provision must likewise be left unprotected by the plan's injunction and gatekeeper provisions. In response, the court altered a single sentence of its opinion, which did not affect the Fifth Circuit's ruling that "the injunction and gatekeeping provisions are sound," App., *infra*, 28a, or its conclusion about section 524(e).

REASONS FOR GRANTING THE PETITION

For thirty years, the courts of appeals have been deeply divided over whether section 524(e) prohibits bankruptcy courts from ordering a limited exculpation

or release of non-debtor liability as part of a chapter 11 reorganization plan. That longstanding circuit split—in which such provisions are authorized in seven circuits but generally prohibited in two circuits—shows no signs of dissipating. This Court should therefore grant certiorari to resolve the intractable disagreement among the circuits on an issue of great importance.

A. There Is An Acknowledged And Substantial Circuit Split

As the court of appeals acknowledged below, "there is a circuit split concerning the effect and reach of § 524(e)." App., *infra*, 30a. At least seven circuits have concluded that nonconsensual non-debtor relief is not barred by section 524(e). Only two circuits—including the Fifth Circuit—have reached the opposite conclusion. See *id.* at 30a-31a (listing cases).

This circuit conflict is widely recognized. See *Blixseth* v. *Credit Suisse*, 961 F.3d 1074, 1082 n.4 (9th Cir. 2020) ("There is a long-running circuit split on this issue."), cert. denied, 141 S. Ct. 1394 (2021); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1077 (11th Cir. 2015) ("Other circuits are split as to whether a bankruptcy court has the authority to issue a non-debtor release."); *In re Dow Corning Corp.*, 280 F.3d 648, 657 (6th Cir. 2002) ("[S]ome courts have found that the Bankruptcy Code does not permit enjoining a non-consenting creditor's claims against a non-debtor."); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141 (2d Cir. 2005) (acknowledging conflicting appellate decisions).

As one district court recently observed, this "long-standing conflict among the Circuits that have ruled on the question" has created "the anomaly that

whether a bankruptcy court can bar third parties from asserting non-derivative claim against a non-debtor–a matter that surely ought to be uniform throughout the country–is entirely a function of where the debtor files for bankruptcy." *In re Purdue Pharma, L.P.*, 635 B.R. 26, 89 (S.D.N.Y. 2021), appeal pending, No. 22-110 (2d Cir.) (argued Apr. 29, 2022).[2]

1. The majority approach—followed by the Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits—allows bankruptcy courts, in certain circumstances, to confirm a chapter 11 plan containing a non-debtor exculpation or third-party release, and to do so over an interested party's objection. *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142-143 (2d Cir. 2005); *In re PWS Holding Corp.*, 228 F.3d 224, 247 (3d Cir. 2000); *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648, 657-658 (6th Cir. 2002); *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640, 656 (7th Cir. 2008); *Blixseth* v. *Credit Suisse*, 961 F.3d 1074, 1082 (9th Cir. 2020), cert. denied, 141 S. Ct.

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[2] See also Fouad Kurdi, *A Question of Power: Non-Consensual Third-Party Releases in Chapter 11 Plans*, 25 No. 4 J. Bankr. L. & Prac. NL Art. 6 (Aug. 2016) ("Courts, practitioners, and scholars have vociferously debated the permissibility of non-consensual third-party releases for decades."); Elizabeth Gamble, *Nondebtor Releases in Chapter 11 Reorganizations: A Limited Power*, 38 Fordham Urb. L.J. 821, 831 (2011) ("Courts are divided on whether bankruptcy courts have the power to grant nondebtor third party releases and injunctions."); Joshua M. Silverstein, *Hiding in Plain View: A Neglected Supreme Court Decision Resolves the Debate Over Non-Debtor Releases in Chapter 11 Reorganizations*, 23 Emory Bankr. Dev. J. 13, 14 (2006) (noting "long-standing circuit split on an issue of critical significance to bankruptcy").

1394 (2021); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015).

The Seventh Circuit's opinion in *Airadigm Communications*, 519 F.3d 640, sums up the majority approach. See also *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d at 1078 n.7 (recent Eleventh Circuit decision observing that the Seventh Circuit's analysis "squarely supports the majority position"). In *Airadigm Communications*, the confirmed plan released certain non-debtor parties "for any act or omission arising out of or in connection with the Case, the confirmation of this Plan, the consummation of this Plan, or the administration of this Plan or property to be distributed under this Plan, except for willful misconduct." 519 F.3d at 655.

The court upheld that plan provision, holding that section 524(e) does not "bar[] a bankruptcy court from releasing non-debtors from liability to a creditor without the creditor's consent." 519 F.3d at 656. The "natural reading" of section 524(e), the court explained, "does not foreclose a third-party release from a creditor's claims." *Ibid.* Rather, section 524(e) simply clarifies that the discharge of a debtor's debt "does not affect the liability of any other entity on * * * such debt," 11 U.S.C. § 524(e), and thus acts as a "saving clause" to "preserve[] rights that might otherwise be construed as lost after the reorganization," 519 F.3d at 656. In other words, according to the majority view, section 524(e) simply establishes that, if the debtor and a non-debtor are both liable on the same debt, then the debtor *and only the debtor* benefits from discharge with respect to that debt.

The Seventh Circuit also observed that section 524(e) lacks any terms even "purport[ing] to limit the bankruptcy court's powers." 519 F.3d at 656. It does not, for instance, include any "mandatory terms" like "shall" or "will." *Ibid.* By contrast, "where Congress has limited the powers of the bankruptcy court, it has done so clearly—for example, by expressly limiting the court's power." *Ibid.* In the absence of such mandatory, power-limiting language, the court concluded, there is no reason to read section 524(e) as "bar[ring] a non-consensual third-party release from liability." *Ibid.*

The Seventh Circuit further held that "Congress affirmatively gave the bankruptcy court the power to release third parties from a creditor's claims without the creditor's consent" through sections 105(a) and 1123(b)(6) of the Bankruptcy Code. 519 F.3d at 657; see generally *United States* v. *Energy Res. Co.*, 495 U.S. 545, 549 (1990) (construing same provisions). The Seventh Circuit understood those provisions to "permit[] the bankruptcy court to release third parties from liability to participating creditors if the release is 'appropriate' and not inconsistent with any provision of the bankruptcy code." 519 F.3d at 657.[3]

2. Only two circuits—the Fifth and Tenth—disagree with the majority approach. In those circuits, section 524(e) is interpreted as prohibiting bankruptcy courts from exculpating or releasing most non-

[3] The Fifth Circuit here rejected reliance on those statutory provisions. App., *infra*, 32a. If, however, the majority construction of section 524(e) is correct, and that section does not limit the powers of a bankruptcy court, then the basis for the Fifth Circuit's opinion evaporates without regard to the correct construction of other provisions of the Code.

debtors under chapter 11 plans. *In re Pacific Lumber Co.*, 584 F.3d 229, 252-253 (5th Cir. 2009); *In re Western Real Est. Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1990) (per curiam).

In *Pacific Lumber*, the Fifth Circuit held that section 524(e) "broadly * * * foreclose[s] non-consensual non-debtor releases" because it "only releases the debtor, not co-liable third parties." 584 F.3d at 252. The Fifth Circuit thus expressly rejected the "more lenient approach to non-debtor releases taken by other courts" even then—now 14 years ago. *Ibid.*[4] In the decision below, the Fifth Circuit acknowledged the even deeper circuit split that now exists but reaffirmed its view that section 524(e) "categorically bars third-party exculpations." App., *infra*, 30a. The rule in the Tenth Circuit is similar. See *In re Western Real Est. Fund, Inc.*, 922 F.2d at 602

[4] In *Pacific Lumber*, the Fifth Circuit affirmed only a non-debtor release of the "disinterested volunteers" on the creditors' committee, concluding that such a limited non-debtor release was consistent with the committee members' "qualified immunity for actions within the scope of their duties" under 11 U.S.C. § 1103(c). 584 F.3d at 253. The Fifth Circuit applied that same holding in its decision below, and likewise correctly affirmed the non-debtor exculpation of petitioner's disinterested, independent directors as being consistent with the limited liability of a bankruptcy trustee. Respondents have obtained an extension of time until January 16, 2023, to file a petition for a writ of certiorari to challenge that holding. No. 22A303. That holding—reached under a minority view of section 524(e) as being a highly restrictive view of bankruptcy courts' powers—does not implicate the circuit split that the Fifth Circuit acknowledged and is not certworthy. Petitioner will elaborate on the uncertworthiness of the issue in its response to any petition for a writ of certiorari that respondents may file.

(release of non-debtor liability "improperly insulate[s] nondebtors in violation of section 524(e)").

The Fifth Circuit's decision to double down on its minority approach to section 524(e) demonstrates that the circuits will not resolve their diverging approaches of their own accord.

B. The Question Presented Is A Recurring And Important Issue

It is of critical and widespread importance to the bankruptcy laws whether chapter 11 plans can incorporate non-debtor releases and exculpations to facilitate a debtor's successful reorganization. The depth and persistence of the circuit split on this issue demonstrate how often this issue arises in chapter 11 bankruptcies, including some of the most complex and consequential corporate reorganizations managed by the bankruptcy courts.

An exculpation clause, like the one in petitioner's plan, serves to provide only "limited immunity" to certain parties for conduct related to the chapter 11 case. American Bankruptcy Institute, Report of Commission to Study the Reform of Chapter 11, at 250 (2014) ("ABI Study"). In connection with plan confirmation, courts have found such limitations of liability to be reasonable and appropriate in a variety of circumstances, particularly (as here) when an exculpation "was narrowly tailored, exculpated only negligent conduct, and was in the best interests of the estate." *Id.* at 250-251 (citing *In re Enron Corp.*, 326 B.R. 497, 504 (S.D.N.Y. 2005)). Such provisions, where permissible, can have laudatory effects on the success of a bankruptcy case, including "encouraging parties to engage in the process and assist the debtor in achieving a confirmable plan—actions that * * *

estate representatives and their professionals * * * may not be willing to undertake in the face of litigation risk." *Id.* at 251.

Although petitioner's plan did not include a non-debtor release, such releases—which relieve recipients of all liability for specified claims against them, and which are also categorically prohibited under the Fifth Circuit's reading of section 524(e)—can in certain circumstances also provide significant benefits to the debtor's estate. Courts in the majority circuits generally permit such releases only in "rare," "unique," and "truly unusual" cases in which doing so is "important to the success of the plan." *Metromedia*, 416 F.3d at 141-143.

In those exceptional cases, because of their "particular fact patterns," non-debtor releases can be instrumental in "facilitat[ing] a confirmable plan and ultimately benefit[ing] all stakeholders." ABI Study at 255; see also *id.* at 255-256 (recommending context-specific consideration for third-party releases of claims against non-debtors, and disapproving of any "blanket prohibition" on such releases).

Yet, because of the circuits' divergent approaches, debtors' ability to avail themselves of non-debtor exculpations or releases depends on the happenstance of geography. In an area of the law that prizes "uniform[ity]," such a result is untenable. U.S. Const. Art. I, § 8, Cl. 4; see *In re Purdue Pharma*, 635 B.R. at 104 ("conflicting" circuit decisions on non-debtor releases and exculpation have created "a most unfortunate circumstance when dealing with a supposedly uniform and comprehensive nationwide scheme to adjust debtor-creditor relations").

Moreover, these geographic disparities in the availability of non-debtor plan relief have invited forum shopping. Debtors who perceive non-debtor exculpation or releases as a valuable tool to achieve a successful reorganization seek out jurisdictions that allow for such relief to be granted, and avoid those jurisdictions that do not. See, *e.g.*, Robert K. Rasmussen, *COVID-19 Debt and Bankruptcy Infrastructure*, 131 Yale L.J.F. 337, 354 (2021) (noting a debtor's choice to file for bankruptcy in Chicago because it "decided that the law on third-party releases was more favorable in the Seventh Circuit than in other possible venues"). But this Court has emphasized the importance of "discourag[ing] forum shopping * * * to prevent a party from receiving a windfall merely by reason of the happenstance of bankruptcy." *Butner* v. *United States*, 440 U.S. 48, 55 (1979) (quotation marks omitted); see also Ralph Brubaker, *Mandatory Aggregation of Mass Tort Litigation in Bankruptcy*, 131 Yale L.J.F. 960, 991-992 (2022) (noting the "well-known and rapidly escalating phenomenon of unrestricted forum shopping" in chapter 11 cases).

Despite the long-standing circuit split and use of non-debtor exculpations and releases in most circuits, this Court has never specifically considered whether such relief is permitted under the Bankruptcy Code. See *Travelers Indem. Co.* v. *Bailey*, 557 U.S. 137, 155 (2009) (noting that the Court did "not resolve whether a bankruptcy court * * * could properly enjoin claims against nondebtor insurers that are not derivative of the debtor's wrongdoing"). Without this Court's review, there is no reason to think that this three-decade-long division of authority will resolve itself.

Only this Court can establish a uniform rule concerning debtors' ability to use non-debtor releases and exculpation to achieve successful chapter 11 reorganizations.

C. The Fifth Circuit's Approach Is Wrong

The acknowledged circuit split on a recurring and important question would warrant this Court's review even if the decision below were correct. But it is not.

First, neither *Pacific Lumber* nor the decision below engages with the text of section 524(e) itself. As the Seventh Circuit explained, nothing in section 524(e) actually prohibits a bankruptcy court from granting non-debtor relief. *Airadigm Commc'ns*, 519 F.3d at 656. The provision lacks any mandatory language constraining bankruptcy courts' authority in any respect. *Ibid.* It is merely a "saving clause" intended to clarify that a debtor's discharge from its debts has no effect on the liability of others on those same debts. *Ibid.*

Second, other provisions of the Bankruptcy Code do—unlike section 524(e)—expressly address what a court may do rather than what the automatic effect of a discharge is. This Court has underscored, for example, that the Bankruptcy Code "grants the bankruptcy courts residual authority to approve reorganization plans including 'any . . . appropriate provision not inconsistent with the applicable provisions of this title.'" *Energy Res. Co.*, 495 U.S. at 549 (quoting 11 U.S.C. § 1123(b)(6)).

This Court need not resolve any issues concerning the meaning of such other provisions to resolve the question presented by this petition. But Congress's careful attention to courts' authority

elsewhere in the Code shows the stark implausibility of construing the words "discharge * * * does not affect" as if they too were a limitation on courts' powers.

D. This Case Is An Ideal Vehicle For Resolving This Important Question

This case is an ideal vehicle for addressing the question presented. Both the bankruptcy court (App., *infra*, 106a-111a) and the court of appeals (*id.* at 28a-35a) decided the issue following extensive briefing and argument concerning the effect of section 524(e). The Fifth Circuit's decision directly addressed the circuits' competing approaches to section 524(e). *Id.* at 30a-31a.

Furthermore, the Fifth Circuit reversed petitioner's confirmed plan solely as to certain of its non-debtor exculpations; it otherwise affirmed confirmation of the plan in full. App., *infra*, 21a; see also *id.* at 38a ("[T]he Plan violates § 524(e) but only insofar as it exculpates and enjoins certain non-debtors."). The question presented is thus squarely and cleanly presented here.

Finally, this case involves only non-debtor exculpations, not any more comprehensive non-debtor releases. No one has ever identified any basis other than section 524(e) to invalidate exculpation clauses, whereas non-party releases raise a host of other questions as well. See, *e.g.*, *In re Purdue Pharma L.P.*, 633 B.R. 53, 98-101 (Bankr. S.D.N.Y.) (discussing constitutional issues raised by non-debtor releases), rev'd in pertinent part, 635 B.R. 26, 89 (S.D.N.Y. 2021), appeal pending, No. 22-110 (2d Cir.) (argued Apr. 29, 2022).

This Court should accordingly grant certiorari to resolve the deep and entrenched circuit split over the interpretation of section 524(e).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 2023

Appendix Exhibit 130

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RE: ***Patrick Daugherty v. James Dondero, et al.,***
Civil Action No. 2019-0956-MTZ

Dear Counsel:

On May 15, 2020, plaintiff Patrick Daugherty filed his amended complaint in this action (the "Amended Complaint").[1] In March of 2021, this matter was stayed in view of a related bankruptcy. But today I write to resolve three motions, which I collectively refer to as the "Motions to Dismiss": (1) the Motion to Dismiss the Amended Verified Complaint filed by defendant Michael Hurst;[2] (2) the Motion to Dismiss or, in the Alternative, Stay Plaintiff's Verified Amended Complaint filed by defendants James Dondero, Highland Employee Retention Assets LLC ("HERA"), Highland ERA Management LLC ("HERA

[1] Docket Item ("D.I.") 28 [hereinafter Am. Compl.].

Management"), Scott Ellington, Thomas Surgent, and Issac Leventon (collectively the "Highland Defendants");[3] and (3) the Motion to Dismiss Plaintiff's Verified Amended Complaint filed by defendants Marc Katz and Hunton Andrews Kurth LLP's ("Andrews Kurth" and collectively the "Andrews Kurth Defendants" and together with Hurst and the Highland Defendants, "Defendants").[4] I conclude that Daugherty has impermissibly split his claims. Defendants' Motions to Dismiss are granted.

I. BACKGROUND[5]

Daugherty was a partner and senior executive of nonparty Highland Capital Management L.P. ("Highland Capital"). In 2009, Highland Capital formed HERA, a Delaware limited liability company. Highland Capital granted Daugherty and other employees "equity-like awards in certain funds, and then distribut[ed] the

[2] D.I. 31.

[3] D.I. 32.

[4] D.I. 34.

[5] All facts are drawn from the Amended Complaint, the documents integral to it, and those that are incorporated by reference. *See Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004).

proceeds of those interests to the employees in their capacity as unit holders of HERA."[6] Daugherty was also a director of HERA.

Daugherty has had a difficult relationship with Highland Capital and its principals for over a decade. He resigned from Highland Capital on September 28, 2011, though he continued to hold an interest in HERA. He contends that in February 2012, his adversaries began a multi-step plan designed to deprive him of that HERA interest.

In 2012, Highland Capital sued Daugherty in a Texas court, and Daugherty responded by filing counterclaims against Highland Capital and third-party claims against HERA and others. During those proceedings, certain Defendants created an escrow to hold Daugherty's HERA interest pending the resolution of the litigation, which they represented would be transferred to him if he prevailed. But Daugherty contends the escrow was created to allow those Defendants to represent to the Texas judge and jury that they had not deprived Daugherty of his interest: according to Daugherty, those Defendants never intended to transfer Daugherty's interest to him, even if he won.

[6] Am. Compl. ¶ 20.

Daugherty did win on at least one of his claims.[7] The Texas jury found in his favor and awarded him damages of $2.6 million plus interest against HERA (the "Texas Judgment"). The verdict was appealed, and the Texas Court of Appeals affirmed the trial court's decision on December 1, 2016, making the Texas Judgment collectable. Shortly thereafter, the escrow agent resigned and the escrowed assets were transferred to Highland Capital, not back to HERA. Moreover, Daugherty alleges that before the Texas Judgment became final, certain Defendants caused a disproportionate amount of legal fees from those proceedings to be allocated to HERA. With the assets transferred to Highland from the escrow, and in light of the fee allocations, HERA no longer held any assets and so could not satisfy the Texas Judgment. Daugherty alleges he has been unable to collect the Texas Judgment.

On July 6, 2017, Daugherty sued Highland Capital and the Highland Defendants in this Court (the "First Delaware Action").[8] His claims generally fall into three categories: (1) the transfer of HERA's assets out of escrow; (2) amendments to HERA's LLC agreement introduced by certain Defendants; and (3)

[7] The Texas jury also awarded Highland Capital attorneys' fees of $2.8 million.

[8] *Daugherty v. Highland Cap. Mgmt., L.P.*, 2017-0488-MTZ (Del. Ch.) [hereinafter First Del. Act.], D.I. 1.

indemnification and fees on fees relating to the Texas litigation.[9] Over the next two years, the Court issued two written decisions resolving motions to dismiss,[10] the parties engaged in various other motion practice,[11] Daugherty filed two amended complaints,[12] and the parties completed discovery. On July 11, 2018, Dondero was dismissed from the case, leaving Highland Capital, HERA, and HERA Management as the only defendants.[13] The case proceeded to trial on October 14, 2019.

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[9] *Id.* ¶¶ 73–119.

[10] First Del. Act., D.I. 36; *Daugherty v. Highland Cap. Mgmt.*, 2018 WL 417270 (Del. Ch. Jan. 16, 2018); First Del. Act., D.I. 66; *Daugherty v. Highland Cap. Mgmt., L.P.*, 2018 WL 3217738 (Del. Ch. June 29, 2018).

[11] *See, e.g.*, First Del. Act., D.I. 61 (motion for a protective order); First Del. Act., D.I. 106 (motion to compel escrow agent's documents pursuant to crime-fraud exception); First Del. Act., D.I. 133 (motion for partial summary judgment); First Del. Act., D.I. 152 (motion for status quo order); First Del. Act., D.I. 207 (motion for rule to show cause why defendants should not be held in contempt); First Del. Act., D.I. 210 (motion to compel discovery relating to escrow); First Del. Act., D.I. 211 (motion for reargument concerning motion to compel); First Del. Act., D.I. 220 (motion to stay pending interlocutory appeal); First Del. Act., D.I. 229 (motion for partial summary judgment); First Del. Act., D.I. 259 (motion for protective order); First Del. Act., D.I. 269 (motion to compel and submit to a continued deposition); First Del. Act., D.I. 270 (motion to compel testimony); First Del. Act., D.I. 298 (motion in limine); First Del. Act., D.I. 299 (motion in limine); First Del. Act. at D.I. 329 (motion for continuance); First Del. Act., D.I. 355 (motion to continue confidential treatment of certain joint exhibits).

[12] First Del. Act., D.I. 77; First Del. Act., D.I. 127.

[13] First Del. Act., D.I. 68.

On the morning of October 16, 2019—the third day of trial—the defendants informed the Court that Highland Capital filed for bankruptcy.[14] All proceedings against Highland Capital were automatically stayed, and the parties agreed that the rest of the First Delaware Action should also be stayed.[15] Those proceedings remained stayed, and the trial record remains open.

Plaintiff initiated this action on December 1, 2019, and filed the Amended Complaint on May 15, 2020.[16] The Amended Complaint asserts claims against all defendants in the First Delaware Action (including Dondero) other than Highland Capital. It added as new defendants Highland Capital's outside counsel (Andrews Kurth, Katz, and Hurst) and three of Highland Capital's in-house counsel (Ellington, Leventon, and Surgent). The new allegations in the Amended Complaint center on these new Defendants' participation in transferring HERA's assets out of escrow and otherwise assisting in devaluing or appropriating Daugherty's HERA interest. The Amended Complaint arises out of the same

[14] First Del. Act., D.I. 362.

[15] *Id.*; First Del. Act., D.I. 358.

[16] D.I. 1; Am. Compl.

series of actions at issue in the First Delaware Action—a point Daugherty readily admits.[17]

On July 15, 2020, Defendants filed the Motions to Dismiss pursuant to Court of Chancery Rule 12(b)(6).[18] The Highland Defendants also moved in the alternative to stay this action.[19] Daugherty asserted claims relating to the Texas Judgment and other damages sought in the Delaware actions as a creditor in Highland Capital's bankruptcy, so I granted the stay pending the resolution of Highland Capital's bankruptcy proceedings.[20] The bankruptcy proceedings remain ongoing, but Daugherty has reached a settlement of his claims against Highland Capital.[21]

On a May 5, 2022, status conference, I requested that the parties provide supplemental briefing on the issues of claim splitting and the Texas attorney

[17] D.I. 46 at 26 [hereinafter Ans. Br.] ("There is no real dispute between Daugherty and the Defendants that the claims in this action are part of the same common nucleus of fact.").

[18] D.I. 31; D.I. 32; D.I. 34.

[19] D.I. 32.

[20] D.I. 61; D.I. 62 at 59–64.

[21] D.I. 66; D.I. 69 at 2–3; D.I. 92 at 6–7 [hereinafter Supp. Ans. Br.].

immunity doctrine[22] for purposes of determining whether some or all of the claims set forth in the Amended Complaint could be resolved on the pleadings and without intruding on the bankruptcy proceedings.[23] The parties filed their supplemental briefs[24] and I heard argument on October 6, 2022.[25]

II. ANALYSIS

The standard governing Defendants' Motions to Dismiss is as follows:

> (i) [A]ll well-pleaded factual allegations are accepted as true; (ii) even vague allegations are "well-pleaded" if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and [(iv)] dismissal is inappropriate unless the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[26]

Defendants moved to dismiss the Amended Complaint on the basis of claim splitting. The claim splitting doctrine requires that a plaintiff raise all legal

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[22] Under the Texas attorney immunity doctrine, "an attorney is immune from liability to nonclients for conduct within the scope of his representation of his clients." *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018). The parties dispute both the availability and applicability of this protection in this case. This letter resolves Defendants' Motions to Dismiss under the doctrine of claim splitting, so I do not reach whether the Texas immunity doctrine applies.

[23] D.I. 86 at 22–30.

[24] D.I. 87; D.I. 88; D.I. 90; Supp. Ans. Br.; D.I. 98; D.I. 100; D.I. 101.

[25] D.I. 103; D.I. 104. I also draw on the parties' earlier briefing on these same issues. D.I. 31; D.I. 33; D.I. 35; Ans. Br.; D.I. 53; D.I. 54; D.I. 55.

[26] *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002) (footnotes omitted) (quoting *Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 227 (Del. 1982)).

theories arising from a common nucleus of operative fact in one action so long as she has had a full and free opportunity to do so.[27] A final judgment in the first-filed action is not a necessary element of the doctrine.[28] Claim splitting may bar a second cause of action even where there is not complete overlap between the named defendants.[29] The burden is on the plaintiff to show that she could not have raised her new claims in the first proceeding.[30] Two principles drive the claim

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[27] *J.L. v. Barnes*, 33 A.3d 902, 918 (Del. Super. 2011); *see also Goureau v. Lemonis*, 2021 WL 1197531, at *9 (Del. Ch. Mar. 30, 2021) (reasoning the claim splitting doctrine can apply to a series of related transactions). Claim splitting will not be applied where a plaintiff "could not for jurisdictional reasons have presented his claim in its entirety in a prior or parallel adjudication." *Barnes*, 33 A.3d at 920 (internal quotation marks omitted) (quoting *Maldonado v. Flynn*, 417 A.2d 378, 383 (Del. Ch. 1980)).

[28] *See Balin v. Amerimar Realty Co.*, 1995 WL 170421, at *4 (Del. Ch. Apr. 10, 1995) (explaining that the "basic difference" between res judicata and claim splitting "is that *res judicata* precludes the relitigation of factual and legal issues previously decided in an earlier lawsuit, while the rule against claim splitting eliminates the contemporaneous litigation of the same factual or legal issues in different courts"); *Hawkins v. Daniel*, 2021 WL 3732539, at *12–14 (Del. Ch. Aug. 24, 2021) (considering simultaneously pending actions); *Goureau*, 2021 WL 1197531, at *8 (same); *Barnes*, 33 A.3d at 917–18 (same); *Winner Acceptance Corp. v. Return on Cap. Corp.*, 2008 WL 5352063, at *18 (Del. Ch. Dec. 23, 2008) (noting the policy of claim splitting is intended to avoid both "overlapping [and] repetitive actions in different courts or at different times" (internal quotation marks omitted) (quoting *Balin*, 1995 WL 170421, at *4)); *see also* 18 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4406 (4th ed.) ("In dealing with simultaneous actions on related theories, courts at times express principles of 'claim splitting' that are similar to claim preclusion, but that do not require a prior judgment.").

[29] *Barnes*, 33 A.3d at 918–19 (considering that substantial factual overlap between the two pending actions made it likely that the defendants would be subjected to claims or third-party claims for contribution in each case).

[30] *Maldonado*, 417 A.2d at 383–84.

splitting doctrine: (1) "that no person should be unnecessarily harassed with a multiplicity of suits"; and (2) a litigant should be prohibited "from getting 'two bites at the apple.'"[31]

Daugherty's First Delaware Action asserted claims arising out of, among other things, the transfer of HERA assets from the escrow. Those proceedings were stayed by the automatic bankruptcy stay and by consent. Daugherty then filed this second action, asserting claims that he concedes arise from the same common nucleus of operative fact,[32] which he describes as only "nominally new,"[33] against overlapping and additional defendants. These simultaneously pending, overlapping cases undoubtedly risk subjecting Defendants to multiple judgments and potentially risk giving Daugherty two chances at prevailing on claims arising from the same series of transactions (in addition to his third opportunity as a creditor in Highland Capital's bankruptcy). Indeed, Daugherty

[31] *Barnes*, 33 A.3d at 918 (internal quotation marks omitted) (quoting Joseph E. Edwards, LL.B, Annotation*, Waiver of, by Failing to Promptly Raise, Objection to Splitting Cause of Action*, 40 A.L.R.3d 108 (1971), and then *Balin*, 1995 WL 170421, at *1).

[32] Ans. Br. at 26.

[33] Supp. Ans. Br. at 2–3.

does not dispute that he has engaged in claim splitting; he argues he should be excused from the consequences of doing so.[34]

Daugherty urges this Court to apply an exception to the claim splitting doctrine that, in other jurisdictions, forecloses dismissal where a plaintiff could not have discovered a cause of action due to the defendant's fraud or concealment.[35] He contends he did not assert his claims against the additional defendants earlier because, according to Daugherty, Dondero stated for the first time at trial that Highland Capital was relying on the advice of counsel in carrying out the underlying acts.[36]

[34] *See* D.I. 104 at 43 ("I agree with one thing [Defendants] said. The claims were split, but where I take issue is that the claim splitting was improper here."); Supp. Ans. Br. at 7–10.

[35] Supp. Ans. Br. at 7–10 (citing *Havercombe v. Dep't of Educ. of the Commonwealth of P.R.*, 250 F.3d 1, 8 n.9 (1st Cir. 2001)).

[36] Ans. Br. at 29.

If I were to implement this exception to improper claim splitting, this case would not satisfy it. Daugherty has failed to persuade me that the defendants in the First Delaware Action concealed either the attorney defendants' involvement in the underlying events or the principals' intention to rely on advice of counsel to defeat the claims against them. The defendants in the First Delaware Action indicated they would argue that they did not act with the mental state required for Daugherty's claims because they relied on the advice of counsel, but it appears Daugherty did not pursue documents or testimony under the at-issue exception until his objection to Dondero's trial testimony.

The defendants in the First Delaware Action consistently pled an affirmative defense that they "did not act with the necessary knowledge, intent, or scienter, and instead acted in good faith and with due care at all times."[37] On January 9, 2019, they responded to Daugherty's interrogatory requesting the basis for that defense by stating, in relevant part, that "[t]he Amended Complaint alleges no specific facts establishing that the transfer of the Deposit Assets was made with the actual intent to hinder, delay, or defraud," and that "Defendants' Counsel," among others,

[37] First Del. Act., D.I. 81 at Affirmative Defense ¶ 8; First Del. Act., D.I. 238 at Affirmative Defense ¶ 8 (same).

have knowledge concerning this defense.[38] Daugherty did not move to compel a more expansive response. On March 22, 2019, Daugherty noticed service of a subpoena *duces tecum* on Andrews Kurth LLP requesting documents relating to the escrow.[39] It is not clear to me whether Daugherty ever received those documents, but he never filed a motion to compel relating to that subpoena. Daugherty also moved for the commission of a subpoena *ad testificandum* to be served on Katz.[40] That motion was denied without prejudice, and the Court expressly permitted Daugherty to renew that motion after obtaining other discovery if he could demonstrate that there were "gaps in the record he needs to fill."[41] He never did so. Likewise, in a May 24, 2019 motion to compel, Daugherty expressed concerns with the defendants' April 2019 privilege log, but he did not seek relief on any entry on the basis of the at issue exception.[42] When

[38] First Del. Act. at Joint Exhibit 582 at res. 64.

[39] First Del. Act., D.I. 139.

[40] First Del. Act., D.I. 140.

[41] First Del. Act., D.I. 218 at 16–18. That other discovery included certain documents from Highland Capital's Delaware counsel for its actions relating to the escrow, pursuant to the crime-fraud exception. *Id.* at 14–15.

[42] First Del. Act., D.I. 210 at 4, 6–9.

Dondero was deposed on August 6, 2019, it appears that he conveyed that he relied on the advice of counsel several times as to several different matters.[43]

In pretrial briefing, the First Delaware Action defendants' brief included multiple references to the advice of counsel defense, and expressly argued that the defendants relied on their Delaware counsel's advice as a defense to several of the claims relating to the escrow.[44]

And so, leading up to trial, it appears Daugherty was on notice that the First Delaware Action defendants might argue that their reliance on the advice of counsel foreclosed a finding that they held the requisite intent in taking the

[43] First Del. Act., D.I. 349, Ex. G at 48 ("[**Q.**] So is it your position that HERA was receiving $9.5 million worth of services from Highland at the time? **A.** Yeah. I believe it would have been an appropriate transfer. That's why it was done. **Q.** And what makes it appropriate, in your view? **A.** It was strategized, reviewed, and vetted by counsel as appropriate, given facts and circumstances, expenses and ownership. **Q.** Okay. Apart from the belief of Highland's in-house or outside counsel about the appropriateness, do you have -- is anything else in forming your position that the transfer was appropriate? **A.** I rely on their expertise."); *id.* at 52 ("**Q.** Do you remember communicating with anybody in or around December 2013 regarding the escrow? **A.** No. It wouldn't -- it wouldn't have been my idea, but it would've been the advice of counsel."; *id.* at 54 ("**Q.** You said it would -- when you were referring to the escrow, you said it would've been the advice of counsel. Which counsel are you referring to? **A.** I don't know. **Q.** Highland counsel? **A.** No. It would've -- yeah, it would've been external counsel, but I don't know which one. **Q.** Okay. So outside counsel? **A.** Yes. **Q.** To Highland? **A.** I don't know. **Q.** Was it Andrews Kurth? **A.** I don't know. **Q.** Who, apart from Andrews Kurth, was Highlands [sic] outside counsel related to the Texas case? **A.** I don't know. **Q.** And as far as you can recall, you never communicated with Abrams & Bayliss about the escrow? **A.** Correct.").

complained-of actions. He also was on notice that he did not know what that advice was. He investigated the defendants' affirmative defense and conducted discovery to his apparent satisfaction in the First Delaware Action.

In opposing the Motions to Dismiss, Daugherty argues Defendants raised the advice of counsel defense for the first time at trial. His briefing cites a number of pages of trial testimony, without explaining how any of that testimony supports his position.[45] In the hearing, he focused on the following testimony, which he argued constituted new information:[46]

> Q. Did Highland have outside counsel advising with respect to the purchase of the units?
>
> A. Yes. I believe the whole situation was the most lawyered thing we've ever done. I mean, there was counsel for each of the board members, there was counsel for Highland, there was counsel for HERA, there was Delaware counsel. Everything was orchestrated, dictated by counsel.
>
> Q. Did Highland have -- did that counsel that Highland used also advise counsel on the documents, the transaction documents, relating to those purchases?
>
> A. Yes. All the functional documents and major moves at various turning points were all at the request -- or decided by counsel.[47]

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[44] First Del. Act., D.I. 323 at 26, 35–36, 42–43.

[45] Ans. Br. at 29 (citing First Del. Act., D.I. 361 at 284–85, 288, 293, 298–99, 300, 308–13, 325–27, 342).

[46] D.I. 104 at 45–48.

[47] First Del. Act., D.I. 361 at 284.

. . .

Q. Did you have any communication -- are you familiar with Abrams & Bayliss, with what Abrams & Bayliss is?

A. I know they're a Delaware law firm. But beyond that, no.

Q. Did you ever have any communications with Abrams & Bayliss about them resigning as escrow agent?

A. No. Highland and myself, I know, were purposely kept separate from this whole thing. And it was driven by -- it was driven by counsel.[48]

. . .

Q. My question is a little bit more specific because it relates to the escrow assets and Mr. Daugherty. If you had been told by counsel that Mr. Daugherty was entitled to the escrow assets, you would have given him the escrow assets; right?

A. Yes. We would have done whatever counsel told us. We tried very hard to compartmentalize this mess. We have a business to run. And this is -- a half dozen lawsuits, haranguing everybody in public, it was all intended to disrupt our business as much as possible. So we tried to delegate it and compartmentalize it to the lawyers as much as possible.[49]

. . .

[48] *Id.* at 288.

[49] *Id.* at 325–26.

> Q. Let's talk about which lawyers you're referring to. So I'll start with the in-house lawyers again. Which in-house lawyers of Highland are you relying on with respect to the transfer of the escrow assets?
>
> A. It would have been the same three internal lawyers working with external counsel.
>
> Q. Mr. Ellington, Mr. Leventon, and Mr. Surgent; is that right?
>
> A. I believe so. I believe they were the ones at that time and place.
>
> Q. Which outside counsel are you relying on?
>
> A. I don't know if Andrews and Kurth had merged with Piper. I don't know who else was involved besides the Abrams guys. But it would have been, more likely than not, those two counsels with whatever other counsel was representing some of the people who were sued individually.[50]

Additionally, Daugherty's counsel clarified with Dondero that he had testified he had relied on counsel in connection with buying out other HERA unitholders.[51]

Then, and only then, did Daugherty object. He did not object to any of the above testimony as introducing a new, unexpected, or potentially waived defense. Rather, Daugherty took issue with the fact that the defendants asserted attorney-client privilege over their counsel's advice, arguing privilege was waived under the

[50] *Id.* at 326.

[51] *Id.* at 292–293.

at-issue exception and that he "reserve[d] the right to pursue the at-issue waiver in the event that anyone else at Highland might recall the advice that was received."[52]

But as explained, Daugherty was aware of the defense before that testimony, and had an opportunity to pursue any legal advice put at issue before Dondero's trial testimony. Daugherty cannot avoid the consequences of his claim splitting on the assertion that he was surprised at trial in the First Delaware Action.[53]

---

[52] *Id.* at 300; *id.* at 293 ("MR. UEBLER: Your Honor, the defendants are using the attorney-client privilege as a sword and a shield. The purposes [sic] of the testimony is to establish, at least as far as I understand it, if this buyout process was proper. And Mr. Dondero has testified today that it was done at the advice of counsel. If they're going to rely on that advice to support any positions that they're taking in this case, we're entitled to know what that advice was. THE COURT: . . . You're asserting the at-issue exception? MR. UEBLER: Yes.").

[53] Daugherty also suggests that he had to file a separate action because the automatic bankruptcy stay precluded amending his complaint in the First Delaware Action. Supp. Ans. Br. at 2–3 ("Daugherty filed the nominally new action against the defendants Dondero implicated as the root bad actors because Daugherty could not take action in the original case due to the automatic stay."); *id.* at 7 ("Because the evidence was withheld, Daugherty did not have the evidence to assert all of his claims in the first action. Then he was stymied by the automatic stay."). He has failed to demonstrate that Dondero's trial testimony would have justified a late and prejudicial amended pleading in the First Delaware Action (if it had not been stayed). A surprise defense at trial is not typically resolved by the plaintiff filing an amended complaint. Rather, where a defendant raises an argument or invokes for the first time a defense in the middle of a trial, the most sensible outcome is a finding that the party waived its argument or defense. *See Barra v. Adams*, 1994 WL 369532, at *6 (Del. Ch. July 1, 1994) ("As a procedural matter, the estoppel defense comes too late, as it was never pleaded or even referred to in the pretrial order" and instead raised the for the first time at trial); *Carberry v. Redd*, 1977 WL 9561, at *1–2 (Del. Ch. Jan. 19, 1977) (holding statute of limitations defense was waived where it was included in an answer filed after trial preparation had already begun); *see also Knutkowski v. Cross*, 2011 WL 6820335, at *2 n.10 (Del. Ch. Dec. 22, 2011) ("Although

Daugherty also argues that the policy concerns driving the claim splitting doctrine are not implicated here because they can be addressed by consolidating this action with the First Delaware Action. I reject this argument as well. "The Court has ample discretion in considering how to remedy claim splitting."[54] And under Court of Chancery Rule 42, the Court may consolidate actions pending before the Court whenever they "involve[] a common question of law or fact."[55] Claim splitting is not implicated unless the claims share a common nucleus of operative fact.[56] To accept Daugherty's solution would mean that the doctrine of claim splitting, which as explained can apply to contemporaneously pending actions, could never bar a second claim pending before this Court.

In addition, Court of Chancery Rule 1 states that the Court's rules "shall be construed, administered, and employed by the Court . . . to secure the just, speedy

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it is indisputably the general rule that a party's failure to raise an affirmative defense in the appropriate pleading results in waiver, . . . there is ample authority in this Circuit for the proposition that absent unfair surprise or prejudice to the plaintiff, a defendant's affirmative defense is not waived when it is first raised in a pre-trial dispositive motion. . . . This view is in accord with the vast majority of our sister circuits." (alterations in original) (internal quotation marks omitted) (quoting *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 612 (4th Cir. 1999))). Such an amendment would not have been proper if the case had proceeded; that it was stayed does not make the amendment proper.

[54] *Goureau*, 2021 WL 1197531, at *12.

[55] Ct. Ch. R. 42(a).

[56] *See, e.g.*, *Winner Acceptance Corp.*, 2008 WL 5352063, at *18.

and inexpensive determination of every proceeding."[57] It is difficult to see how any of Rule 1's purposes would be served by implementing Rule 42 as Daugherty suggests. After more than two years of hard-fought litigation involving extensive motion practice, Daugherty is effectively requesting that I permit him to amend his complaint on the third day of trial to add, among other things, five new defendants to the case, based on a legal theory and discovery position he was on notice of during discovery. To allow consolidation here would only make an already procedurally complicated situation even more complicated just as it is approaching its resolution. I deny Daugherty's request for consolidation.

Defendants' Motions to Dismiss are **GRANTED.** The dismissal of the Amended Complaint is without prejudice.

IT IS SO ORDERED.

Sincerely,

/s/ Morgan T. Zurn

Vice Chancellor

MTZ/ms

cc: All Counsel of Record, via *File & ServeXpress*

[57] Ct. Ch. R. 1.

Appendix Exhibit 131

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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
Reorganized Debtor.	§	

MOTION FOR LEAVE TO FILE PROCEEDING

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MOTION FOR LEAVE TO FILE PROCEEDING

Movants The Dugaboy Investment Trust ("Dugaboy") and Hunter Mountain Investment Trust ("Hunter Mountain" and collectively with Dugaboy, "Movants") file this Motion for Leave to File Proceeding.

SUMMARY AND STATEMENT OF FACTS[1]

1. Movants file this Motion for Leave to File Proceeding (the "Motion for Leave") out of an abundance of caution in light of the gatekeeper injunction (the "Gatekeeper Provision") contained in the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) ("Plan") confirmed by order of this Court on February 22, 2021, § AA & Ex. A, Article IX.F [Dkt. No.1950]. Specifically, Movants seek an order from the Court finding that the Gatekeeper Provision is inapplicable to the proposed proceeding (the "Valuation Proceeding") to be commenced by Movants in this Court, or that the requisite standard is met.

2. The Valuation Proceeding largely seeks the same relief previously sought by Movants through motion practice. In particular, the Valuation Proceeding seeks information regarding the value of the estate, including the assets and liabilities of the Highland Claimant Trust (the "Claimant Trust") and related determinations by the Court. On December 6, 2022, the Court ordered Movants to seek the relief previously sought by motion practice through an adversary proceeding [Dkt. No. 3645]. As a result, Movants are required to name Highland Capital Management, L.P. ("HCMLP" or "Debtor") and the Highland Claimant Trust (the "Claimant Trust") as defendants in the Valuation Proceeding, notwithstanding that what Movants are really

[1] Movants incorporate the facts alleged in their proposed Complaint To (I) Compel Disclosures About The Assets Of The Highland Claimant Trust And (II) Determine (A) Relative Value Of Those Assets, And (B) Nature Of Plaintiffs' Interests In The Claimant Tru[st ("Proposed Complaint" or "Valuation Complaint"), annexed hereto as Exhibit A.

seeking is information from HCMLP and the Claimant Trust. Under the circumstances, Movants believe their Valuation Proceeding should fall outside of the Gatekeeper Provision.

3. However, if the Court determines that the Gatekeeper Provision applies to the Valuation Proceeding, Movants seek an order determining that the Valuation Proceeding presents a "colorable claim" within the meaning of the Gatekeeper Provision and should be allowed.

4. As holders of Contingent Claimant Trust Interests[2] that vest into Claimant Trust Interests once all creditors are paid in full, and as defendants in litigation pursued by Marc S. Kirschner ("Kirschner") as Trustee of the Litigation Sub-Trust (which seeks to recover damages on behalf of the Claimant Trust), Movants need to file the Valuation Proceeding in an effort to obtain information about the assets and liabilities of the Claimant Trust established to liquidate the assets of the HCMLP bankruptcy estate.

5. HCMLP's October 21, 2022 and January 24, 2023 post-confirmation reports show that, even with inflated claims and below market sales of assets, cash available is likely more than enough to pay class 8 and class 9 creditors 100 cents on the dollar. Accordingly, Movants and the entire estate would benefit from a close evaluation of current assets and liabilities. Such evaluation will also show whether assets were marked below appraised value during the pandemic and unreasonably held on the books ***at those values***, along with overstated liabilities, to justify continued litigation. That litigation serves to enable James P. Seery ("Mr. Seery") and other estate professionals to carefully extract nearly every last dollar out of the estate with (along with incentive fees), leaving little or nothing for the owners that built the company.

6. While grave harm has already been done, valuation now would at least enable the Court to put an end to this already long-running case and salvage some value for equity. As this

[2] Capitalized terms not defined have the meanings set forth herein. If no meaning is set forth herein, the terms have the meaning set forth in the Fifth Amended Plan of Reorganization (as Modified) [Dkt. No. 1808].

Court observed in the *In re ADPT DFW Holdings* case, where there is significant uncertainty about insolvency, protections must be put in place so that the conduct of the case itself does not deplete the equity. In some cases, the protection is in the form of an equity committee; here, a prompt valuation of the estate would serve the same purpose and is needed.

7. As set forth in greater detail in the annexed complaint ("Valuation Complaint"), upon information and belief, during the pendency of HCMLP's bankruptcy proceedings, creditor claims and estate assets have been sold in a manner that fails to maximize the potential return to the estate, including Movants. Rather, Mr. Seery, first acting as Chief Executive Officer and Chief Restructuring Officer of the Debtor and then as the Claimant Trustee, facilitated the sale of creditor claims to entities with undisclosed business relationships with Mr. Seery who would then be inclined to approve inflated compensation when the hidden but true value of the estate's assets was realized. Because Mr. Seery and the Debtor have failed to operate the estate in the required transparent manner, they have been able to justify pursuit of unnecessary avoidance actions (for the benefit of the professionals involved), even though the assets of the estate, if managed in good faith, should be sufficient to pay all creditors.

8. Further, by understating the value of the estate and preventing open and robust scrutiny of sales of the estate's assets, Mr. Seery and the Debtor have been able to justify actions to further marginalize equity holders that otherwise would be in the money, such as including plan and trust provisions that disenfranchise equity holders by preventing them from having any input or information unless the Claimant Trustee certifies that all other interest holders have been paid in full. Because of the lack of transparency to date, unless Movants are allowed to proceed, there will be no checks and balances to prevent a wrongful failure to certify, much less any process to

ensure that the estate has been managed in good faith so as to enable all interest holders, including the much-maligned equity holders, to receive their due.

9. On the petition date, the estate had over $550 million in assets, with far less in in non-disputed non-contingent liabilities.

10. By June 30, 2022, the estate had $550 million in cash and approximately $120 million of other assets despite paying what appears in reports to be over $60 million in professional fees and selling assets non-competitively, on information and belief, at least $75 million below market price.[3]

11. On information and belief, the value of the assets in the estate as of June 1, 2022, was as follows:

Highland Capital Assets		**Value in Millions**	
		Low	**High**
Cash as of Feb 1. 2022		$125.00	$125.00
Recently Liquidated	$246.30		
Highland Select Equity	$55.00		
Highland MultiStrat Credit Fund	$51.44		
MGM Shares	$26.00		
Portion of HCLOF	$37.50		
Total of Recent Liquidations	$416.24	$416.24	$416.24
Current Cash Balance		**$541.24**	**$541.24**
Remaining Assets			
Highland CLO Funding, LTD		$37.50	$37.50
Korea Fund		$18.00	$18.00
SE Multifamily		$11.98	$12.10
Affiliate Notes[4]		$50.00	$60.00
Other (Misc. and legal)		$5.00	$20.00
Total (Current Cash + Remaining Assets)		**$663.72**	**$688.84**

[3] Additional detail in the Valuation Complaint and its exhibits.
[4] Some of the Affiliate Notes should have been forgiven as of the MGM sale, but litigation continues over that also.

12. By June 2022, Mr. Seery had also engineered settlements making the inflated face amount of the major claims against the estate $365 million, but which traded for significantly less.

Creditor	Class 8	Class 9	Beneficiary	Purchase Price
Redeemer	$137.0	$0.0	Claim buyer 1	$65 million
ACIS	$23.0	$0.0	Claim buyer 2	$8.0
HarbourVest	$45.0	$35.0	Claim buyer 2	$27.0
UBS	$65.0	$60.0	Claim buyers 1 & 2	$50.0
TOTAL	**$270.0**	**$95.0**		**$150.0 million**

13. On information and belied, Mr. Seery made no efforts to buy the claims into the estate or resolve the estate efficiently. Mr. Seery never made a proposal to the residual holders or Mr. Dondero and never responded with a reorganization plan to the many settlement offers from Mr. Dondero, even though many of Mr. Dondero's offers were in excess of the amounts paid by the claims buyers.

14. Instead, it appears that Mr. Seery brokered transactions enabling colleagues with long-standing but undisclosed business relationships to buy the claims without the knowledge or approval of the Court. Because the claims sellers were on the creditors committee, Mr. Seery and those creditors had been notified that "Creditors wishing to serve as fiduciaries on any official committee are advised that they may not purchase, sell or otherwise trade in or transfer claims against the Debtor while they are committee members absent an order of the Court." Making the transactions particularly suspect is the fact that the claims buyers paid amounts equivalent to the value the Plan estimated would be paid three years' hence. Sophisticated buyers would not pay what appeared to be full price unless they had material non-public information that the claims could and would be monetized for much more than the public estimates made at the time of Plan confirmation – as indeed they have been.

15. On information and belief, Mr. Seery provided such information to claims buyers rather than buying the claims in to the estate for the roughly $150 million for which they were sold.

By May 2021, when the claims transfers were announced to the Court, the estate had over 100 million in cash and access to additional liquidity to retire the claims for the sale amounts, leaving an operating business in the hands of its equity owners.

16. Specifically, Mr. Seery could and should have investigated seeking sufficient funds from equity to pay all claims and return the estate to the equity holders. This was an obvious path because the estate had assets sufficient to support a line of credit for $59 million, as Mr. Seery eventually obtained. If funds had been raised to pay creditors in the amounts for which claims were sold, much of the massive administrative costs run up by the estate would never have been incurred. One such avoided cost would be the post effective date litigation now pursued by Marc S. Kirschner, as Litigation Trustee for the Litigation Sub-Trust, whose professionals likely charge over $2000 an hour for senior lawyers and over $800 an hour for first year associates (data obtained from other cases because, of course, there has been no disclosure in the HCMLP bankruptcy of the cost of the Kirschner litigation). But buying in the claims to resolve the bankruptcy and enabling equity to resume operations would not have had the critical benefit to Mr. Seery that his scheme contained: placing the decision on his incentive bonus, perhaps as much as $30 million, in the hands of grateful business colleagues who received outsized rewards for the claims they were steered into buying. The parameters of Mr. Seery's incentive compensation is yet another item cloaked in secrecy, contrary to the general rule that the hallmark of the bankruptcy process is transparency.

17. But worse still, even with all of the manipulation that appears to have occurred, Movants believe that the combination of cash and other assets held by the Claimant Trust in its own name and held in various funds, reserve accounts, and subsidiaries, if not depleted by

unnecessary litigation would be sufficient to pay all Claimant Trust Beneficiaries in full, with interest, now.

18. In short, it appears that the professionals representing HCMLP, the Claimant Trust, and the Litigation Sub-Trust are litigating claims against Movants and others, even though the only beneficiaries of any recovery from such litigation would be Movants in this adversary proceeding (and of course the professionals pressing the claims). It is only the cost of the pursuit of those claims that threatens to depress the value of the Claimant Trust sufficiently to justify continued pursuit of the claims, creating a vicious cycle geared only to enrich the professionals, including Mr. Seery, and to strip equity of any meaningful recovery.

19. Based upon the restrictions imposed on Movants including the unprecedented inability for Plaintiffs, as holders of Contingent Claimant Trust Interests, to access virtually any financial information related to the Claimant Trust, Movants have little to no insight into the value of the Claimant Trust assets versus the Claimant Trust's obligations and no method to independently ascertain those amounts until Movants become Claimant Trust Beneficiaries. Because Mr. Seery and the professionals benefiting from Mr. Seery's actions have ensured that Movants are in the dark regarding the estate's assets and liabilities, as well as the estate's professional and incentive fees that are rapidly depleting the estate, there is a compelling need for the relief sought herein.

20. Movants are seeking transparency about the assets currently held in the Claimant Trust and their value—information that would ultimately benefit all creditors and parties-in-interest by moving forward the administration of the Bankruptcy Case.

ARGUMENT

A. The Gatekeeper Provision.

21. The Debtor's Plan includes a Gatekeeper Provision, limiting how claims can be asserted against Protected Parties (Plan, § AA & Ex. A, Article IX.F), such as the reorganized Debtor and the Claimant Trust. Plan Ex. A, Article I.B, ¶ 105.

22. Under the Debtor's Plan confirmed by this Court, an "Enjoined Party" may not:

> [C]ommence or pursue a claim or cause of action of any kind against any Protected Party that 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 . . . against a Protected Party and (ii) specifically authorizing such Enjoined Party to bring such claim or cause of action against any such Protected Party.

Plan, § AA & Ex. A, Article IX.F.

23. The Plan defines the term "Enjoined Party" to include "all Entities who have held, hold, or may hold Claims against or Equity Interests in the Debtor", "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 "Related Entity." Plan Ex. A, Article I.B, ¶ 56. The Plan expressly defines "Related Entity" to include Dugaboy and Hunter Mountain. *Id.*, § B, ¶ 110. Accordingly, each of Movants is an "Enjoined Party." The question thus arises whether Movants must seek Court permission prior to instituting the annexed Valuation Proceeding.

B. The Gatekeeper Provision Is Satisfied Because Movants Were Directed to Raise Valuation Issues through an Adversary Proceeding

24. Movants previously sought by way of contested matter to obtain the relief sought in the Valuation Proceeding [Dkt. Nos. 3382, 3467, and 3533]. Debtor objected, asserting both that that the relief asserted was unwarranted and that it could only be obtained in an adversary proceeding [Dkt No. 3465]. The Court ruled that Movants must pursue an adversary proceeding.

Given that the Court has already ordered Movants to proceed in this fashion, the Court has already served its gatekeeper function and this motion is unnecessary [Dkt. No. 3645].

25. However, Movants conferenced the issue with Debtor, and Debtor was only willing to stipulate that no gatekeeper motion was needed if Movants sought exactly the same relief as had been sought in the motion. Because the relief sought is better defined now, and to avoid further delay, in an excess of caution, Movants bring this motion. After filing, Movants will attempt to negotiate a resolution of this motion so that the Court can proceed directly to the merits.

C. The Valuation Proceeding Sets Forth a Colorable Claim.

26. Movants present colorable claims that should be authorized to proceed.

27. The Plan does not define what constitutes a "colorable claim of any kind." Nor does the Bankruptcy Code define the term. The case law construing the requirement for "colorable" claims clearly provides that the requisite showing is a relatively low threshold to satisfy, requiring Movants to prove "there is a possibility of success." *See Spring Svc. Tex., Inc. v. McConnell (In re McConnell)*, 122 B.R. 41, 44 (Bankr. S.D. Tex. 1989).

28. The Fifth Circuit has stated that "the colorable claim standard is met if the [movant] has asserted claims for relief that on appropriate proof would allow a recovery. Courts have determined that a court need not conduct an evidentiary hearing, but must ensure that the claims do not lack any merit whatsoever." *Louisiana World Exposition v. Fed. Ins. Co.*, 858 F.2d 233, 248 (5th Cir. 1988). The Court therefore need not be satisfied that there is an evidentiary basis for the claims to be asserted but instead should allow the claims if they appear to have some merit.

29. Other federal circuit courts have reached similar conclusions regarding the standard to be applied. For example, the Eighth Circuit held that "creditors' claims are colorable if they would survive a motion to dismiss." *In re Racing Services, Inc.*, 540 F.3d 892, 900 (8th Cir. 2008); *accord In Re Foster*, 516 B.R. 537, 542 (B.A.P. 8th Cir. 2014), *aff'd* 602 Fed. Appx. 356 (8th Cir.

2015) (per curiam). The Sixth Circuit has adopted a similar test requiring that the court look only to the face of the complaint to determine if claims are colorable. *In re The Gibson Group, Inc.*, 66 F.3d 1436, 1446 (6th Cir. 1995).

30. Other federal courts have adopted roughly the same standard—*i.e.*, a claim is colorable if it is merely "plausible" and thus could survive a motion to dismiss. *See In re America's Hobby Center, Inc.*, 223 B.R. 275, 282 (S.D.N.Y 1998); *see also, e.g., In re GI Holdings*, 313 B.R. at 631 (court must decide whether the committee has asserted "claims for relief that on appropriate proof would support a recovery"); *Official Comm. v. Austin Fin. Serv. (In re KDI Holdings)*, 277 B.R. 493, 508 (Bankr. S.D.N.Y. 1999) (observing that the inquiry into whether a claim is colorable is similar to that undertaken on a motion to dismiss for failure to state a claim); *In re iPCS, Inc.*, 297 B.R. 283, 291-92 (Bankr. N.D. Ga. 2003) (same).

31. In addition, in the non-bankruptcy context, the District Court for this district has explained that "[t]he requirement of a 'colorable claim' means only that the plaintiff must have an 'arguable claim' and not that the plaintiff must be able to succeed on that claim." *Gonzales v. Columbia Hosp. at Med. City Dallas Subsidiary, L.P.*, 207 F. Supp. 2d 570, 577 (N.D. Tex. 2002).

32. This Court's analysis of whether the Valuation Proceeding sets forth a colorable claim is not a determination of whether the Court finds there is enough evidence presented. Rather, if on the face of the Valuation Complaint, there appears a plausible claim, then the Valuation Proceeding presents a colorable claim, and this Motion must be granted to allow Movants to file their Valuation Complaint.

33. In the First Claim for Relief of the Valuation Complaint, Movants seek disclosures of Claimant Trust Assets and request an accounting. An equitable accounting is proper "when the facts and accounts presented are so complex that adequate relief may not be obtained at law."

Gooden v. Mackie, No. 4:19-CV-02948, 2020 WL 714291 (S.D. Tex. Jan. 23 2020) (quoting *McLaughlin v. Wells Fargo Bank, N.A.*, No. 4:12-CV-02658, 2013 WL 5231486, at *6 (S.D. Tex. Sep. 13, 2013); *Bates Energy Oil & Gas v. Complete Oilfeld Servs.*, 361 F. Supp. 3d 633, 663 (W.D. Tex. 2019) (finding an equitable accounting claim was sufficiently stated when was a party was less than forthcoming in providing information and the available information was insufficient to determine what was done with a party's money); *Phillips v. Estate of Poulin*, No. 03-05-00099-CV, 2007 WL 2980179, at *3 (Tex. App.-Austin, Oct. 12, 2007, no pet.) (finding that an accounting order was appropriate where the facts are complex and when the plaintiff could not obtain adequate relief through standard discovery); *Southwest Livestock & Trucking Co. v. Dooley*, 884 S.W.2d 805, 809 (Tex. App.-San Antonio 1994, writ denied) (finding that an accounting was necessary in order to determine the identity of the property or the amount of money owed to a party).

34. The requested disclosures and accounting are necessary due to the lack of transparency surrounding the assets and liabilities of the Claimant Trust. The Court has retained jurisdiction to ensure that distributions to Holders of Allowed Equity Interests are accomplished pursuant to the provisions of the Plan. *See* Plan, Article XI. As set forth above and in the Valuation Complaint, Movants have concerns that those provisions are not being appropriately followed, and efforts to obtain the information necessary to confirm otherwise has been unavailable through discovery. As a result of the restrictions imposed on Movants, including Movants' inability, as holders of Contingent Claimant Trust Interests, to access virtually any financial information related to the Claimant Trust, Movants have little to no insight into the value of the Claimant Trust assets versus the Claimant Trust's obligations and no method to independently ascertain those amounts until Movants become Claimant Trust Beneficiaries. Because Movants are in the dark regarding

the estate's assets and liabilities, as well as the estate's professional and incentive fees that are rapidly depleting the estate, there is a compelling need for the relief sought. Movants are unable to protect their own interests without an equitable accounting. Therefore, the First Claim for Relief sets forth a colorable claim.

35. The Second Claim for Relief of the Valuation Complaint sets forth Movants' request for a declaratory judgment regarding the value of Claimant Trust Assets compared to the bankruptcy estate obligations. When considering whether a valid declaratory judgment claim exists, a court must engage in a three-step inquiry. *Orix Credit All., Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000). The court must ask (1) whether an actual controversy exists between the parties, (2) whether the court has the authority to grant such declaratory relief; and (3) whether the court should exercise its "discretion to decide or dismiss a declaratory judgment action." *Id*; *see also In re Fieldwood Energy LLC,* No. 20-33948, 2021 WL 4839321, at *4 (Bankr. S.D. Tex. Oct. 15 2021) (seeking declaratory judgment regarding interpretation of a Plan and whether certain claims were discharged); *In re Think3, Inc.,* 529 B.R. 147, 206-07 (Bankr. W.D. Tex. 2015) (sufficient actual controversy to bring a declaratory judgment action to assist with an early and prompt adjudication of claims and to promote judicial and party economy).

36. In this case, there can be no serious doubt that an actual controversy exists between the parties with respect to the relief sought, as the Debtor has already opposed the relief sought in the Valuation Complaint. Additionally, there is no dispute that the Court has the inherent power to grant the relief sought in the Proposed Complaint. Further, the third element is satisfied because this determination is important to the implementation of the Plan and distributions to Holders of Allowed Claims and Allowed Equity Interests. If the value of the Claimant Trust assets exceeds the obligations of the estate, then several currently pending adversary proceedings aimed at

recovering value for HCMLP's estate are not necessary to pay creditors in full. As such, the pending adversary proceedings could be brought to a swift close, allowing creditors to be paid and the Bankruptcy Case to be brought to a close. In addition, such a determination by the Court could allow for a settlement that would cover the spread between current assets and obligations before that gap is further widened by the professional fees incurred by the Claimant Trust. Therefore, the Second Claim for Relief pleads a colorable claim.

37. Finally, in the Third Claim for Relief of the Valuation Complaint, Movants request a declaratory judgment and determination regarding the nature of their interests. As with the Second Claim for Relief, there is no serious dispute that an actual controversy exists between the parties and that the Court has the power to grant the relief requested. Additionally, the third element is satisfied because, in particular, in the event that the Court determines that the Claimant Trust assets exceed the obligations of the bankruptcy estate in an amount sufficient to pay all Allowable Claims indefeasibly, Movants seek a declaration and a determination that the conditions are such that their Contingent Claimant Trust Interests are likely to vest into Claimant Trust Interests, making them Claimant Trust Beneficiaries. To be clear, Plaintiffs do not ask the Court to determine that they are Claimant Trust Beneficiaries or otherwise to convert their contingent interests into non-contingent interests. All of that must be done according to the terms of the Plan and the Claimant Trust Agreement. However, the requested determination would further assist parties in interest, such as Movants, to ascertain whether the estate is capable of paying all creditors in full and also paying some amount to residual interest holders, as contemplated by the Plan and the Claimant Trust Agreement. Therefore, the Third Claim for Relief pleads a colorable claim.

38. The equitable relief sought in the Valuation Proceeding certainly meets any iteration of the standard for what constitutes "a colorable claim of any kind." Instead of using the

information governing provisions of the Claimant Trust as a shield, HCMLP and the Claimant Trust are using them as a sword to enable continued litigation that ultimately provides no benefit to Claimant Trust Beneficiaries or Movants as holders of Contingent Claimant Trust Interests.

39. As set forth above, the Valuation Complaint seeks disclosure of information and an accounting that are related to the administration of the Plan and property to be distributed under the Plan, but not otherwise available to Movants. The Valuation Complaint also requests declaratory judgments within the Court's jurisdiction and relevant to the furtherance of the Bankruptcy Case. These claims are colorable, and this Motion for Leave should be granted.

WHEREFORE, Movants request the entry of an order i) granting this Motion for Leave; ii) determining that the Gatekeeping Provision is satisfied as applied to the Valuation Proceeding; and iii) authorizing Movants to file the Valuation Complaint.

Respectfully submitted,

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Counsel for The Dugaboy Investment Trust and the Hunter Mountain Investment Trust

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that on February 5, 2023, Louis M. Phillips conferenced with counsel for Defendants, John Morris, regarding this motion. Counsel for Defendants was willing to stipulate that no gatekeeper motion was needed if Movants sought exactly the same relief as had been sought in their prior motion addressing these issues. Because the relief sought is better defined now, and to avoid further delay, in an excess of caution, Movants bring this motion. After filing, Movants will attempt to negotiate a resolution of this motion so that the Court can proceed directly to the merits.

/s/Deborah Deitsch-Perez
Deborah Deitsch-Perez

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 6, 2023, a true and correct copy of this document was served electronically via the Court's CM/ECF system to the parties registered or otherwise entitled to receive electronic notices in this case.

/s/Deborah Deitsch-Perez
Deborah Deitsch-Perez

Appendix Exhibit 132

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

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

HUNTER MOUNTAIN INVESTMENT TRUST'S EMERGENCY MOTION FOR LEAVE TO FILE VERIFIED ADVERARY PROCEEDING

Hunter Mountain Investment Trust ("HMIT"), Movant, files this Emergency Motion for Leave to File Verified Adversary Proceeding ("Motion"), both in its individual capacity and as a derivative action on behalf of the Reorganized Debtor, Highland Capital Management, L.P. ("HCM" or "Reorganized Debtor") and the Highland Claimant Trust against Muck Holdings, LLC ("Muck"), Jessup Holdings, LLC ("Jessup"), Farallon

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IN THE UNITED STATES BANKRUPTCY COURT
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Capital Management, LLC ("Farallon"), Stonehill Capital Management, LLC ("Stonehill"), James P. Seery, Jr. ("Seery") and John Doe Defendant Nos. 1-10 (Muck, Jessup, Stonehill, Farallon, Seery and the John Doe Defendant Nos. 11-10 are collectively "Respondents" or "Proposed Defendants").

I. Good Cause for Expedited Relief

1. HMIT seeks leave to file an Adversary Proceeding pursuant to the Court's "gatekeeping" orders, as well as the injunction and exculpation provisions in the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (Doc. 1943), as modified (the "Plan").[1] A copy of HMIT's proposed Verified Adversary Proceeding ("Adversary Proceeding") is attached as Exhibit 1 to this Motion. This Motion is separately supported by objective evidence derived from historical filings in the bankruptcy proceedings,[2] as well as the declarations of James Dondero, dated May 2022 (Ex. 2), James Dondero, dated February 2023 (Ex. 3), and Sawnie A. McEntire with attached evidence (Ex. 4). [3]

[1] The exculpation provisions were recently modified by a decision of the Fifth Circuit. Such provisions apply to James P. Seery, Jr. only and are limited to his capacity as an Independent Director. *Matter of Highland Cap. Mgmt., L.P.*, 48 F.4th 419, 438 (5th Cir. 2022).

[2] Unless otherwise referenced, all references to evidence involving documents filed in the Debtor's bankruptcy proceedings (Case No. 19-34054-sgj11 (Bankr. N.D. Tex.)) are cited by "Doc." reference. HMIT asks the Court to take judicial notice of the documents identified by such entries.

[3] The supporting declarations will be cited as Dondero 2022 Dec. (Ex. 2), Dondero 2023 Dec. (Ex. 3), and McEntire Dec. (Ex. 4).

2. The expedited nature of this Motion is permitted under Fed. R. Bank P. 9006 (c)(1), which authorizes a shortened time for a response and hearing for good cause. For the reasons set forth herein, HMIT has shown good cause and requests that the Court schedule a hearing on this Motion on three (3) days' notice, and that any responses be filed no later than twenty-four hours before the scheduled hearing.[4]

3. HMIT brings this Motion on behalf of itself and derivatively on behalf of the Reorganized Debtor and the Highland Claimant Trust ("Claimant Trust"), as defined in the Claimant Trust Agreement (Doc. 3521-5) ("CTA").[5] Upon the Plan's Effective Date, Highland Capital Management, LP, as the original Debtor ("Original Debtor"), transferred its assets, including its causes of action, to the Claimant Trust, including the causes of action set forth in the attached Adversary Proceeding. The attached Adversary Proceeding alleges claims which are substantially more than "colorable" based upon plausible allegations that the Proposed Defendants, acting in concert, perpetrated a fraud,[6] including a fraud upon innocent stakeholders, as well as breaches of fiduciary

[4] Expedited action on this Motion is also warranted to hasten Movants' opportunity to file suit, pursue prompt relevant discovery, and reduce the threat of loss of potentially key evidence. Upon information and belief, Seery has been deleting text messages on his personal iPhone via a rolling, automatic deletion setting.

[5] Solely in the alternative, and in the unlikely event HMIT's proposed causes of actions against Seery, Stonehill, Farallon, Muck, and/or Jessup are considered to be "Estate Claims" as those terms are used and defined within the CTA and Exhibit A to the Notice of Final Term Sheet [Docket No. 354] in HCM's bankruptcy (and without admitting the same), HMIT alternatively seeks standing to bring this action as a derivative action on behalf of the Litigation Sub-Trust as appropriate.

[6] Neither this Motion nor the proposed Adversary Complaint seeks to challenge the Court's Orders or the Plan. In addition, neither this Motion nor the proposed Adversary Complaint seeks to redistribute the assets of the Claimant Trust in a manner that would adversely impact innocent creditors. Rather, the

duties and knowing participation in (or aiding and abetting) breaches of fiduciary duty. The Adversary Proceeding also alleges that the Proposed Defendants did so collectively by falsely representing the value of the Debtor's Estate, failing to timely disclose accurate values of the Debtor's Estate, and trading on material non-public information regarding such values. HMIT also alleges that the Proposed Defendants colluded to manipulate the Debtor's Estate—providing Seery the opportunity to plant close business allies into positions of control to approve Seery's compensation demands following the Effective Date.

4. Emergency relief is needed because of a fast-approaching date (April 16, 2023) that one or more of the Proposed Defendants *may* argue, depending upon choice of law, constitutes the expiration of the statute of limitations concerning some of the common law claims available to the Claimant Trust, as well as to HMIT.[7] Although HMIT offered to enter tolling agreements from each of the Proposed Defendants, they either rejected HMIT's requests or have not confirmed their willingness to do so, thereby necessitating the expedited nature of this Motion.[8] Because this Motion is subject to the

proposed Adversary Proceeding seeks to benefit all innocent stakeholders while working within the terms and provisions of the Plan, as well as the Claimant Trust Agreement.

[7] The first insider trade at issue involved the sale and transfer of Claim 23 in the amount of $23 million held by ACMLD Claim, LLC to Muck on April 16, 2021 (Doc. 2215).

[8] HMIT has been diligent in its efforts to investigate the claims described in this Motion, including the filing of a Tex. R. Civ. P. Rule 202 proceeding in January 2023, which was not adjudicated until recently in March 2023. Those proceeding were conducted in the 191st Judicial District Court in Dallas County, Texas, under Cause DC-23-01004. *See* McEntire Dec. Ex. 4 and the attached Ex. 4-A. Farallon and Stonehill defended those proceedings by aggressively arguing, in significant part, that the discovery issues were better undertaken in this Court.[8] The Rule 202 Petition was recently dismissed (**necessarily without prejudice**)

Court's "gatekeeping" orders and the injunction provisions of the Plan, emergency leave is required.

5. This Motion will come as no surprise to the Proposed Defendants. Farallon and Stonehill were involved in recent pre-suit discovery proceedings under Rule 202 of the Texas Rules of Civil Procedure relating to the same insider trading allegations described in this Motion. Muck and Jessup, special purpose entities created and ostensibly controlled by Farallon and Stonehill, respectively, also were provided notice of these Rule 202 Proceedings in February 2023.[9] Like this Motion, the Rule 202 Proceedings focused on Muck, Jessup, Farallon, and Stonehill and their wrongful purchase of large, allowed claims in the Original Debtor's bankruptcy based upon material non-public information. Seery is also aware of these insider trading allegations because of a prior written demand.

6. In light of the Proposed Defendants' apparent refusal to enter tolling agreements, or their failure to fully affirm their willingness to do so, HMIT is forced to seek emergency relief from this Court to proceed timely with the proposed Adversary Proceeding before the expiration of any *arguable* limitations period.[10]

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on March 8, 2023, ostensibly based on such arguments. However, it is telling that Stonehill and Farallon admitted during the Rule 202 Proceedings to their "affiliation" with Muck and Jessup and that they bought the Claims through these entities.

[9] *See* Dec. of Sawnie McEntire, Ex. 4.

[10] HMIT respectfully requests that this Motion be addressed and decided on an expedited basis that provides HMIT sufficient time to bring the proposed action timely. In the event the Court denies the requested relief, HMIT respectfully requests prompt notice of the Court's ruling to allow HMIT sufficient

II. Summary of Claims

7. HMIT requests leave to commence the proposed Adversary Proceeding, attached as Exhibit 1, seeking redress for breaches of duty owed to HMIT, breaches of duties owed to the Original Debtor's Estate, aiding and abetting breaches of those fiduciary duties, conspiracy, unjust enrichment, and fraud. HMIT also alleges several viable remedies, including (i) imposition of a constructive trust; (ii) equitable disallowance of any unpaid balance on the claims at issue;[11] (iii) disgorgement of ill-gotten profits (received by Farallon, Stonehill, Muck and Jessup) to be restituted to the Claimant Trust; (iv) disgorgement of ill-gotten compensation (received by Seery) to be restituted to the Claimant Trust; (v) declaratory judgment relief; (vi) actual damages; and (vii) punitive damages.

III. Standing

8. **HMIT.** Prior to the Plan's Effective Date, HMIT was the largest equity holder in the Original Debtor and held a 99.5% limited partnership interest. HMIT currently holds a Class 10 Claim as a contingent Claimant Trust Interest under the CTA

time to seek, if necessary, appropriate relief in the United States District Court. In order to have a fair opportunity to seek such relief on a timely basis and protect HMIT's rights and the rights of the Reorganized Debtor, HMIT will need to seek such relief on or before Wednesday, April 5, 2023, if this Motion has not been resolved.

[11] In the alternative only, subordination of Muck's and Jessup's General Unsecured Claim Trust Interests and Subordinated Claim Trust Interests to all other interests in the Claimant Trust, including HMIT's Contingent Trust Interest, is necessary and appropriate to remedy Muck's and Jessup's wrongful conduct, and is also consistent with the purposes of the Bankruptcy Code.

(Doc. 3521-5). Upon information and belief, all conditions precedent to HMIT's certification as a vested Claimant Trust Beneficiary would be readily satisfied but for the Defendants' wrongful actions and conduct described in this Motion and the attached Adversary Proceeding.

9. **Reorganized Debtor.** Although HMIT has standing as a former Class B/C Equity Holder, Class 10 claimant, and now contingent Claimant Trust Interest under the CTA,[12] this Motion separately seeks authorization to prosecute the Adversary Proceeding derivatively on behalf of the Reorganized Debtor and Claimant Trust. All conditions precedent to bringing a derivative action are satisfied.

10. Fed. R. Civ. P. 23.1 provides the procedural steps for "derivative actions," and applies to this proceeding pursuant to Fed. R. Bank. P. 7023.1. Applying Rule 7023.1, the Proposed Defendants' wrongful conduct occurred, and the improper trades consummated, in the spring and early summer of 2021, before the Effective Date in August 2021. During this period, HMIT was the 99.5% Class B/C limited partner in the original Debtor. As such, HMIT has individual standing to bring this action because Seery owed fiduciary duties directly to HMIT at that time, and the other Proposed Defendants aided and abetted breaches of those duties at that time.

[12] The last transaction at issue involved Claim 190, the Notice for which was filed on August 9, 2021. (Doc. 2698).

11. The derivative nature of this proceeding is also appropriate because any demand on Seery would be futile.[13] Seery is the Claimant Trustee under the terms of the CTA. Furthermore, any demand on the Oversight Board to prosecute these claims would be equally futile because Muck and Jessup, both of whom are Proposed Defendants, dominate the Oversight Board.[14]

12. The "classic example" of a proper derivative action is when a debtor-in-possession is "unable or unwilling to fulfill its obligations" to prosecute an otherwise colorable claim where a conflict of interest exists. *Cooper*, 405 B.R. at 815 (quoting *Louisiana World*, 858 F.2d at 252). Here, because HMIT's proposed Adversary Proceeding includes claims against Seery, Muck, and Jessup, the conflicts of interest are undeniable. Seery is the Trustee of the Claimant Trust Assets under the CTA, and he also serves as the "Estate Representative."[15] Muck and Jessup, as successors to Acis, the Redeemer Committee and UBS, effectively control the Oversight Board, with the responsibility to "monitor and oversee the administration of the Claimant Trust and the Claimant Trustee's performance . . . ."[16]

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[13] Any demand on the Litigation Sub-Trust would be equally futile for the same reasons addressed herein, since the Litigation Trustee serves at the direction of the Oversight Board.

[14] *See* Footnote 8, *infra.* In December 2021, several stakeholders made a demand on the Debtor through James Seery, in his capacity as Trustee to the Claimant Trust, to pursue claims related to these insider trades.

[15] *See* Claimant Trust Agreement (Doc. 3521-5), Sec. 3.11.

[16] *Id.* at Sec. 4.2(a) and (b).

13. Creditors' committees frequently bring suit on behalf of bankruptcy estates. Yet, it is clear that any ***appropriately designated party*** also may bring derivative claims. *In re Reserve Prod., Inc.*, 232 B.R. 899, 902 (Bankr. E.D. Tex. 1999) (citations omitted); *see In re Enron Corp.*, 319 B.R. 128, 131 (Bankr. S.D. Tex. 2004). As this Court has held in *In Re Cooper*:

> In Chapter 11 [cases], there is both a textual basis . . . and, frequently, a non-textual, equitable rationale for granting a creditor or creditors committee derivative standing to pursue estate actions (*i.e.*, the equitable rationale coming into play when the debtor-in-possession has a conflict of interest in pursuing an action, such as in the situation of an insider-defendant).

In re Cooper, 405 B.R. 801, 803 (Bankr. N.D. Tex. 2009) (also noting that "[c]onflicts of interest are, of course, frequently encountered in Chapter 11, where the metaphor of the 'fox guarding the hen house' is often apropos"); *see also In re McConnell*, 122 B.R. 41, 43-44 (Bankr. S.D. Tex. 1989) ("[I]ndividual creditors can also act in lieu of the trustee or debtor-in-possession . . . ."). Here, the Proposed Defendants are the "*foxes guarding the hen house*," and their conflicts of interest abound.[17] Proceeding in a derivative capacity is necessary, if not critical.

[17] *See Citicorp Venture Cap., Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982, 987 (3d Cir. 1998) (settlement noteholders purchased Debtors' securities with "the benefit of non-public information acquired as a fiduciary" for the "dual purpose of making a profit and influenc[ing] the reorganization in [their] own self-interest."), *see also, Wolf v. Weinstein*, 372 U.S. 633, 642, 83 S.Ct. 969, 10 L.Ed.2d 33 (1963) ("Access to inside information or strategic position in a corporate reorganization renders the temptation to profit by trading in the Debtor's stock particularly pernicious.").

14. The proposed Adversary Proceeding also sets forth claims that readily satisfy the Court's threshold standards requiring "colorable" claims, as well as the requirements for a derivative action. This Motion, which is supported by objective evidence contained in historical filings in the bankruptcy proceedings, also incorporates sworn declarations. At the very least, this additional evidence satisfies the Court's threshold requirements of willful misconduct and fraud set forth in the "gatekeeping" orders, as well as the injunction and exculpation provisions in the Plan.[18] This evidence also supports well-pleaded allegations exempted from the scope of the releases included in the Plan.

15. HMIT is an appropriate party to bring this action on behalf of the Reorganized Debtor and the Claimant Trust. If successful, the Adversary Proceeding will likely recover well over $100 million for the Claimant Trust, thereby enabling the Reorganized Debtor and Claimant Trust to pay off any remaining innocent creditors and make significant distributions to HMIT as a vested Claimant Trust Beneficiary.

16. As of December 31, 2022, the Claimant Trust had distributed 64.2% of the total $397,485,568 par value of all Class 8 and Class 9 unsecured creditor claims. The

[18] HMIT recognizes that it is an "Enjoined Party" under the Plan. The Plan requires a showing, *inter alia*, of bad faith, willful misconduct, or fraud against a "Protected Party." Seery is a "Protected Party" and an "Exculpated Party" in his capacity as an Independent Director. Muck and Jessup *may* be "Protected Parties" as members of the Oversight Committee, but they were not "protected" when they purchased the Claims before the Effective Date. While it is HMIT's position that Farallon and Stonehill do not qualify as "Protected Parties," they are included in this Motion in the interest of judicial economy.

Claims acquired by Muck and Jessup have an allowed par value of $365,000,000. Based on these numbers, the innocent unsecured creditors hold approximately $32 million in allowed claims.[19]

17. As of December 31, 2022, the Claimant Trust has distributed $255,201,228.[20] On a *pro rata* basis, that means that innocent creditors have received approximately $22,373,000 in distributions against the stated value of their allowed claims. That leaves a remaining unpaid balance of approximately $9,627,000.

18. Muck and Jessup already have received approximately $232.8 million on their Claims. Assuming and original investment of approximately $160 million, this represents over $72 million in ill-gotten profits that, if disgorged, would be far more than what is required to fully pay all other innocent creditors - immediately placing HMIT in the status of a vested Claimant Trust Beneficiary. The benefits to the Reorganized Debtor, the Claimant Trust and innocent stakeholders are undeniable.[21]

19. Seery and the Oversight Board should be estopped from challenging HMIT's status to bring this derivative action on behalf of the Claimant Trust. Seery, Muck and Jessup have committed fraud, acted in bad faith and have unclean hands, and they should not be allowed to undermine the proposed Adversary Proceeding - which seeks

[19] Doc. 3653.

[20] *Id.*

[21] Further, under the present circumstances and time constraints, this Motion should be granted to avoid the prospect of the loss of some of HMIT's and the Claimant Trust's claims and denial of due process.

to rectify significant wrongdoing. To hold otherwise would allow Seery, Muck, Jessup, Stonehill, and Farallon the opportunity to not just "guard the hen house," but to also open the door and take what they want.[22] HMIT seeks a declaratory judgment of its rights, accordingly.

IV. The Proposed Defendants

20. Seery acted in several capacities during relevant times. He served as the Debtor's Chief Executive Officer ("CEO") and Chief Restructuring Officer ("CRO"). He also served as member of the Debtor's Independent Board.[23] He currently serves as Claimant Trustee under the CTA and remains the CEO of the Reorganized Debtor.

21. There is no doubt Seery owed the Original Debtor's Estate, as well as equity, fiduciary duties, including the duty of loyalty and the duty to avoid conflicts of interest. *See In re Xtreme Power Inc.*, 563 B.R. 614, 632-33 (Bankr. W.D. Tex. 2016) (detailing fiduciary duties owed by corporate officers and directors under Delaware law); *Louisiana World*, 858 F.2d at 245-46 (detailing duties owed by debtors-in-possession).[24]

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[22] "The doctrine of 'unclean hands' provides that "a litigant who engages in reprehensible conduct in relation to the matter in controversy ... forfeits his right to have the court hear his claim, regardless of its merit. [T]he purpose of the clean hands maxim is to protect the court against misuse by one who, because of his conduct, has forfeited his right to have the court consider his claims, regardless of their merit. As such it is not a matter of defense to be applied on behalf of a litigant; rather it is a rule of public policy." *Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 80–81 (Del. Ch. 2008) (citations omitted) (internal quotations omitted for clarity).

[23] Seery is the beneficiary of the Court's "gatekeeping" orders and is an "exculpated" party in his capacity as an Independent Director. He is also a "Protected Party."

[24] The Internal Affairs Doctrine dictates choice of law. Here, the Debtor, Highland Capital Management, was organized under the law of Delaware. As much, Seery's fiduciary duties and claims involving breaches of those duties will be governed by Delaware law.

22. Farallon and Stonehill are capital management companies which manage hedge funds; they are also Seery's close business allies with a long history of business ventures and close affiliation. Although they were strangers to the Original Debtor's bankruptcy on the petition date, and were not original creditors, they became entangled in this bankruptcy at Seery's invitation and encouragement—and then knowingly participated in the wrongful insider trades at issue. By doing so, Seery was able to plant friendly allies onto the Oversight Board to rubber stamp compensation demands. The proposed Adversary Proceeding alleges that Farallon and Stonehill bargained to receive handsome pay days in exchange.

23. Muck and Jessup are special purpose entities, admittedly created by Farallon and Stonehill on the eve of the alleged insider trades, and they were used as vehicles to assume ownership of the purchased claims.[25] The record is clear that Muck and Jessup ***did not exist*** before confirmation of the Plan in February 2021.[26] Now, however, Muck and Jessup serve on the Oversight Board with immense powers under the CTA.[27] When they purchased the claims at issue, Muck and Jessup were ***not*** acting in their official capacities on the Oversight Committee and, therefore, they were not "Protected Persons" under the Plan.

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[25] *See* Ex. 4-B, Rule 202 Transcript at 55:22-25.

[26] *See* McEntire Dec., Ex. 4, Ex. 4-D, Ex. 4-E. Muck was created on March 9, 2021 before the Effective Date. Jessup was created on April 8, 2021, before the Effective Date.

[27] *See* Doc. 3521-5, Sec. 4(a) and 4(b).

24. By trading on the alleged material non-public information, Farallon, Stonehill, Muck, and Jessup became non-statutory "insiders" with duties owed directly to HMIT at a time when HMIT was the largest equity holder.[28] *See S.E.C. v. Cuban*, 620 F.3d 551, 554 (5th Cir. 2010) ("The corporate insider is under a duty to 'disclose or abstain'—he must tell the shareholders of his knowledge and intention to trade or abstain from trading altogether."). In this context, there is no credible doubt that Farallon's and Stonehill's dealings with Seery were ***not*** arms-length. Again, Farallon and Stonehill were Seery's past business partners and close allies.[29] By virtue of the insider trades at issue, Farallon and Stonehill acquired control (acting through Muck and Jessup) over the Original Debtor and Reorganized Debtor through Seery's compensation agreement and awards, as well as supervisory powers over the Claimant Trust. This makes Farallon and Stonehill paradigm non-statutory insiders.

25. HMIT also seeks recovery against John Doe Defendant Nos. 1 through 10.[30] It is clear Farallon and Stonehill refuse to disclose the precise details of their legal

[28] Because of their "insider" status, this Court should closely scrutinize the transactions at issue.

[29] Farallon and Stonehill are two capital management firms (similar to HCM) with whom Seery has had substantial business relationships. Also, Seery previously served as legal counsel to Farallon. Seery also has a long-standing relationship with Stonehill. GCM Grosvenor, a global asset management firm, held four seats on the Redeemer Committee (an original member of the Unsecured Creditors Committee in HCM's bankruptcy). Upon information and belief, GCM Grosvenor is a significant investor in Stonehill and Farallon. GCM Grosvenor, through Redeemer, also played a large part in appointing Seery as a director of Strand Advisors and approved his appointment as HCM's CEO and CRO.

[30] Farallon and Stonehill consummated their trades concealing their actual involvement through Muck and Jessup as shell companies. Farallon's and Stonehill's identities were not discovered until much later after the fact.

relationships with Muck and Jessup. They resisted such discovery in the prior Rule 202 Proceedings in state district court.[31] They also refused to disclose such details in response to a prior inquiry to their counsel.[32] Furthermore, the corporate filings of both Muck and Farallon conspicuously omit the identity of their respective members or managing members.[33] Accordingly, HMIT intends to prosecute claims against John Doe Defendant Nos. 1 -- 10 seeking equitable tolling pending further discovery whether Farallon and Stonehill inserted intermediate corporate layers between themselves and the special purpose entities (Muck and Jessup) they created. *See In re ATP Oil & Gas Corp.*, No. 12-36187, 2017 WL 2123867, *4 (Bankr. S.D. Tex. May 16, 2017) (lsgur .J.); *see also In re IFS Fin. Corp.* No. 02-39553, 2010 WL 4614293, *3 (Bankr. S.D. Tex. No. 2, 2010) ("The identity of the party concealing the fraud is immaterial, the critical factor is whether any of the parties involved concealed property of the estate." "In either case, the trustee must demonstrate that despite exercising diligence, he could not have discovered the identity of the [unnamed] defendants prior to the expiration of the limitations period.") *ATP Oil,* 2017 WL 2123867 at *4. That burden is easily satisfied here.

[31] *See* McEntire Dec., Ex. 4.

[32] *See* McEntire Dec., Ex. 4, *see also*, Ex. 4-F.

[33] *See* Ex. 4-D, Ex. 4-E.

V. Background

26. As part of this Court's Governance Order, an independent board of directors—which included Seery as one of the selections of the Unsecured Creditor's Committee—was appointed to the Board of Directors (the "Board") of Strand Advisors, Inc., ("Strand Advisors"), the Original Debtor's general partner. Following approval of the Governance Order, the Board then appointed Seery as the Original Debtor's CEO and CRO. [34] Following the Effective Date of the Plan, Seery now serves as Trustee of the Claimant Trust (the Reorganized Debtor's sole post-reorganization limited partner), and continues to serve as the Reorganized Debtor's CEO. [35]

27. Imbued with his powers as CEO and CRO, Seery negotiated and obtained bankruptcy court approval of several settlements prior to the Effective Date, resulting in the following approximate allowed claims (hereinafter "Claims"):[36]

Creditor	**Class 8**	**Class 9**
Redeemer	$137 mm	$0 mm
Acis	$23 mm	$0 mm
HarbourVest	$45 mm	$35 mm
UBS	$65 mm	$60 mm
(Totals)	$270 mm	$95 mm

[34] Doc. 854, Order Approving Retention of Seery as CEO/CRO.

[35] *See* Doc. 1943, Order Approving Plan, p. 34.

[36] Orders Approving Settlements [Doc. 1273, Doc. 1302, Doc. 1788, Doc. 2389].

Each of the settling parties curiously sold their Claims to Farallon or Stonehill (or their affiliated special purpose entities) shortly after they obtained court approval of their settlements. One of these "trades" occurred within just a few weeks before the Effective Date. Farallon and Stonehill coordinated and controlled the purchase of these Claims through Muck and Jessup, and they admitted in open court that Muck and Jessup were created to allow their purchase of the Claims.[37]

28. HMIT alleges that Seery filed (or caused to be filed) deflated, misleading projections regarding the value of the Debtor's Estate,[38] while inducing unsecured creditors to discount and sell their Claims to Farallon and Stonehill. But as reflected in the attached declarations, it is now known that Seery provided material, non-public information to Farallon. The circumstantial evidence is also clear that both Farallon and Stonehill had access to and used this non-public information in connection with their purchase decisions.

29. Farallon and Stonehill are registered investment advisors who have their own fiduciary duties to their investors, and they are acutely aware of what these duties entail. Yet, upon information and belief, they collectively invested over $160 million dollars to purchase the Claims in the absence of any publicly available information that

[37] *See* Ex. 4-B, Rule 202 Transcript at 55:22-25.

[38] The pessimistic projections were issued as part of the Plan Analysis on February 2, 2021. [Doc. 1875-1]. The Debtor projected 0% return on Class 9 claims and only 71.32% return on Class 8 Claims.

could rationally justify such investments. These "trades" become even more suspect because, at the time of confirmation, the Plan provided pessimistic projections advising stakeholders that the Claim holders would never receive full satisfaction:

- From October 2019, when the original Chapter 11 Petition was filed, to January 2021, just before the Plan was confirmed, the valuation of HCM's assets dropped over $200 million from $566 million to $328.3 million.[39]
- HCM's Disclosure Statement projected payment of 71.32% of Class 8 claims, and 0% of claims in Classes 9-11;[40]
  - This meant that Farallon and Stonehill invested more than $103 million in Claims ***when the publicly available information indicated they would receive $0 in return on their investment as Class 9 creditors and substantially less than par on their Class 8 Claims***.
- In HCM's Q3 2021 Post-Confirmation Report, HCM reported that the amount of Class 8 claims expected to be paid dropped even further from 71% *to 54%*;[41]

30. In the third financial quarter of 2021, just over $6 million of the projected $205 million available to satisfy general unsecured creditors was disbursed.[42] No additional distributions were made to the unsecured claimholders until, suddenly, in Q3 2022 almost $250 million was paid toward Class 8 general unsecured claims—**$45 million more than was *ever* projected**.[43]

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[39] Doc. 1473, Disclosure Statement, p. 18.

[40] Doc. 1875-1, Plan Supplement, p. 4.

[41] Doc 2949.

[42] Doc 3200.

[43] Doc 3582.

31. According to Highland Capital's Motion for Exit Financing,[44] and a recent motion filed by Dugaboy Investment Trust,[45] there remain ***substantial*** assets to be monetized for the benefit of the Reorganized Debtor's creditors. Thus, upon information and belief, Stonehill and Farallon, stand to realize significant profits on their wrongful investments. In turn, Stonehill and Farallon will garner (and already have garnered) substantial fees – both base fees and performance fees – as the result of their acquiring and/or managing the Claims. Upon information and belief, HMIT also alleges that Seery has received excessive compensation and bonuses approved by Farallon (Muck) and Stonehill (Jessup) as members of the Oversight Board.

32. As evidenced in the supporting declarations (Exs. 2 and 3):

- Farallon admitted it conducted no due diligence and relied upon Seery in making its multi-million-dollar investment decisions at issue.[46]
- Farallon admitted it was unwilling to sell its stake in these Claims at any price because Seery assured Farallon that the Claims were tremendously valuable.[47]
- Farallon bragged about the value of its investment referencing non-public information regarding Amazon, Inc.'s ("Amazon") interest in acquiring Metro-Goldwyn-Mayer Studios Inc. ("MGM").[48]

[44] Doc 2229.

[45] Doc 3382.

[46] *See* Ex. 2, 2022 Dondero Declaration.

[47] *See* Ex. 2, 2022 Dondero Declaration, Ex. 3, 2023 Dondero Declaration.

[48] *See* Ex. 3, 2023 Dondero Declaration.

- Farallon was unwilling to sell its stake in the newly acquired Claims even though publicly available information suggested that Farallon would lose millions of dollars on its investment.[49]

Farallon can offer ***no credible explanation*** to explain its significant investment, and its refusal to sell at any price, ***except*** Farallon's access to material non-public information. In essence, Seery became the guarantor of Farallon's significant investment. Farallon admitted as much in its statements to James Dondero.

33. The same holds true for Stonehill. Given the negative, publicly available information, Stonehill's multi-million-dollar investments make no rational sense unless Stonehill had access to material non-public information.

34. Fed. R. Bank. P. 2015.3 requires debtors to "file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest." However, no public reports required by Rule 2015.3 were filed. Seery testified they simply "fell through the cracks." [50]

35. Six days prior to the filing of the motion seeking approval of the HarbourVest Settlement, Seery acquired material non-public information regarding Amazon's interest in acquiring MGM.[51] Upon receipt of this material non-public

[49] *See* Ex. 3, 2023 Dondero Declaration, *see also* Doc. 1875-1.

[50] Doc. 1905, February 3, 2021, Hearing Transcript, 49:5-21.

[51] *See* Adversary No. 20-3190-sgj11, Doc. 150-1.

information, MGM should have been placed on the Original Debtor's "restricted list," but Seery continued to move forward with deals that involved MGM stock and notes.[52] Because the Original Debtor additionally held direct interests in MGM,[53] the value of MGM was of paramount importance to the value of the estate.

36. Armed with this and other insider information, Farallon—through Muck—proceeded to invest in the Claims and, acting through Muck, acceded to a powerful position on the Oversight Board to oversee future distributions to Muck and itself. It is no coincidence Seery invited his business allies into these bankruptcy proceedings with promises of great profits. Seery's allies now oversee his compensation.[54]

37. The Court also should be aware that the Texas States Securities Board ("TSSB") opened an investigation into the subject matter of the insider trades at issue, and this investigation has not been closed. The continuing nature of this investigation

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[52] As part of the HarbourVest Settlement, Seery negotiated the purchase of HarbourVest's interest in HCLOF for approximately $22.5 million as part of the transaction. Approximately 19.1% of HCLOF's assets were comprised of debt and equity in MGM. The HCLOF interest was not to be transferred to the Debtor for distribution as part of the bankruptcy estate, but rather to "to an entity to be designated by the Debtor"—*i.e.*, one that was not subject to typical bankruptcy reporting requirements. Doc. 1625, p. 9, n. 5. Doc. 1625.

[53] *See* Doc. 2229, Motion for Exit Financing.

[54] Amazon closed on its acquisition of MGM in March 2022, but the evidence strongly suggests that agreements for the trades already had been reached - while announcement of the trades occurred strategically after the MGM news became public. Now, as a result of their wrongful conduct, Stonehill and Farallon profited significantly on their investments, and they stand to gain substantially more profits.

underscores HMIT's position that the claims described in the attached Adversary Proceeding are plausible and certainly far more than merely "colorable."

VI. Argument

A. HMIT has asserted Colorable Claims against Seery, Stonehill, Farallon, Muck, and Jessup.

38. Unlike the terms "Enjoined Party," "Protected Party," or "Exculpated Party," the Plan does not define what constitutes a "colorable" claim. Nor does the Bankruptcy Code define the term. However, relevant authorities suggest that a Rule 12(b)(6) standard is an appropriate analogue.

39. The Fifth Circuit has held that a "colorable" claim standard is met if a [movant], such as HMIT, has asserted claims for relief that, on appropriate proof, would allow a recovery. A court need not and should not conduct an evidentiary hearing but must ensure that the claims do not lack any merit whatsoever. *Louisiana World Exposition v. Fed. Ins. Co.*, 858 F.2d 233, 248 (5th Cir. 1988). Stated differently, the Court need not be satisfied there is an evidentiary basis for the asserted claims but instead should allow the claims if they ***appear*** to have ***some*** merit.

40. Other federal appellate courts have reached similar conclusions. For example, the Eighth Circuit holds that "creditors' claims are colorable if they would survive a motion to dismiss." *In re Racing Services, Inc.*, 540 F.3d 892, 900 (8th Cir. 2008); *accord In Re Foster*, 516 B.R. 537, 542 (B.A.P. 8th Cir. 2014), aff'd 602 Fed. Appx. 356 (8th Cir. 2015) (*per curiam*). The Sixth Circuit has adopted a similar test requiring that the court

look ***only*** to the face of the complaint to determine if claims are colorable. *In re The Gibson Group, Inc.*, 66 F.3d 1436, 1446 (6th Cir. 1995) (emphasis added).

41. Although there is a dearth of federal court authorities in Texas, other federal courts have adopted the same standard—*i.e.*, a claim is colorable if it is "plausible" and could survive a motion to dismiss. *See In re America's Hobby Center, Inc.*, 223 B.R. 273, 282 (S.D.N.Y 1998). In addition, in the non-bankruptcy context, the District Court for the Northern District of Texas explained that "[t]he requirement of a 'colorable claim' means only that the plaintiff must have an '*arguable* claim' and not that the plaintiff must be able to succeed on that claim." *Gonzales v. Columbia Hosp. at Med. City Dallas Subsidiary, L.P.*, 207 F. Supp. 2d 570, 577 (N.D. Tex. 2002) (Emphasis added).

42. Thus, in this instance, this Court's gatekeeping inquiry is properly limited to whether HMIT has stated a plausible claim on the face of the proposed pleadings involving "bad faith," "willful misconduct," or "fraud." Because the face of the Adversary Complaint alleges plausible facts, HMIT's Motion is properly granted. Clearly, the attached Adversary Proceeding would survive a Rule 12(b)(6) challenge. Furthermore, the supporting declarations and documentary evidence provide additional support, and the circumstantial evidence proves that Farallon and Stonehill, strangers to the bankruptcy on the petition date, would not have leaped into these proceedings without undisclosed assurances of profit.

B. Fraud

43. As set forth in the proposed Adversary Proceeding, HMIT alleges a colorable claim for fraud—both fraud by knowing misrepresentation and fraud by omission of material fact. Here, these allegations of fraud are appropriately governed by Texas law under appropriate choice of law principals.[55]

44. Seery had a duty to not provide material inside information to his business allies. But, he did so. At the latest, Seery became aware of the potential sale of MGM in December 2020 when he received an email from Jim Dondero.[56] Thus, Seery knew at that time that this potential sale would likely yield significant value to the Original Debtor's Estate. Yet, the financial disclosures associated with the Plan's confirmation, which were provided only a month later, presented an entirely different outlook for both Class 8 and Class 9 unsecured creditors.[57] Seery knew at that time that these pessimistic disclosures were misleading, if not inaccurate.

45. There is no credible doubt Seery intended that innocent stakeholders would rely upon the pessimistic projections set forth in the Plan Analysis. Indeed, the singular purpose of the Plan Analysis was to advise stakeholders. As such, HMIT alleges that Seery knowingly made misrepresentations with the intention that innocent stakeholders

[55] However, Delaware law is substantially similar on the elements of fraud. *See Malinals v. Kramer*, No. CIV.A. CPU 6-11002145, 2012 WL 174958, at 2 (Del. Com. PI. Jan. 5, 2012)

[56] *See,* Dondero 2022 Dec., Ex. 2-1.

[57] *See* Doc. 1875-1, Plan Analysis, February 1, 2021.

would rely, and that he failed to disclose material information concerning his entanglements with Farallon and Stonehill, as well as the related negotiations that were chock full of conflicts of interest.

46. On the flip side of this conspiracy coin, Farallon and Stonehill were engaged in negotiations to acquire the Claims at discounted prices; and, they successfully did so. HMIT alleges that their success was based on knowledge that the financial disclosures associated with the Plan Analysis were significantly understated. Otherwise, it would make no financial sense for Farallon and Stonehill to do the deals at issue. Indeed, Farallon admitted that it would not sell the Claims at any price, expressing great confidence in the substantial profits it expected even in the absence of any supporting, publicly available information.[58]

47. All of the Proposed Defendants had a duty of affirmative disclosure under these circumstances. Seery always had this duty. Muck, Jessup, Farallon, and Stonehill assumed this duty when they became non-statutory "insiders." Thus, all of the Proposed Defendants are liable for conspiring to perpetrate a fraud by omission of material facts.

48. HMIT also claims that Seery and the other Proposed Defendants failed to disclose material information concerning Seery's involvement in brokering the Claims in exchange for *quid pro quo* assurances of enhanced compensation. Seery's compensation

[58] Ex. 3, 2023 Dondero Declaration.

should be disgorged or, alternatively, such compensation constitutes a damage recoverable by the Reorganized Debtor and Claimant Trust as assignees (or transferees) of the Original Debtor's causes of action. This compensation was the product of the alleged self-dealing, breaches of fiduciary duty, and fraud.

C. Breaches and Aiding and Abetting Breaches of Fiduciary Duties

49. It is beyond dispute Seery owed fiduciary duties to the Estate. *See Xtreme Power*, 563 B.R. at 632-33 (detailing fiduciary duties owed by corporate officers and directors under Delaware law);[59] *Louisiana World*, 858 F.2d at 245-46 (5th Cir. 1988) (detailing duties owed by debtors-in-possession). Although Seery did not buy the Claims at issue, he stood to profit from these sales because his close business allies would do his bidding after they had acceded to positions of power and control on the Oversight Board. Muck and Jessup were essentially stepping into the shoes of three of the largest unsecured creditors who were already slated to serve on the Oversight Board. Thus, by acquiring their Claims, all of the Proposed Defendants knew that Muck and Jessup would occupy these powerful oversight positions after the Effective Date.

50. Thus, the alleged conspiracy was successfully implemented before the Effective Date. Farallon and Stonehill now occupy control positions through the shell

[59] The *Xtreme* case also notes that "several Delaware courts have recognized that 'directors who are corporate employees lack independence because of their substantial interest in retaining their employment." 563 B.R. at 633-34. Because Muck and Jessup are now in control of Seery's compensation, it follows that Seery is beholden to them, and Seery's disclosure of inside information to Stonehill and Farallon confirms his conflict of interest.

entities (Muck and Jessup) overseeing large compensation packages for Seery. Of course, this control (and the opportunity to control) presented a patent conflict of interest which Seery should have avoided, but instead knowingly created, fostered, and encouraged. HMIT alleges that Seery breached his duty to avoid this conflict or otherwise disclose this conflict and Farallon and Stonehill aided and abetted this breach.

51. The Original Debtor, as an investment adviser registered with the SEC, is also required to make public disclosures on its Form ADV, the uniform registration form for investment advisers required by the SEC. These Form ADV disclosures, which were in effect at the time of the insider trades at issue, explicitly forbade "any access person from trading either personally or on behalf of others . . . on material non-public information or communicating material non-public information to others in violation of the law or duty owed to another party."[60] It now appears these representations were false when made. Seery's alleged conduct also violated, at minimum, the duties Seery owed in his various capacities with the Original Debtor under the Form ADV disclosures.

52. Although initially strangers to the original bankruptcy, by accepting and using inside information, Farallon and Stonehill became "temporary insiders" and thus owed separate duties to the Estate. *See S.E.C. v. Cuban*, 620 F.3d 551 (5th Cir. 2010) ("[E]ven

[60] *See, e.g.*, https://files.adviserinfo.sec.gov/IAPD/Content/Common/crd_iapd_Brochure.aspx?BRCHR_VRSN_ID=777026.

an individual who does not qualify as a traditional insider may become a 'temporary insider' if by entering 'into a special confidential relationship in the conduct of the business of the enterprise [they] are given access to information solely for corporate purposes." *In re Washington Mut., Inc.*, 461 B.R. 200 (Bankr. D. Del. 2011), *vacated in part*, 08-12229 MFW, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012) (finding that equity committee stated colorable claim for equitable disallowance against creditors who "became temporary insiders of the Debtors when the Debtors gave them confidential information and allowed them to participate in negotiations with JPMC for the shared goal of reaching a settlement that would form the basis of a consensual plan of reorganization"; vacated in part as a condition of settlement only);[61] *See also, In re Smith*, 415 B.R. 222, 232-33 (Bankr. N.D. Tex. 2009) ("[a]n insider is an entity or person with 'a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor.' 'Thus, the term "insider" is viewed to encompass two classes: (1) per se insiders as listed in the Code and (2) extra-statutory insiders that do not deal at arm's length.'" (citations omitted)). Farallon, Stonehill, Muck, and Jessup clearly fall into this latter category.

[61] Although the *Washington Mutual* case was subsequently vacated, the Court's intellectual reasoning remains valid because the vacatur was mandated by a mediated settlement, not because the court's logic was flawed or changed, and the court expressly noted that the parties' settlement was conditioned on vacatur. *See In re Washington Mut., Inc.*, No. 08-12229 MFW, 2012 WL 1563880, *8 (Bankr. D. Del. Feb. 24, 2012) ("grant[ing] partial vacatur . . . *in furtherance of the settlement embodied in the Plan*," and noting that "absent the requested vacatur, the collapse of the Plan could result in the termination of the Global Settlement Agreement." (emphasis added)).

53. Because Farallon and Stonehill (acting through Muck and Jessup) now hold the majority of the seats on the Oversight Board, they, along with Seery, exercise control of the reorganization proceedings. At no time were Farallon, Stonehill, or Seery's plans disclosed to the other creditors or equity. In fact, the only inference that can be reasonably drawn is that Farallon and Stonehill brazenly sought to conceal their involvement by establishing shell entities—Muck and Jessup—to nominally hold the Claims and create an opaque barrier to any effort to identify the "*Oz behind the curtain*." Such conduct aligns precisely with the inequitable conduct detailed in *Citicorp* and *Adelphia* (discussed below).

54. In sum, the proposed Adversary Proceeding sets forth plausible allegations that Stonehill and Farallon were aware of Seery's fiduciary duties. Indeed, as registered investment advisors, both Farallon and Stonehill were acutely aware of Seery's fiduciary obligations, including, without limitation, the duty to act in the best interests of the Original Debtor's Estate and the duty not to engage in insider trading that would benefit Seery, as an insider, and themselves, as non-statutory insiders. By accepting and then acting on material non-public information, Farallon and Stonehill (as well as Muck and Jessup) aided and abetted breaches of these fiduciary duties. By placing themselves in positions to control Seery's compensation, Farallon and Stonehill (acting through Muck and Jessup) induced, encouraged, aided and abetted Seery's self-dealing.

D. Equitable Disallowance is an Appropriate Remedy

55. HMIT also seeks equitable disallowance. Although the Fifth Circuit in *Matter of Mobile Steel Co.* generally limited the court's equitable powers to subordination rather than disallowance,[62] the Fifth Circuit **did *not* foreclose** the viability of equitable disallowance as a potential remedy. *See* 563 F.2d 692, 699 n. 10 (5th Cir. 1977). Binding U.S. Supreme Court precedent in *Pepper v. Litton* also permits bankruptcy courts to fashion disallowance remedies. 308 U.S. 295, 304-11 (1939). Bankruptcy Code § 510, which supplies the authority for equitable subordination, was "intended to codify case law, such as *Pepper v. Litton . . . and is not intended to limit the court's power in any way…. Nor does [it] preclude a bankruptcy court from completely disallowing a claim in appropriate circumstances*." *In re Adelphia Commun. Corp.*, 365 B.R. 24, 71-72 (Bankr. S.D.N.Y. 2007), *aff'd in part sub nom. Adelphia Recovery Tr. v. Bank of Am., N.A.*, 390 B.R. 64 (S.D.N.Y. 2008), *adhered to on reconsideration*, 05 CIV. 9050 (LMM), 2008 WL 1959542 (S.D.N.Y. May 5, 2008) (emphasis and omissions in original).[63]

56. The Fifth Circuit's decision in *Mobile Steel* also was premised on the notion that disallowance would not add to the quiver of defenses to fight unfairness because

[62] Equitable subordination is an inadequate remedy in this instance.

[63] In *Washington Mutual*, the Court's intellectual reasoning when imposing disallowance is instructive. *See In re Washington Mut., Inc.*, No. 08-12229 MFW, 2012 WL 1563880, *8 (Bankr. D. Del. Feb. 24, 2012) ("grant[ing] partial vacatur . . . *in furtherance of the settlement embodied in the Plan*," and noting that "absent the requested vacatur, the collapse of the Plan could result in the termination of the Global Settlement Agreement." (emphasis added)).

creditors "are fully protected by subordination" and "[i]f the misconduct directed against the bankrupt is so extreme that disallowance might appear to be warranted, then *surely* the claim is either invalid or the bankrupt possesses a clear defense against it." *Mobile Steel*, 563 F.2d at 699 n. 10 (emphasis added). Importantly, however, the factual scenarios considered in *Mobile Steel* do not exist here.

57. Here, Muck and Jessup purchased both Class 8 and Class 9 Claims, and they now effectively occupy more than 90% of the entire field of unsecured creditors in these two claimant tiers. Thus, subordination cannot effectively address the current facts where the Original Debtor's CEO and CRO conspired directly with close business allies who acquired the largest unsecured claims to the detriment of other innocent creditors and *former equity*. The reasoning in published cases from other circuits supports this conclusion. *See Adelphia*, 365 B.R. at 71-73; *Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982, 991 n. 7 (3d Cir. 1998).

58. The purpose of equitable subordination is to assure that the wrongdoer does not profit from bad conduct. In the typical case, subordination to other creditors will achieve this deterrence. But, it is clear that the Third Circuit's decision in *Citicorp* was structured to use subordination as just one tool in a larger tool box to make sure "at a minimum, the remedy here should deprive – [the fiduciary] of its profit on the purchase of the notes." *Id* at 991. In *Adelphia*, the Southern District of New York also used equitable

subordination as a remedy to address wrongs of non-insiders who aided and abetted breaches a fiduciary duty by the debtor's management. 365 B.R. at 32.

59. But subordination cannot adequately address the wrongful conduct at issue. This is because subordination is typically limited to instances where one creditor is subordinated to other creditors, not equity. Here, for all practical purposes, there are only a few other unsecured creditors with relatively small stakes. Therefore, subordination as a weapon of deterrence is neutered.

60. In sum, by engaging in the alleged wrongful acts, including aiding and abetting Seery's breaches of fiduciary duty, Farallon, Stonehill, Muck, and Jessup should not be rewarded. The Proposed Defendants engaged in alleged conduct which damaged the Original Debtor's estate, including improper agreements to compensate Seery under the terms of the CTA. Equitable disallowance is an appropriate remedy which, when combined with disgorgement of all ill-gotten profits, will deprive the Proposed Defendants of their ill-gotten gains.

E. Disgorgement and Unjust Enrichment

61. The law is clear that disgorgement is an available remedy for breach of fiduciary duty both under Texas Law, see *Kinzbach Tool Co. v. Corbett-Wallace Corporation*, 160 S.W. 2d 509 (Tex. 1942), and under Delaware law, see *Metro Storage International, LLC v. Harron*, 275 A.3d 810 (Del. Ch. 2022). Disgorgement is also an appropriate remedy for unjust enrichment under Texas law, *Hunter v. Shell Oil Co.*, 198 F.2d 485 (5th Cir. 1952),

and under Delaware law, *In re Tyson Foods, Inc. Consolidated Shareholder Litigation*, 919 A.2d 563 (Del. Ch. 2007).[64]

62. Likewise, the imposition of a constructive trust is proper for addressing unjust enrichment under both Delaware and Texas law, see *Teacher's Retirement System of Louisiana v. Aidinoff*, 900 A.2d 654 (Del. Ch. 2006) and *Hsin-Chi-Su v. Vantage Drilling Company*, 474 S.W. 3d 384 (Tex. App. – 14th Dist. 2015), pet. denied. The elements of unjust enrichment are: (1) the defendant must have gained a benefit (2) at the expense of plaintiff, (3) and retention of that benefit must be shown to be unjust. *See Restatement (Third) of Restitution and Unjust Enrichment* §321, cmt. e (2011).

63. Here, the imposition of a constructive trust and disgorgement are clearly appropriate to provide redress for the alleged breaches of fiduciary duty and the knowing participation in (or aiding and abetting) those breaches. Furthermore, the imposition of a constructive trust and disgorgement are appropriate to disgorge the improper benefits that all of the Proposed Defendants received by virtue of collusion and insider trading.

64. As set forth in the proposed Adversary Proceeding, Seery gained the opportunity to have his compensation demands rubber stamped. The other Defendants gained the opportunity to purchase valuable claims at a discount knowing that

[64] It is likely that the Internal Affairs Doctrine will dictate that Delaware choice of law governs the breach of fiduciary duty claims.

pessimistic financial projections were false and that the upside investment potential was great. Retention of the benefits they received would be unjust and inequitable.

65. Clearly, the Debtor's Estate was damaged by virtue of the claimed conduct. Seery obtained profits and compensation to the detriment of that estate as well as the estate of the Reorganized Debtor, other innocent creditors and HMIT, as former equity and as a contingent Claimant Trust Beneficiary.

F. Declaratory Relief

66. HMIT also seeks declaratory relief pursuant to Fed. R. Bank P. 7001(9). Specifically, HMIT seeks a declaratory judgment that: (a) there is a ripe controversy concerning HMIT's rights and entitlements under the Claimant Trust Agreement; (b) as a general matter, HMIT has standing to bring an action against a trustee even if its interest is considered "contingent;" (c) HMIT's status as a Claimant Trust Beneficiary is fully vested upon disgorgement of the ill-gotten profits of Muck and Jessup, and by extension, Farallon and Stonehill; (d) HMIT's status as a Claimant Trust Beneficiary is fully vested upon the equitable disallowance of the Claims held by Muck and Jessup over and above their initial investments; (e) Seery is properly estopped from asserting that HMIT is not an appropriate party to bring this derivative action on behalf of the Reorganized Debtor and/or the Claimant Trust because of fraudulent conduct, bad faith, willful misconduct, and unclean hands; (f) Muck and Jessup are properly estopped from asserting that HMIT is not an appropriate party to bring this derivative action on behalf of the Reorganized

Debtor and the Claimant Trust because of their fraudulent conduct, bad faith, willful misconduct, and unclean hands; and (g) all of the Proposed Defendants are estopped from asserting that HMIT does not have standing in its individual capacity due to their fraudulent conduct, bad faith, willful misconduct, and unclean hands.

G. HMIT has Direct Standing.

67. The Texas Supreme Court recently held that "a partner or other stakeholder in a business organization has constitutional standing to sue for an alleged loss in the value of its interest in the organization." *Pike v. Texas EMC Mgt., LLC*, 610 S.W.3d 763, 778 (Tex. 2020). In so holding, the Court considered federal law and found that the traditional "incantation that a shareholder may not sue for the corporation's injury" is really a question of capacity, which goes to the merits of a claim, rather than an issue of standing that would impact subject matter jurisdiction. *Id.* at 777 (noting that the 5th Circuit and "[o]ther federal circuits agree that a plaintiff has standing to sue for the lost value of its investment in a corporation"). Because Seery, Muck, Jessup, Stonehill, Farallon's alleged actions devalued HMIT's interest in the Debtor's Estate, including, without limitation, payment of excessive compensation to Seery, HMIT has standing to pursue its common law claims directly. HMIT also has direct standing to seek declaratory relief as set forth in the proposed Adversary Proceeding.

VII. Prayer

WHEREFORE, PREMISES CONSIDERED, Hunter Mountain Investment Trust respectfully requests this Court grant HMIT leave authorizing it to file the Adversary Complaint, attached as Exhibit 1, as an Adversary Proceeding in this United States Bankruptcy Court for the Northern District of Texas, in its own name and as a derivative action on behalf of the Debtor Highland Capital Management, L.P., against Muck Holdings, LLC, Jessup Holdings, LLC, Farallon Capital Management, LLC, Stonehill Capital Management, LLC, James P. Seery, Jr., and John Doe Defendants Nos. 1 – 10, and further grant HMIT all such other and further relief to which HMIT may be justly entitled.

Dated: March 28, 2023

Respectfully Submitted,
PARSONS MCENTIRE MCCLEARY PLLC

By: */s/ Sawnie A. McEntire*

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Attorneys for Hunter Mountain Investment Trust

CERTIFICATE OF CONFERENCE

Beginning on March 24, 2023, and also on March 27, 2023, the undersigned counsel conferred either by telephone or via email with all counsel for all Respondents regarding the relief requested in the foregoing Motion, including John A. Morris on behalf of James P. Seery, and Brent McIlwain on behalf of Muck Holdings LLC, Jessup Holdings LLC, Stonehill Capital Management, and Farallon Capital Management. Mr. Seery is opposed to this Motion. Based upon all communications with Mr. McIlwain, it is reasonably believed his clients are also opposed and we advised him that this recitation would be placed in the certificate of conference.

/s/ Sawnie A. McEntire
Sawnie A. McEntire

CERTIFICATE OF SERVICE

I certify that on the 28th day of March 2023, a true and correct copy of the foregoing Motion was served on all counsel of record or, as appropriate, on the Respondents directly.

/s/ Sawnie A. McEntire
Sawnie A. McEntire

Exhibit 2

CAUSE NO. DC-21-09534

IN RE JAMES DONDERO,	§	**IN THE DISTRICT COURT**
	§	
Petitioner.	§	**95th JUDICIAL DISTRICT**
	§	
	§	**DALLAS COUNTY, TEXAS**

DECLARATION OF JAMES DONDERO

COUNTY OF DALLAS §
§
STATE OF TEXAS §

Mr. James Dondero provides this unsworn declaration under TEXAS CIVIL PRACTICE & REMEDIES CODE § 132.001.

1. My name is James Dondero. I declare under penalty of perjury that I am over the age of 18 and of sound mind and competent to make this declaration.

2. Earlier this year I retained investigators to look into certain activities involving the respondents in the above-styled case and the related bankruptcy proceedings. Last year, I called Farallon's Michael Lin about purchasing their claims in the bankruptcy. I offered them 30% more than what they paid. I was told by Michael Lin of Farallon that they purchased the interests without doing any due diligence other than what Mr. James Seery—the CEO of Highland—told them, and that he told them that the interests would be worth far more than what Farallon paid. Given the value of those claims that Mr. Seery had testified in court, it made no sense to me that Mr. Lin would think that the claims were worth more than what Mr. Seery testified under oath was the value of the bankruptcy claims.

3. In addition to my role as equity holder in the Crusader Funds, I have an interest in ensuring that the claims purchased by Respondents are not used as a means to deprive the equity holders of their share of the funds. It has become obvious that despite the fact that the bankrupt estate has enough money to pay all claimants 100 cents on the dollar, there is plainly a movement afoot to drain the bankrupt estate and deprive equity of their rights.

4. Accordingly, I commissioned an investigation by counsel who have been in communication with the Office of the United States Trustee. True and correct copies of the reports, which were created in the ordinary course, and their attachments, are attached hereto as Exhibits A and B. A true and correct copy of the letter I received from Alverez and Marsal is attached as Exhibit C hereto.

My name is James Dondero, my birthday is on June 29, 1962. My address is 300 Crescent Court, Suite 700, Dallas, Texas 75201. I declare under penalty of perjury that the foregoing testimony is true and correct and is within my personal knowledge.

James Dondero

May 31, 2022

Date

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EDWARD M. HELLER
(1926-2013)

October 5, 2021

Mrs. Nan R. Eitel
Office of the General Counsel
Executive Office for U.S. Trustees
20 Massachusetts Avenue, NW
8th Floor
Washington, DC 20530

Re: Highland Capital Management, L.P. – USBC Case No. 19-34054sgj11

Dear Nan,

The purpose of this letter is to request that your office investigate the circumstances surrounding the sale of claims by members of the Official Committee of Unsecured Creditors ("Creditors' Committee") in the bankruptcy of Highland Capital Management, L.P. ("Highland" or "Debtor"). As described in detail below, there is sufficient evidence to warrant an immediate investigation into whether non-public inside information was furnished to claims purchasers. Further, there is reason to suspect that selling Creditors' Committee members may have violated their fiduciary duties to the estate by tying themselves to claims sales at a time when they should have been considering meaningful offers to resolve the bankruptcy. Indeed, three of four Committee members sold their claims without advance disclosure, in violation of applicable guidelines from the U.S. Trustee's Office. This letter contains a description of information and evidence we have been able to gather, and which we hope your office will take seriously.

By way of background, Highland, an SEC-registered investment adviser, filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the District of Delaware on October 16, 2019, listing over $550 million in assets and net $110 million in liabilities. The case eventually was transferred to the Northern District of Texas, to Judge Stacey G.C. Jernigan. Highland's decision to seek bankruptcy protection primarily was driven by an expected net $110 million arbitration award in favor of the "Redeemer Committee."[1] After nearly 30 years of successful operations, Highland and its co-founder, James Dondero, were advised by Debtor's counsel that a court-approved restructuring of the award in Delaware was in Highland's best interest.

[1] The "Redeemer Committee" was a group of investors in a Debtor-managed fund called the "Crusader Fund" that sought to redeem their interests during the global financial crisis. To avoid a run on the fund at low-watermark prices, the fund manager temporarily suspended redemptions, which resulted in a dispute between the investors and the fund manager. The ultimate resolution involved the formation of the "Redeemer Committee" and an orderly liquidation of the fund, which resulted in the investors receiving their investment plus a return versus the 20 cents on the dollar they would have received had the fund been liquidated when the redemption requests were made.

I became involved in Highland's bankruptcy through my representation of The Dugaboy Investment Trust ("Dugaboy"), an irrevocable trust of which Mr. Dondero is the primary beneficiary. Although there were many issues raised by Dugaboy and others in the case where we disagreed with the Court's rulings, we will address those issues through the appeals process.

From the outset of the case, the Creditors' Committee and the U.S. Trustee's Office in Dallas pushed to replace the existing management of the Debtor. To avoid a protracted dispute and to facilitate the restructuring, on January 9, 2020, Mr. Dondero reached an agreement with the Creditors' Committee to resign as the sole director of the Debtor's general partner, on the condition that he would be replaced by three independent directors who would act as fiduciaries of the estate and work to restructure Highland's business so it could continue operating and emerge from bankruptcy as a going concern. The agreement approved by the Bankruptcy Court allowed Mr. Dondero, UBS (which held one of the largest claims against the estate), and the Redeemer Committee each to choose one director and also established protocols for operations going forward. Mr. Dondero chose The Honorable Former Judge Russell F. Nelms, UBS chose John Dubel, and the Redeemer Committee chose James Seery.[2] It was expected that the new, independent management would not only preserve Highland's business but would also preserve jobs and enable continued collaboration with charitable causes supported by Highland and Mr. Dondero.

Judge Jernigan confirmed Highland's Fifth Amended Plan of Reorganization on February 22, 2021 (the "Plan"). We have appealed certain aspects of the Plan and will rely upon the Fifth Circuit Court of Appeals to determine whether our arguments have merit. I write instead to call to your attention the possible disclosure of non-public information by Committee members and other insiders and to seek review of actions by Committee members that may have breached their fiduciary duties—both serious abuses of process.

1. The Bankruptcy Proceedings Lacked The Required Transparency, Due In Part To the Debtor's Failure To File Rule 2015.3 Reports

Congress, when it drafted the Bankruptcy Code and created the Office of the United States Trustee, intended to ensure that an impartial party oversaw the enforcement of all rules and guidelines in bankruptcy. Since that time, the Executive Office for United States Trustees (the "EOUST") has issued guidance and published rules designed to effectuate that purpose. To that end, EOUST recently published a final rule entitled "*Procedures for Completing Uniform Periodic Reports in Non-Small Business Cases Filed Under Chapter 11 of Title 11*" (the "Periodic Reporting Requirements"). The Periodic Reporting Requirements reaffirmed the EOUST's commitment to maintaining "uniformity and transparency regarding a debtor's financial condition and business activities" and "to inform creditors and other interested parties of the debtor's financial affairs." 85 Fed. Reg. 82906. The goal of the Periodic Reporting Requirements is to "assist the court and parties in interest in ascertaining, [among other things], the following: (1) Whether there is a substantial or continuing loss to or diminution of the bankruptcy estate; . . . (3) whether there exists gross mismanagement of the bankruptcy estate; . . . [and] (6) whether the debtor is engaging in the unauthorized disposition of assets through sales or otherwise . . . ." *Id.*

Transparency has long been an important feature of federal bankruptcy proceedings. The EOUST instructs that "Debtors-in-possession and trustees must account for the receipt, administration, and disposition of all property; provide information concerning the estate and the estate's administration as parties in interest request; and file periodic reports and summaries of a debtor's business, including a statement of receipts and disbursements, and such other

[2] *See* Appendix, pp. A-3 - A-14.

information as the United States Trustee or the United States Bankruptcy Court requires." *See* http://justice.gov/ust/chapter-11-information (citing 11 U.S.C. § 1106(a)(1), 1107(a)). And Federal Rule of Bankruptcy Procedure 2015.3(a) states that "the trustee or debtor in possession shall file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest." This rule requires the trustee or a debtor in possession to file a report for each non-debtor affiliate prior to the first meeting of creditors and every six months thereafter until the effective date of a plan of reorganization. Fed R. Bankr. P. 2015.3(b). Importantly, the rule does not absolve a debtor from filing reports due prior to the effective date merely because a plan has become effective.[3] Notably, the U.S. Trustee has the duty to ensure that debtors in possession properly and timely file all required reports. 28 U.S.C. § 1112(b)(4)(F), (H).

The entire purpose of these guidelines and rules is to ensure that external stakeholders can fairly evaluate the progress of bankruptcy proceedings, including compliance with legal requirements. In fact, 11 U.S.C. § 1102(b)(3) requires a creditors' committee to share information it receives with those who "hold claims of the kind represented by the committee" but who are not appointed to the committee. In the case of the Highland bankruptcy, the transparency that the EOUST mandates and that creditors' committees are supposed to facilitate has been conspicuously absent. I have been involved in a number of bankruptcy cases representing publicly-traded debtors with affiliated non-debtor entities, much akin to Highland's structure here. In those cases, when asked by third parties (shareholders or potential claims purchasers) for information, I directed them to the schedules, monthly reports, and Rule 2015.3 reports. In this case, however, no Rule 2015.3 reports were filed, and financial information that might otherwise be gleaned from the Bankruptcy Court record is unavailable because a large number of documents were filed under seal or heavily redacted. As a result, the only means to make an informed decision as to whether to purchase creditor claims and what to pay for those claims had to be obtained from non-public sources.

It bears repeating that the Debtor and its related and affiliated entities failed to file *any* of the reports required under Bankruptcy Rule 2015.3. There should have been at least four such reports filed on behalf of the Debtor and its affiliates during the bankruptcy proceedings. The U.S. Trustee's Office in Dallas did nothing to compel compliance with the rule.

The Debtor's failure to file the required Rule 2015.3 reports was brought to the attention of the Debtor, the Bankruptcy Court, and the U.S. Trustee's Office. During the hearing on Plan confirmation, the Debtor was questioned about the failure to file the reports. The sole excuse offered by the Debtor's Chief Restructuring Officer and Chief Executive Officer, Mr. Seery, was that the task "fell through the cracks."[4] This excuse makes no sense in light of the years of bankruptcy experience of the Debtor's counsel and financial advisors. Nor did the Debtor or its counsel ever attempt to show "cause" to gain exemption from the reporting requirement. That is because there was no good reason for the Debtor's failure to file the required reports. In fact, although the Debtor and the Creditors' Committee often refer to the Debtor's structure as a "byzantine empire," the assets of the estate fall into a handful of discrete investments, most of which have audited financials and/or are required to make monthly or quarterly net-asset-value or fair-value determinations.[5] Rather than disclose financial information that was readily

[3] After notice and a hearing, the bankruptcy court may grant relief from the Rule 2015.3 disclosure requirement "for cause," including that "the trustee or debtor in possession is not able, after a good faith effort, to comply with th[e] reporting requirements, or that the information required by subdivision (a) is publicly available." Fed. R. Bankr. 2015.3(d).

[4] *See* Doc. 1905 (Feb. 3, 2021 Hr'g Tr. at 49:5-21).

[5] During a deposition, the Debtor's Chief Restructuring Officer, Mr. Seery, identified most of the Debtor's assets "[o]ff the top of [his] head" and acknowledged that he had a subsidiary ledger that detailed the assets held by entities

available, the Debtor appears to have taken deliberate and strategic steps to avoid transparency, and the U.S. Trustee's Office did nothing to rectify the problem.

By contrast, the Debtor provided the Creditors' Committee with robust weekly information regarding (i) transactions involving assets held directly on the Debtor's balance sheet or the balance sheet of the Debtor's wholly owned subsidiaries, (ii) transactions involving entities managed by the Debtor and in which the Debtor holds a direct or indirect interest, (iii) transactions involving entities managed by the Debtor but in which the Debtor does not hold a direct or indirect interest, (iv) transactions involving entities not managed by the Debtor but in which the Debtor holds a direct or indirect interest, (v) transactions involving entities not managed by the Debtor and in which the Debtor does not hold a direct or indirect interest, (vi) transactions involving non-discretionary accounts, and (vii) weekly budget-to-actuals reports referencing non-Debtor affiliates' 13-week cash flow budget. In other words, the Committee had real-time, actual information with respect to the financial affairs of non-debtor affiliates, and this is precisely the type of information that should have been disclosed to the public pursuant to Rule 2015.3.

After the claims at issue were sold, I filed a Motion to Compel compliance with the reporting requirement. Judge Jernigan held a hearing on the motion on June 10, 2021. Astoundingly, the U.S. Trustee's Office took no position on the Motion and did not even bother to attend the hearing. Ultimately, on September 7, 2021, the Court denied the Motion as "moot" because the Plan had by then gone effective. I have appealed that ruling because, again, the Plan becoming effective does not alleviate the Debtor's burden of filing the requisite reports.

The U.S. Trustee's Office also failed to object to the Court's order confirming the Debtor's Plan, in which the Court appears to have released the Debtor from its obligation to file any reports after the effective date of the Plan that were due for any period prior to the effective date, an order that likewise defeats any effort to demand transparency from the Debtor. The U.S. Trustee's failure to object to this portion of the Court's order is directly at odds with the spirit and mandate of the Periodic Reporting Requirements, which recognize the U.S. Trustee's duty to ensure that debtors timely file all required reports.

2. There Was No Transparency Regarding The Financial Affairs Of Non-Debtor Affiliates Or Transactions Between The Debtor And Its Affiliates

The Debtor's failure to file Rule 2015.3 reports for affiliate entities created additional transparency problems for interested parties and creditors wishing to evaluate assets held in non-Debtor subsidiaries. In making an investment decision, it would be important to know if the assets of a subsidiary consisted of cash, marketable securities, other liquid assets, or operating businesses/other illiquid assets. The Debtor's failure to file Rule 2015.3 reports hid from public view the composition of the assets and the corresponding liabilities at the subsidiary level. During the course of proceedings, the Debtor sold $172 million in assets, which altered the asset mix and liabilities of the Debtor's affiliates and controlled entities. Although Judge Jernigan held that such sales did not require Court approval, a Rule 2015.3 report would have revealed the mix of assets and the corresponding reduction in liabilities of the affiliated or controlled entity. In the Appendix, I have included a schedule of such sales.

Of particular note, the Court authorized the Debtor to place assets that it acquired with "allowed claim dollars" from HarbourVest (a creditor with a contested claim against the estate) into a specially-created non-debtor entity ("SPE").[6] The Debtor's motion to settle the

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below the Debtor. *See* Appendix, p. A-19 (Jan. 29, 2021 Dep. Tr. at 22:4-10; 23:1-29:10).

[6] Prior to Highland's bankruptcy, HarbourVest had invested $80 million into a Highland fund called Acis Loan Funding, later rebranded as Highland CLO Funding, Ltd. ("HCLOF"). A dispute later arose between HarbourVest

HarbourVest claim valued the asset acquired (HarbourVest's interest in HCLOF) at $22 million. In reality, that asset had a value of $40 million, and had the asset been placed in the Debtor entity, its true value would have been reflected in the Debtor's subsequent reporting. By instead placing the asset into an SPE, the Debtor hid from public view the true value of the asset as well as information relating to its disposition; all the public saw was the filed valuation of the asset. The U.S. Trustee did not object to the Debtor's placement of the HarbourVest assets into an SPE and apparently just deferred to the judgment of the Creditors' Committee about whether this was appropriate.[7] Again, when the U.S. Trustee's Office does not require transparency, lack of transparency significantly increases the need for non-public information. Because the HarbourVest assets were placed in a non-reporting entity, no potential claims buyer without insider information could possibly ascertain how the acquisition would impact the estate.

3. The Plan's Improper Releases And Exculpation Provisions Destroyed Third-Party Rights

In addition, the Debtor's Plan contains sweeping release, exculpation provisions, and a channeling injunction requiring that any permitted causes of action to be vetted and resolved by the Bankruptcy Court. On their face, these provisions violate *Pacific Lumber*, in with the United States Court of Appeals for the Fifth Circuit rejected similarly broad exculpation clauses. The U.S. Trustee's Office in Dallas has, in all cases but this one, vigorously protected the rights of third parties against such exculpation clauses. In this case, the U.S. Trustee's Office objected to the Plan, but it did not pursue that objection at the confirmation hearing (nor even bother to attend the first day of the hearing),[8] nor did it appeal the order of the Bankruptcy Court approving the Plan and its exculpation clauses.

As a result of this failure, third-party investors in entities managed by the Debtor are now barred from asserting or channeled into the Bankruptcy Court to assert any claim against the Debtor or its management for transactions that occurred at the non-debtor affiliate level. Those investors' claims are barred notwithstanding that they were not notified of the releases and have never been given any information with which to evaluate their potential claims, nor given the opportunity to "opt out." Conversely, the releases insulate claims purchasers from the risk of potential actions by investors in funds managed by the Debtor (for breach of fiduciary duty, diminution in value, or otherwise). These releases are directly at odds with investors' expectations when they invest in managed funds—i.e., that fund managers will act in a fiduciary capacity to maximize investors' returns and that investors will have recourse for any failure to do so. While the agreements executed by investors may limit the exposure of fund managers, typically those provisions require the fund manager to obtain a third-party fairness opinion where there is a conflict between the manager's duty to the estate and his duty to fund investors.

As an example, the Court approved the settlement of UBS's claim against the Debtor and two funds managed by the Debtor (collectively referred to as "MultiStrat"). Pursuant to that settlement, MultiStrat agreed to pay UBS $18.5 million and represented that it was advised by "independent legal counsel" in the negotiation of the settlement.[9] That representation is untrue;

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and Highland, and HarbourVest filed claims in the Highland bankruptcy approximating $300 million in relation to damages allegedly due to HarbourVest as a result of that dispute. Although the Debtor initially placed no value on HarbourVest's claim (the Debtor's monthly operating report for December 2020 indicated that HarbourVest's allowed claims would be $0), eventually the Debtor entered into a settlement with HarbourVest—approved by the Bankruptcy Court—which entitled HarbourVest to $80 million in claims. In return, HarbourVest agreed to convey its interest in HCLOF to the SPE designated by the Debtor and to vote in favor of the Debtor's Plan.

[7] Dugaboy has appealed the Bankruptcy Court's ruling approving the placement of the HarbourVest assets into a non-reporting SPE.

[8] *See* Doc. 1894 (Feb. 2, 2021 Hr'g Tr. at 10:7-14).

[9] *See* Doc. 2389 (Order Approving Debtor's Settlement With UBS Securities LLC and UBS AG London Branch) at

MultiStrat did not have separate legal counsel and instead was represented only by the Debtor's counsel.[10] If that representation and/or the terms of the UBS/MultiStrat settlement in some way unfairly impacted MultiStrat's investors, they now have no recourse against the Debtor. The release and exculpation provisions in Highland's Plan do not afford third parties any meaningful recourse to third parties, even when they are negatively impacted by misrepresentations of the type contained in the UBS/MultiStrat settlement or when their interests are impaired by fund managers' failure to obtain fairness opinions to resolve conflicts of interest.

The U.S. Trustee's Office recently has argued in the context of the bankruptcy of Purdue Pharmaceuticals that release and exculpations clauses akin to those contained in Highland's Plan violate both the Bankruptcy Code and the Due Process Clause of the United States Constitution.[11] It has been the U.S. Trustee's position that where, as here, third parties whose claims are being released did not receive notice of the releases and had no way of knowing, based on the Plan's language, what claims were extinguished, third-party releases are contrary to law.[12] This position comports with Fifth Circuit case law, which makes clear that releases must be consensual, and that the released party must make a substantial contribution in exchange for any release. Highland's Plan does not provide for consent by third parties (or an opt-out provision), nor does it require that released parties provide value for their releases. Under these circumstances, it is difficult to understand why the U.S. Trustee's Office in Dallas did not lodge an objection to the Plan's release and exculpation provisions. Several parties have appealed this issue to the Fifth Circuit.

4. The Lack Of Transparency Facilitated Potential Insider Trading

The biggest problem with the lack of transparency at every step is that it created a need for access to non-public confidential information. The Debtor (as well as its advisors and professionals) and the Creditors' Committee (and its counsel) were the only parties with access to critical information upon which any reasonable investor would rely. But the public did not.

In the context of this non-transparency, it is notable that three of the four members of the Creditors' Committee and one non-committee member sold their claims to two buyers, Muck Holdings LLC ("Muck") and Jessup Holdings LLC ("Jessup"). The four claims that were sold comprise the largest four claims in the Highland bankruptcy by a substantial margin,[13] collectively totaling almost $270 million in Class 8 claims and $95 million in Class 9 claims[14]:

Claimant	Class 8 Claim	Class 9 Claims	Date Claim Settled
Redeemer Committee	$136,696,610	N/A	October 28, 2020
Acis Capital	$23,000,000	N/A	October 28, 2020
HarbourVest	$45,000,000	$35,000,000	January 21, 2021
UBS	$65,000,000	$60,000,000	May 27, 2021
TOTAL:	**$269,6969,610**	**$95,000,000**	

Muck is owned and controlled by Farallon Capital Management ("Farallon"), and we have reason to believe that Jessup is owned and controlled by Stonehill Capital Management ("Stonehill"). As the purchasers of the four largest claims in the bankruptcy, Muck (Farallon)

Ex. 1, §§ 1(b), 11; *see* Appendix, p. A-57.

[10] The Court's order approving the UBS settlement is under appeal in part based on MultiStrat's lack of independent legal counsel.

[11] *See* Memorandum of Law in Support of United States Trustee's Expedited Motion for Stay of Confirmation Order, *In re Purdue Pharma, L.P.*, Case No. 19-23649 (RDD) (Bankr. S.D.N.Y.), Doc. 3778 at 17-25.

[12] *See id.* at 22.

[13] *See* Appendix, p. A-25.

[14] Class 8 consists of general unsecured claims; Class 9 consists of subordinated claims.

and Jessup (Stonehill) will oversee the liquidation of the Reorganized Debtor and the payment over time to creditors who have not sold their claims.

This is concerning because there is substantial evidence that Farallon and Stonehill may have been provided material, non-public information to induce their purchase of these claims.[15] In particular, there are three primary reasons we believe that non-public information was made available to facilitate these claims purchases:

- The scant publicly-available information regarding the Debtor's estate ordinarily would have dissuaded sizeable investment in purchases of creditors' claims;
- The information that actually was publicly available ordinarily would have compelled a prudent investor to conduct robust due diligence prior to purchasing the claims;
- Yet these claims purchasers spent in excess of $100 million (and likely closer to $150 million) on claims, ostensibly without any idea of what they were purchasing.

We believe the claims purchases of Stonehill and Farallon can be summarized as follows:

Creditor	Class 8	Class 9	Purchaser	Purchase Price
Redeemer	$137.0	$0.0	Stonehill	$78.0[16]
ACIS	$23.0	$0.0	Farallon	$8.0
HarbourVest	$45.0	$35.0	Farallon	$27.0
UBS	$65.0	$60.0	Stonehill and Farallon	$50.0[17]

To elaborate on our reasons for suspicion, an analysis of publicly-available information would have revealed to any potential investor that:

- There was a $200 million dissipation in the estate's asset value, which started at a scheduled amount of $556 million on October 16, 2019, then plummeted to $328 million as of September 30, 2020, and then increased only slightly to $364 million as of January 31, 2021.[18]

[15] A timeline of relevant events can be found at Appendix, p. A-26.

[16] *See* Appendix, pp. A-70 – A-71. Because the transaction included "the majority of the remaining investments held by the Crusader Funds," the net amount paid by Stonehill for the Claims was approximately $65 million.

[17] Based on the publicly-available information at the time Stonehill and Farallon purchased the UBS claim, the purchase made no economic sense. At the time, the publicly-disclosed Plan Analysis estimated that there would be a 71.32% distribution to Class 8 creditors and a 0.00% distribution to Class 9 creditors, which would mean that Stonehill and Farallon paid $50 million for claims worth only $46.4 million. *See* Appendix, p. A-28. If, however, Stonehill and Farallon had access to information that only came to light later—i.e., that the estate was actually worth much, much more (between $472-600 million as opposed to $364 million)—then it makes sense that they would pay what they did to buy the UBS claim.

[18] *Compare* Jan. 31, 2021 Monthly Operating Report [Doc. 2030], *with* Disclosure Statement (approved on Nov. 24, 2020) [Doc. 1473]. The increase in value between September 2020 and January 2021 is attributable to the Debtor's settlement with HarbourVest, which granted HarbourVest a Class 8 claim of $45 million and a Class 9 Claim of $35 million, and in exchange the Debtor received HarbourVest's interest in HCLOF, which we believe was worth approximately $44.3 million as of January 31, 2021. *See* Appendix, p. A-25. It is also notable that the January 2021

- The total amount of allowed claims against the estate increased by $236 million; indeed, just between the time the Debtor's disclosure statement was approved on November 24, 2020, and the time the Debtor's exhibits were introduced at the confirmation hearing, the amount of allowed claims increased by $100 million.

- Due to the decrease in the value of the Debtor's assets and the increase in the allowed claims amount, the ultimate projected recovery for creditors in bankruptcy went from 87.44% to 62.99% in just a matter of months.[19]

No prudent investor or hedge fund investing third-party money would purchase substantial claims out of the Highland estate based on this publicly-available information without conducting thorough due diligence to be satisfied that the assets of the estate would not continue to deteriorate or that the allowed claims against the estate would not continue to grow.

There are other good reasons to investigate whether Muck and Jessup (through Farallon and Stonehill) had access to material, non-public information that influenced their claims purchasing. In particular, there are close relationships between the claims purchasers, on the one hand, and the selling Creditors' Committee members and the Debtor's management, on the other hand. What follows is our understanding of those relationships:

- Farallon and Stonehill have long-standing, material, undisclosed relationships with the members of the Creditors' Committee and Mr. Seery.[20] Mr. Seery formerly was the Global Head of Fixed Income Loans at Lehman Bros. until its collapse in 2009. While at Lehman, Mr. Seery did a substantial amount of business with Farallon. After the Lehman collapse, Mr. Seery joined Sidley & Austin as co-head of the corporate restructuring and bankruptcy group, where he worked with Matt Clemente, counsel to the Creditors' Committee in these bankruptcy proceedings.

- In addition, Grovesnor, one of the lead investors in the Crusader Fund from the Redeemer Committee (which appointed Seery as its independent director) both played a substantial role on the Creditors' Committee and is a large investor in Farallon and Stonehill.

- According to Farallon principals Raj Patel and Michael Linn, while at Sidley, Mr. Seery represented Farallon in its acquisition of claims in the Lehman estate.

- Also while at Sidley, Mr. Seery represented the Steering Committee in the Blockbuster Video bankruptcy; Stonehill (through its Managing Member, John Motulsky) was one of the five members of the Steering Committee.

- Mr. Seery left Sidley in 2013 to become the President and Senior Investment Partner of River Birch Capital, a hedge fund founded by his former Lehman colleagues. He left River Birch in October 2017 just before the fund imploded. In 2017, River Birch and Stonehill Capital were two of the biggest note holders in the Toys R Us bankruptcy and were members of the Toys R Us creditors'

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monthly financial report values Class 8 claims at $267 million, an exponential increase over their estimated value of $74 million in December 2020.

19 *See* Appendix, pp. A-25, A-28.

20 *See* Appendix, pp. A-2; A-62 – A-69.

committee.

It does not seem a coincidence that two firms with such significant ties to Mr. Seery have purchased $365 million in claims. The nature of the relationships and the absence of public data warrants an investigation into whether the claims purchasers may have had access to non-public information.

Other transactions occurring during the Highland bankruptcy also reinforce the suspicion that insider trading occurred. In particular, it appears that one of the claims buyers, Stonehill, used non-public information obtained incident to the bankruptcy to purchase stock in NexPoint Strategic Opportunities Fund (NYSE: NHF), a publicly traded, closed-end '40 Act fund with many holdings in common with assets held in the Highland estate outlined above. Stonehill is a registered investment adviser with $3 billion under management that has historically owned very few equity interests, particularly equity interests in a closed-end fund. As disclosed in SEC filings, Stonehill acquired enough stock in NHF during the second quarter of 2021 to make it Stonehill's eighth largest equity position.

The timing of the acquisitions of claims by Farallon and Stonehill also warrants investigation. In particular, although notices of the transfer of the claims were filed immediately after the confirmation of the Debtor's Plan and prior to the effective date of the Plan, it seems likely that negotiations began much earlier. Transactions of this magnitude do not take place overnight and typically require robust due diligence. We know, for example, that Muck was formed on March 9, 2021, more than a month before it filed notice that it was purchasing the Acis claim. If the negotiation or execution of a definitive agreement for the purchase began before or contemporaneously with Muck's formation, then there is every reason to investigate whether selling Creditors' Committee members and/or Debtor management provided Farallon with critical non-public information well before the Creditors' Committee members sold their claims and withdrew from the Committee. Indeed, Mr. Patel and Mr. Linn have stated to others that they purchased the Acis and HarbourVest claims in late January or early February. We believe an investigation will reveal whether negotiations of the sale and the purchase of claims from Creditors' Committee members preceded the confirmation of the Debtor's Plan and the resignation of those members from the Committee.

Likewise, correspondence from the fund adviser to the Crusader Fund indicates that the Crusader Fund and the Redeemer Committee had "consummated" the sale of the Redeemer Committee's claims and other assets on April 30, 2021, "for $78 million in cash, which was paid in full to the Crusader Funds at closing."[21] We also know that there was a written agreement among Stonehill, the Crusader Fund, and the Redeemer Committee that potentially dates back to the fourth quarter of 2020. Presumably such an agreement, if it existed, would impose affirmative and negative covenants upon the seller and grant the purchaser discretionary approval rights during the pendency of the sale. An investigation by your office is necessary to determine whether there were any such agreement, which would necessarily conflict with the Creditors' Committee members' fiduciary obligations.

The sale of the claims by the members of the Creditors' Committee also violates the guidelines provided to committee members that require a selling committee member to obtain approval from the Bankruptcy Court prior to any sale of such member's claim. The instructions provided by the U.S. Trustee's Office (in this instance the Delaware Office) state:

[21] *See* Appendix, pp. A-70 – A-71.

> **In the event you are appointed to an official committee of creditors, the United States Trustee may require periodic certifications of your claims while the bankruptcy case is pending. Creditors wishing to serve as fiduciaries on any official committee are advised that they may not purchase, sell or otherwise trade in or transfer claims against the Debtor while they are committee members absent an order of the Court. By submitting the enclosed Questionnaire and accepting membership on an official committee of creditors, you agree to this prohibition. The United States Trustee reserves the right to take appropriate action, including removing a creditor from any committee, if the information provided in the Questionnaire is inaccurate, if the foregoing prohibition is violated, or for any other reason the United States Trustee believes is proper in the exercise of her discretion. You are hereby notified that the United States Trustee may share this information with the Securities and Exchange Commission if deemed appropriate.**

In this case, no Court approval was ever sought or obtained, and the Dallas U.S. Trustee's Office took no action to enforce this guideline. The Creditors' Committee members were sophisticated entities, and they were privy to inside information that was not available to other unsecured creditors. For example, valuations of assets placed into a specially-created affiliated entities, such as the assets acquired in the HarbourVest settlement, and valuations of assets held by other entities owned or controlled by the Debtor, were available to the selling Creditors' Committee members, but not other creditors or parties-in-interest.

While claims trading itself is not necessarily prohibited, the circumstances surrounding claims trading often times prompt investigation due to the potential for abuse. This case warrants such an investigation due to the following:

a) The selling parties were *three* of the four Creditors' Committee members, and each one had access to information they received in a fiduciary capacity;

b) Some of the information they received would have been available to other parties-in-interest if Rule 2015.3 had been enforced;

c) The sales allegedly occurred after the Plan was confirmed, and certain other matters immediately thereafter came to light, such as the Debtor's need for an exit loan (although the Debtor testified at the confirmation hearing that no loan was needed) and the inability of the Debtor to obtain Directors and Officer insurance;

d) The Debtor settled a dispute with UBS and obligated itself (using estate assets) to pursue claims and transfers and to transfer certain recoveries to UBS, as opposed to distributing those recoveries to creditors, and the Debtor used third-party assets as consideration for the settlement[22];

e) The projected recovery to creditors changed significantly between the approval of the Disclosure Statement and the confirmation of the Debtor's Plan; and

f) There was a suspicious purchase of stock by Stonehill in NHF, a closed-end fund that is publicly traded on the New York stock exchange. The Debtor's assets and the positions held by the closed-end fund are similar.

Further, there is reason to believe that insider claims-trading negatively impacted the estate's ultimate recovery. Immediately prior to the Plan confirmation hearing, Judge Jernigan suggested that the Creditors' Committee and Mr. Dondero attempt to reach a settlement. Mr. Dondero, through counsel, made numerous offers of settlement that would have maximized the estate's recovery, even going so far as to file a proposed Plan of Reorganization. The Creditors' Committee did not timely respond to these efforts. It was not until The Honorable Former Judge D. Michael Lynn, counsel for Mr. Dondero, reminded the Creditors' Committee counsel that its

members had a fiduciary duty to respond that a response was forthcoming. Mr. Dondero's proposed plan offered a greater recovery than what the Debtor had reported would be the expected Plan recovery. The Creditors' Committee's failure to timely respond to that offer suggests that some members may have been contractually constrained from doing so, which itself warrants investigation.

We encourage the EOUST to question and explore whether, at the time that Mr. Dondero's proposed plan was filed, the Creditors' Committee members already had committed to sell their claims and therefore were contractually restricted from accepting Mr. Dondero's materially better offer. If that were the case, the contractual tie-up would have been a violation of the Committee members' fiduciary duties. The reason for the U.S. Trustee's guideline concerning the sale of claims by Committee members was to allow a public hearing on whether Committee members were acting within the bounds of their fiduciary duties to the estate incident to the sale of any claim. The failure to enforce this guideline has left open questions about sale of Committee members' claims that should have been disclosed and vetted in open court.

In summary, the failure of the U.S. Trustee's Office to demand appropriate reporting and transparency created an environment where parties needed to obtain and use non-public information to facilitate claims trading and potential violations of the fiduciary duties owed by Creditors' Committee members. At the very least, there is enough credible evidence to warrant an investigation. It is up to the bankruptcy bar to alert your office to any perceived abuses to ensure that the system is fair and transparent. The Bankruptcy Code is not written for those who hold the largest claims but, rather, it is designed to protect all stakeholders. A second Neiman Marcus should not be allowed to occur.

We would appreciate a meeting with your office at your earliest possible convenience to discuss the contents of this letter and to provide additional information and color that we believe will be valuable in making a determination about whether and what to investigate. In the interim, if you need any additional information or copies of any particular pleading, we would be happy to provide those at your request.

Very truly yours,

/s/Douglas S. Draper

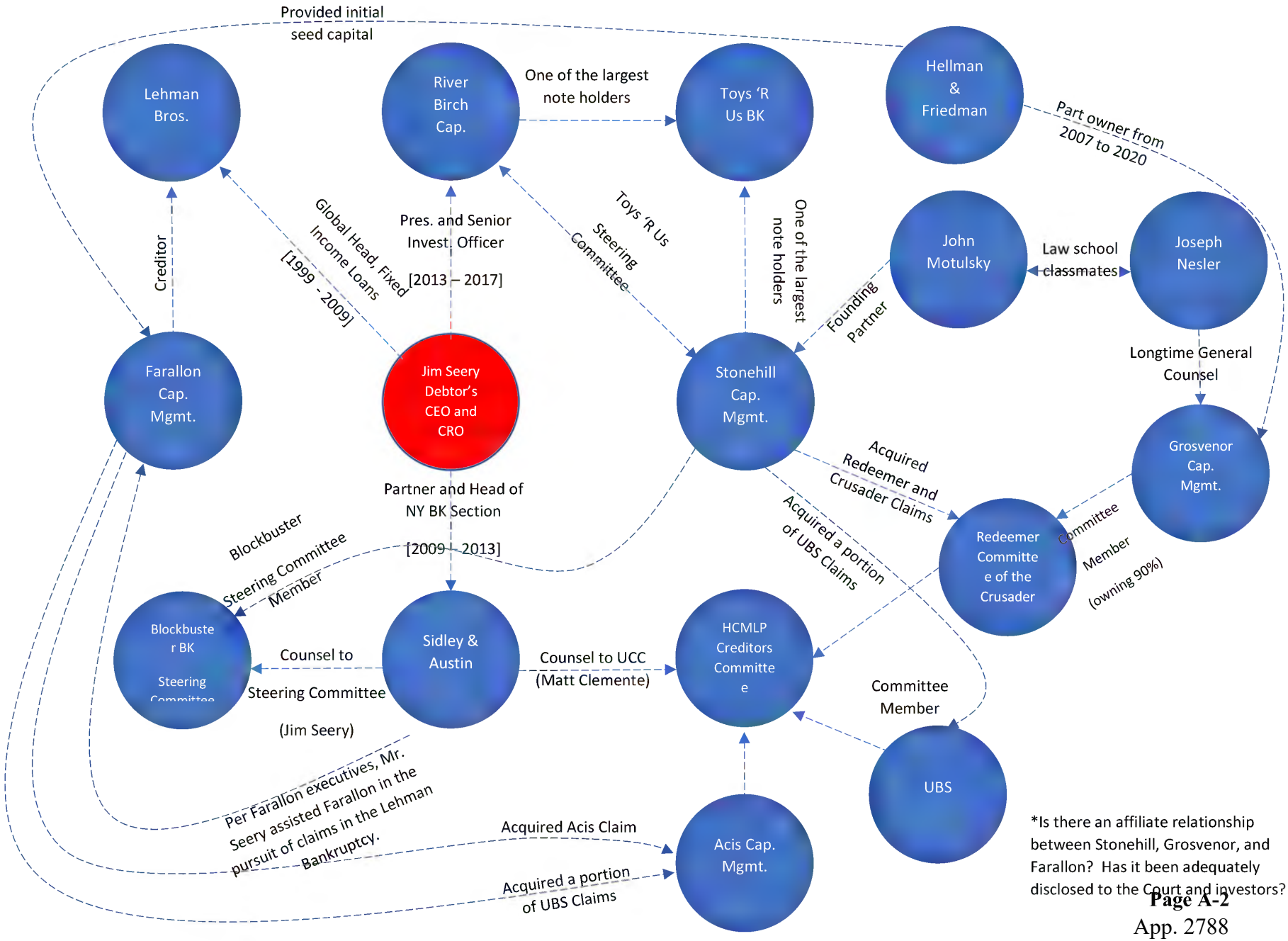
Douglas S. Draper

DSD:dh

Appendix

Table of Contents

Relationships Among Debtor's CEO/CRO, the UCC, and Claims Purchasers



Debtor Protocols [Doc. 466-1]

I. **Definitions**

A. "Court" means the United States Bankruptcy Court for the Northern District of Texas.

B. "NAV" means (A) with respect to an entity that is not a CLO, the value of such entity's assets less the value of its liabilities calculated as of the month end prior to any Transaction; and (B) with respect to a CLO, the CLO's gross assets less expenses calculated as of the quarter end prior to any Transaction.

C. "Non-Discretionary Account" means an account that is managed by the Debtor pursuant to the terms of an agreement providing, among other things, that the ultimate investment discretion does not rest with the Debtor but with the entity whose assets are being managed through the account.

D. "Related Entity" means collectively (A)(i) any non-publicly traded third party in which Mr. Dondero, Mr. Okada, or Mr. Grant Scott, or Mr. John Honis (with respect to Messrs. Okada, Scott and Honis, only to the extent known by the Debtor) has any direct or indirect economic or ownership interest, including as a beneficiary of a trust; (ii) any entity controlled directly or indirectly by Mr. Dondero, Mr. Okada, Mr. Grant Scott, or Mr. John Honis (with respect to Messrs. Okada, Scott and Honis, only to the extent known by the Debtor); (iii) MGM Holdings, Inc.; (iv) any publicly traded company with respect to which the Debtor or any Related Entity has filed a Form 13D or Form 13G; (v) any relative (as defined in Section 101 of the Bankruptcy Code) of Mr. Dondero or Mr. Okada each solely to the extent reasonably knowable by the Debtor; (vi) the Hunter Mountain Investment Trust and Dugaboy Investment Trust; (vii) any entity or person that is an insider of the Debtor under Section 101(31) the Bankruptcy Code, including any "non-statutory" insider; and (viii) to the extent not included in (A)(i)-(vii), any entity included in the listing of related entities in **Schedule B** hereto (the "Related Entities Listing"); and (B) the following Transactions, (x) any intercompany Transactions with certain affiliates referred to in paragraphs 16.a through 16.e of the Debtor's cash management motion [Del. Docket No. 7]; and (y) any Transactions with Charitable DAF Fund, L.P. (provided, however, that additional parties may be added to this subclause (y) with the mutual consent of the Debtor and the Committee, such consent not to be unreasonably withheld).

E. "Stage 1" means the time period from the date of execution of a term sheet incorporating the protocols contained below the ("Term Sheet") by all applicable parties until approval of the Term Sheet by the Court.

F. "Stage 2" means the date from the appointment of a Board of Independent Directors at Strand Advisors, Inc. until 45 days after such appointment, such appointment being effective upon Court approval.

G. "Stage 3" means any date after Stage 2 while there is a Board of Independent Directors at Strand Advisors, Inc.

H. "Transaction" means (i) any purchase, sale, or exchange of assets, (ii) any lending or borrowing of money, including the direct payment of any obligations of another entity, (iii) the satisfaction of any capital call or other contractual

requirement to pay money, including the satisfaction of any redemption requests, (iv) funding of affiliates and (v) the creation of any lien or encumbrance.

I. "Ordinary Course Transaction" means any transaction with any third party which is not a Related Entity and that would otherwise constitute an "ordinary course transaction" under section 363(c) of the Bankruptcy Code.

J. "Notice" means notification or communication in a written format and shall include supporting documents necessary to evaluate the propriety of the proposed transaction.

K. "Specified Entity" means any of the following entities: ACIS CLO 2017-7 Ltd., 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, PamCo Cayman Ltd., Rockwall CDO II Ltd., Rockwall CDO Ltd., Southfork CLO Ltd., Stratford CLO Ltd., Westchester CLO, Ltd., Aberdeen Loan Funding, Ltd., Bristol Bay 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.

II. Transactions involving the (i) assets held directly on the Debtor's balance sheet or the balance sheet of the Debtor's wholly-owned subsidiaries, including Jefferies Prime Account, and (ii) the Highland Select Equity Fund, L.P., Highland Multi Strategy Credit Fund, L.P., and Highland Restoration Capital Partners

A. **Covered Entities**: N/A (See entities above).

B. **Operating Requirements**

1. Ordinary Course Transactions do not require Court approval (All Stages).

a) Stage 1 and Stage 2: ordinary course determined by the CRO.

b) Stage 3: ordinary course determined by the Debtor.

2. Related Entity Transactions

a) Stage 1 and Stage 2: Transactions with Related Entities require prior approval of CRO and five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) Stage 3:

(1) Transactions with Related Entities greater than $1,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

(2) Transactions with Related Entities greater than $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require Court approval, which the Committee agrees may be sought on an expedited basis.

3. Third Party Transactions (All Stages)

a) Except as set forth in (b) and (c) below, Transactions in excess of $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require three business days advance notice to Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) The Debtor may satisfy any redemption requests from entities that are not Related Entities without advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable. The Debtor will provide the Committee with five business days advance notice of any redemption requests made by and payable to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

c) The Debtor may satisfy margin calls and short covers without providing the Committee advance notice if the exigencies do not allow advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable.

C. **Weekly Reporting**: The Debtor will provide the Committee with weekly reports showing all Transactions under this category.

III. Transactions involving entities the Debtor manages and in which the Debtor holds a direct or indirect interest (other than the entities discussed in Section I above)

A. **Covered Entities**: See **Schedule A** hereto. **Schedule A** includes or will include all entities the Debtor manages and in which the Debtor holds a direct or indirect interest (other than the entities discussed in Section I above).[1]

B. **Operating Requirements**

1. Ordinary Course Transactions do not require Court approval (All Stages).

a) Stage 1 and Stage 2: ordinary course determined by the CRO.

b) Stage 3: ordinary course determined by the Debtor.

2. Related Entity Transactions

[1] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

a) Stage 1 and Stage 2: Transactions with Related Entities require prior approval of CRO and five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) Stage 3:

(1) Transactions with Related Entities greater than $1,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

(2) Transactions with Related Entities greater than $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require Court approval, which the Committee agrees may be sought on an expedited basis.

3. Third Party Transactions (All Stages)

a) Except as set forth in (b) and (c) below, Transactions in excess of $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require three business days advance notice to Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) The Debtor may satisfy any redemption requests from entities that are not Related Entities without advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable. The Debtor will provide the Committee with five business days advance notice of any redemption requests made by and payable to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

c) The Debtor may satisfy margin calls and short covers without providing the Committee advance notice if the exigencies do not allow advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable.

C. **Weekly Reporting**: The Debtor will provide the Committee with weekly reports showing all Transactions under this category.

IV. Transactions involving entities that the Debtor manages but in which the Debtor does not hold a direct or indirect interest

A. **Covered Entities**: See **Schedule A** hereto. **Schedule A** includes or will include all entities that the Debtor manages but in which the Debtor does not hold a direct or indirect interest.[2]

B. **Operating Requirements**

1. Ordinary Course Transactions do not require Court approval (All Stages).

   a) Stage 1 and Stage 2: ordinary course determined by the CRO.

   b) Stage 3: ordinary course determined by the Debtor.

2. Related Entity Transactions

   a) Stage 1 and Stage 2: Transactions with Related Entities require prior approval of CRO and five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

   b) Stage 3:

      (1) Transactions with Related Entities greater than $1,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

      (2) Transactions with Related Entities greater than $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require Court approval, which the Committee agrees may be sought on an expedited basis.

3. Third Party Transactions (All Stages):

   a) Except (x) as set forth in (b) and (c) below and (y) for any Transaction involving a Specified Entity and the sale or purchase by such Specified Entity of an asset that is not an obligation or security issued or guaranteed by any of the Debtor, a Related Entity or a fund, account, portfolio company owned, controlled or managed by the Debtor or a Related Entity, where such Transaction is effected in compliance with the collateral management agreement to which such Specified Entity is party, any Transaction that decreases the NAV of an entity managed by the Debtor in excess of the greater of (i) 10% of NAV or (ii) $3,000,000 requires five business days advance notice to

[2] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) The Debtor may satisfy any redemption requests from entities that are not Related Entities without advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable. The Debtor will provide the Committee with five business days advance notice of any redemption requests made by and payable to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

c) The Debtor may take such steps as may be reasonably necessary to winddown any managed entity and make distributions as may be required in connection with such winddown to any required parties. The Debtor will provide the Committee with five business days advance notice of any distributions to be made to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

C. **Weekly Reporting**: The Debtor will provide the Committee with weekly reports showing all Transactions under this category. Such reports will include Transactions involving a Specified Entity unless the Debtor is prohibited from doing so under applicable law or regulation or any agreement governing the Debtor's relationship with such Specified Entity.

V. Transactions involving entities that the Debtor does not manage but in which the Debtor holds a direct or indirect interest

A. Covered Entities: See **Schedule A** hereto. **Schedule A** includes or will include all entities that the Debtor does not manage but in which the Debtor holds a direct or indirect interest.[3]

B. Ordinary Course Transactions (All Stages): N/A

C. Operating Requirements: N/A

D. Weekly Reporting: Debtor will provide weekly reports of all cross-held asset Transactions, i.e. Transactions in which the Debtor or a Related Entity also holds a direct or indirect interest.

[3] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

VI. Transactions involving entities that the Debtor does not manage and in which the Debtor does not hold a direct or indirect interest

A. Covered Entities: See **Schedule A** hereto. **Schedule A** includes or will include all entities that the Debtor does not manage and in which the Debtor does not hold a direct or indirect interest.[4]

B. Ordinary Course Transactions (All Stages): N/A

C. Operating Requirements: N/A

D. Weekly Reporting: Debtor will provide weekly reports of all cross-held asset Transactions, i.e. Transactions in which the Debtor or a Related Entity also holds a direct or indirect interest.

VII. Transactions involving Non-Discretionary Accounts

A. Covered Entities: See **Schedule A** hereto. **Schedule A** includes or will include all non-discretionary accounts.[5]

B. Ordinary Course Transactions (All Stages): N/A

C. Operating Requirements: N/A

D. Weekly Reporting: Debtor will provide weekly reports of all cross-held asset Transactions, i.e. Transactions in which the Debtor or a Related Entity also holds a direct or indirect interest.

VIII. Additional Reporting Requirements – All Stages (to the extent applicable)

A. DSI will provide detailed lists and descriptions of internal financial and operational controls being applied on a daily basis for a full understanding by the Committee and its professional advisors three (3) business days in advance of the hearing on the approval of the Term Sheet and details of proposed amendments to said financial and operational controls no later than seven (7) days prior to their implementation.

B. The Debtor will continue to provide weekly budget to actuals reports referencing their 13-week cash flow budget, such reports to be inclusive of all Transactions with Related Entities.

IX. Shared Services

A. The Debtor shall not modify any shared services agreement without approval of the CRO and Independent Directors and seven business days' advance notice to counsel for the Committee.

B. The Debtor may otherwise continue satisfying its obligations under the shared services agreements.

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[4] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

[5] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

X. Representations and Warranties

A. The Debtor represents that the Related Entities Listing included as **Schedule B** attached hereto lists all known persons and entities other than natural persons included in the definitions of Related Entities covered by Section I.D parts A(i)-(vii) above at the time of the execution of the Term Sheet.

B. The Debtor represents that the list included as **Schedule C** attached hereto lists all known natural persons included in the definitions of Related Entities covered by Section I.D parts A(i)-(vii) above at the time of the execution of the Term Sheet.

C. The Debtor represents that, if at any time the Debtor becomes aware of any person or entity, including natural persons, meeting the definition of Related Entities covered by Section I.D parts A(1)-(vii) above that is not included in the Related Entities Listing or Schedule C, the Debtor shall update the Related Entities Listing or Schedule C, as appropriate, to include such entity or person and shall give notice to the Committee thereof.

Schedule A[6]

Entities the Debtor manages and in which the Debtor holds a direct or indirect interest

1. Highland CLO Funding, Ltd. (0.63% Ownership Interest)
2. Dynamic Income Fund (0.26% Ownership Interest)

Entities that the Debtor manages but in which the Debtor does not hold a direct or indirect interest

1. Highland Prometheus Master Fund L.P.
2. NexAnnuity Life Insurance Company
3. PensionDanmark
4. Highland Argentina Regional Opportunity Fund
5. Longhorn A
6. Longhorn B
7. Collateralized Loan Obligations
   a) Rockwall II CDO Ltd.
   b) Grayson CLO Ltd.
   c) Eastland CLO Ltd.
   d) Westchester CLO, Ltd.
   e) Brentwood CLO Ltd.
   f) Greenbriar CLO Ltd.
   g) Highland Park CDO Ltd.
   h) Liberty CLO Ltd.
   i) Gleneagles CLO Ltd.
   j) Stratford CLO Ltd.
   k) Jasper CLO Ltd.
   l) Rockwall DCO Ltd.
   m) Red River CLO Ltd.
   n) Hi V CLO Ltd.
   o) Valhalla CLO Ltd.
   p) Aberdeen CLO Ltd.
   q) South Fork CLO Ltd.
   r) Legacy CLO Ltd.
   s) Pam Capital
   t) Pamco Cayman

Entities that the Debtor does not manage but in which the Debtor holds a direct or indirect interest

1. Highland Opportunistic Credit Fund
2. Highland Healthcare Opportunities Fund f/k/a Highland Long/Short Healthcare Fund
3. NexPoint Real Estate Strategies Fund
4. Highland Merger Arbitrage Fund
5. NexPoint Strategic Opportunities Fund
6. Highland Small Cap Equity Fund
7. Highland Global Allocation Fund

[6] NTD: Schedule A is work in process and may be supplemented or amended.

8. Highland Socially Responsible Equity Fund
9. Highland Income Fund
10. Stonebridge-Highland Healthcare Private Equity Fund ("Korean Fund")
11. SE Multifamily, LLC

Entities that the Debtor does not manage and in which the Debtor does not hold a direct or indirect interest

1. The Dugaboy Investment Trust
2. NexPoint Capital LLC
3. NexPoint Capital, Inc.
4. Highland IBoxx Senior Loan ETF
5. Highland Long/Short Equity Fund
6. Highland Energy MLP Fund
7. Highland Fixed Income Fund
8. Highland Total Return Fund
9. NexPoint Advisors, L.P.
10. Highland Capital Management Services, Inc.
11. Highland Capital Management Fund Advisors L.P.
12. ACIS CLO Management LLC
13. Governance RE Ltd
14. PCMG Trading Partners XXIII LP
15. NexPoint Real Estate Partners, LLC f/k/a HCRE Partners LLC
16. NexPoint Real Estate Advisors II LP
17. NexPoint Healthcare Opportunities Fund
18. NexPoint Securities
19. Highland Diversified Credit Fund
20. BB Votorantim Highland Infrastructure LLC
21. ACIS CLO 2017 Ltd.

Transactions involving Non-Discretionary Accounts

1. NexBank SSB Account
2. Charitable DAF Fund LP

Schedule B

Related Entities Listing (other than natural persons)

Schedule C

1. James Dondero
2. Mark Okada
3. Grant Scott
4. John Honis
5. Nancy Dondero
6. Pamela Okada
7. Thomas Surgent
8. Scott Ellington
9. Frank Waterhouse
10. Lee (Trey) Parker

Seery Jan. 29, 2021 Testimony

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

In Re:	Chapter 11
HIGHLAND CAPITAL	Case No.
MANAGEMENT, LP,	19-34054-SGJ 11
Debtor	

REMOTE DEPOSITION OF JAMES P. SEERY, JR.

January 29, 2021

10:11 a.m. EST

Reported by:
Debra Stevens, RPR-CRR
JOB NO. 189212

January 29, 2021
9:00 a.m. EST

Remote Deposition of JAMES P. SEERY, JR., held via Zoom conference, before Debra Stevens, RPR/CRR and a Notary Public of the State of New York.

REMOTE APPEARANCES:

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EXAMINATIONS

EXHIBITS

SEERY DYD

INFORMATION/PRODUCTION REQUESTS

MARKED FOR RULING

COURT REPORTER: My name is Debra Stevens, court reporter for TSG Reporting and notary public of the State of New York. Due to the severity of the COVID-19 pandemic and following the practice of social distancing, I will not be in the same room with the witness but will report this deposition remotely and will swear the witness in remotely. If any party has any objection, please so state before we proceed.

Whereupon,

JAMES SEERY,

having been first duly sworn/affirmed, was examined and testified as follows:

EXAMINATION BY
MR. DRAPER:

Q. Mr. Seery, my name is Douglas Draper, representing the Dugaboy Trust. I have series of questions today in connection with the 30(b) Notice that we filed. The first question I have for you, have you seen the Notice of Deposition

J. SEERY

the screen, please?
A. Page what?
Q. I think it is page 174.
A. Of the PDF or of the document?
Q. Of the disclosure statement that was filed. It is up on the screen right now.
COURT REPORTER: Do you intend this as another exhibit for today's deposition?
MR. DRAPER: We'll mark this Exhibit 2.
(So marked for identification as Seery Exhibit 2.)
Q. If you look to the recovery to Class 8 creditors in the November 2020 disclosure statement was a recovery of 87.44 percent?
A. That actually says the percent distribution to general unsecured creditors was 87.44 percent. Yes.
Q. And in the new document that was filed, given to us yesterday, the recovery is 62.5 percent?

J. SEERY

A. It says the percent distribution to general unsecured creditors is 62.14 percent.
Q. Have you communicated the reduced recovery to anybody prior to the date -- to yesterday?
MR. MORRIS: Objection to the form of the question.
A. I believe generally, yes. I don't know if we have a specific number, but generally yes.
Q. And would that be members of the Creditors' Committee who you gave that information to?
A. Yes.
Q. Did you give it to anybody other than members of the Creditors' Committee?
A. Yes.
Q. Who?
A. HarbourVest.
Q. And when was that?
A. Within the last two months.
Q. You did not feel the need to communicate the change in recovery to

J. SEERY

anybody else?
A. I said Mr. Doherty.
Q. In looking at the two elements, and what I have asked you to look at is the claims pool. If you look at the November disclosure statement, if you look down Class 8, unsecured claims?
A. Yes.
Q. You have 176,000 roughly?
A. Million.
Q. 176 million. I am sorry. And the number in the new document is 313 million?
A. Correct.
Q. What accounts for the difference?
A. An increase in claims.
Q. When did those increases occur? Were they yesterday? A month ago? Two months ago?
A. Over the last couple months.
Q. So in fact over the last couple months you knew in fact that the recovery in the November disclosure statement was

J. SEERY

not accurate?
A. Yes. We secretly disclosed it to the Bankruptcy Court in open court hearings.
Q. But you never did bother to calculate the reduced recovery; you just increased --
(Reporter interruption.)
Q. You just advised as to the increased claims pool. Correct?
MR. MORRIS: Objection to the form of the question.
A. I don't understand your question.
Q. What I am trying to get at is, as you increase the claims pool, the recovery reduces. Correct?
A. No. That is not how a fraction works.
Q. Well, if the denominator increases, doesn't the recovery ultimately decrease if --
A. No.
Q. -- if the numerator stays the

J. SEERY

were amended without consideration a few years ago. So, for our purposes we didn't make the assumption, which I am sure will happen, a fraudulent conveyance claim on those notes, that a fraudulent conveyance action would be brought. We just assumed that we'd have to discount the notes heavily to sell them because nobody would respect the ability of the counterparties to fairly pay.

Q. And the same discount was applied in the liquidation analysis to those notes?

A. Yes.

Q. Now --

A. The difference -- there would be a difference, though, because they would pay for a while because they wouldn't want to accelerate them. So there would be some collections on the notes for P and I.

Q. But in fact as of January you have accelerated those notes?

A. Just one of them, I believe.

Q. Which note was that?

J. SEERY

A. NexPoint, I said. They defaulted on the note and we accelerated it.

Q. So there is no need to file a fraudulent conveyance suit with respect to that note. Correct, Mr. Seery?

MR. MORRIS: Objection to the form of the question.

A. Disagree. Since it was likely intentional fraud, there may be other recoveries on it. But to collect on the note, no.

Q. My question was with respect to that note. Since you have accelerated it, you don't need to deal with the issue of when it's due?

MR. MORRIS: Objection to the form of the question.

A. That wasn't your question. But to that question, yes, I don't need to deal with when it's due.

Q. Let me go over certain assets. I am not going to ask you for the valuation of them but I am going to ask

J. SEERY

you whether they are included in the asset portion of your $257 million number, all right? Mr. Morris didn't want me to go into specific asset value, and I don't intend to do that.

The first question I have for you is, the equity in Trustway Highland Holdings, is that included in the $257 million number?

A. There is no such entity.

Q. Then I will do it in a different way. In connection with the sale of the hard assets, what assets are included in there specifically?

A. Off the top of my head -- it is [redacted] Trustway Holdings and all the value that flows up from Trustway Holdings. It [redacted] flows up from Targa. It includes CCS [redacted] to the Debtor from CCS Medical. It includes Cornerstone and all the value that would flow from Cornerstone. It

J. SEERY

includes any other securities and all the value that would flow from Cornerstone. It includes HCLOF and all the value that would flow up from HCLOF. It includes [redacted] from Korea.

There may be others off the top of my head. I don't recall them. I don't have a list in front of me.

Q. Now, with respect to those assets, have you started the sale process of those assets?

A. No. Well, each asset is different. So, the answer is, with respect to any securities, we do seek to sell those regularly and we do seek to monetize those assets where we can depending on whether there is a restriction or not and whether there is liquidity in the market.

With respect to the PE assets or the companies I described -- Targa, CCS, Cornerstone, JHT -- we have not -- Trustway. We have not sought to sell

J. SEERY

A. I don't recall the specific limitation on the trust. But if there was a reason to hold on to the asset, if there is a limitation, we can seek an extension.

Q. Let me ask a question. With respect to these businesses, the Debtor merely owns an equity interest in them. Correct?

A. Which business?

Q. The ones you have identified as operating businesses earlier?

A. It depends on the business.

Q. Well, let me -- again, let's try to be specific. With respect to SSP, it was your position that you did not need to get court approval for the sale. Correct?

A. That's correct.

Q. Which one of the operating businesses that are here, that you have identified, do you need court authority for a sale?

MR. MORRIS: Objection to the form of the question.

A. Each of the businesses will be

J. SEERY

different analysis that we'll undertake with bankruptcy counsel to determine what we would need depending on when it is

either under the code are or under the plan.

Q. Is there anything that would stop you from selling these businesses if the Chapter 11 went on for a year or two years?

MR. MORRIS: Objection to form of the question.

A. Is there anything that would stop me? We'd have to follow the strictures of the code and the protocols, but there would be no prohibition -- let me finish, please.

There would be no prohibition that I am aware of.

Q. Now, in connection with your differential between the liquidation of what I will call the operating businesses under the liquidation analysis and the plan analysis, who arrived at the discount

J. SEERY

or determined the discount that has been placed between the two, plan analysis versus liquidation analysis?

MR. MORRIS: Objection to form of the question.

A. To which document are you referring?

Q. Both the June -- the January and the November analysis has a different estimated proceeds for monetization for the plan analysis versus the liquidation analysis. Do you see that?

A. Yes.

Q. And there is a note under there. "Assumes Chapter 7 trustee will not be able to achieve the same sales proceeds as Claimant trustee."

A. I see that, yes.

Q. Do you see that note?

A. Yes.

Q. Who arrived at that discount?

A. I did.

Q. What percentage did you use?

A. Depended on the asset. Each one

J. SEERY

is different.

Q. Is the discount a function of capability of a trustee versus your capability, or is the discount a function of timing?

MR. MORRIS: Objection to form.

A. It could be a combination.

Q. So, let's -- let me walk through this. Your plan analysis has an assumption that everything is sold by December 2022. Correct?

A. Correct.

Q. And the valuations that you have used here for the monetization assume a sale between -- a sale prior to December of 2022. Correct?

A. Sorry. I don't quite understand your question.

Q. The 257 number, and then let's take out the notes. Let's use the 210 number.

MR. MORRIS: Can we put the document back on the screen, please? Sorry, Douglas, to interrupt, but it

J. SEERY

would be helpful.

MR. DRAPER: That is fine, John.

(Pause.)

MR. MORRIS: Thank you very much.

Q. Mr. Seery, do you see the 257?

A. In the one from yesterday?

Q. Yes.

A. Second line, 257,941. Yes.

Q. That assumes a monetization of all assets by December of 2022?

A. Correct.

Q. And so everything has been sold by that time; correct?

A. Yes.

Q. So, what I am trying to get at is, there is both the capability between you and a trustee, and then the second issue is timing. So, what discount was put on for timing, Mr. Seery, between when a trustee would sell it versus when you would sell it?

MR. MORRIS: Objection.

Q. What is the percentage you

J. SEERY

applied?

A. Each of the assets is different.

Q. Is there a general discount that you used?

A. Not a general discount, no. We looked at each individual asset and went through and made an assessment.

Q. Did you apply a discount for your capability versus the capability of a trustee?

A. No.

Q. So a trustee would be as capable as you are in monetizing these assets?

MR. MORRIS: Objection to the form of the question.

Q. Excuse me? The answer is?

A. The answer is maybe.

Q. Couldn't a trustee hire somebody as capable as you are?

MR. MORRIS: Objection to the form of the question.

A. Perhaps.

Q. Sir, that is a yes or no question. Could the trustee hire somebody

J. SEERY

as capable as you are?

MR. MORRIS: Objection to the form of the question.

A. I don't know.

Q. Is there anybody as capable as you are?

MR. MORRIS: Objection to the form of the question.

A. Certainly.

Q. And they could be hired. Correct?

A. Perhaps. I don't know.

Q. And if you go back to the November 2020 liquidation analysis versus plan analysis, it is also the same note about that a trustee would bring less, and there is the same sort of discount between the estimated proceeds under the plan and under the liquidation analysis.

MR. MORRIS: If that is a question, I object.

Q. Is that correct, Mr. Seery, looking at the document?

A. There are discounts, yes.

J. SEERY

Q. Again, the discounts are applied for timing and capability?

A. Yes.

Q. Now, in looking at the November plan analysis number of $190 million and the January number of $257 million, what accounts for the increase between the two dates? What assets specifically?

A. There are a number of assets. Firstly, the HCLOF assets are added.

Q. How much are those?

A. Approximately 22 and a half million dollars.

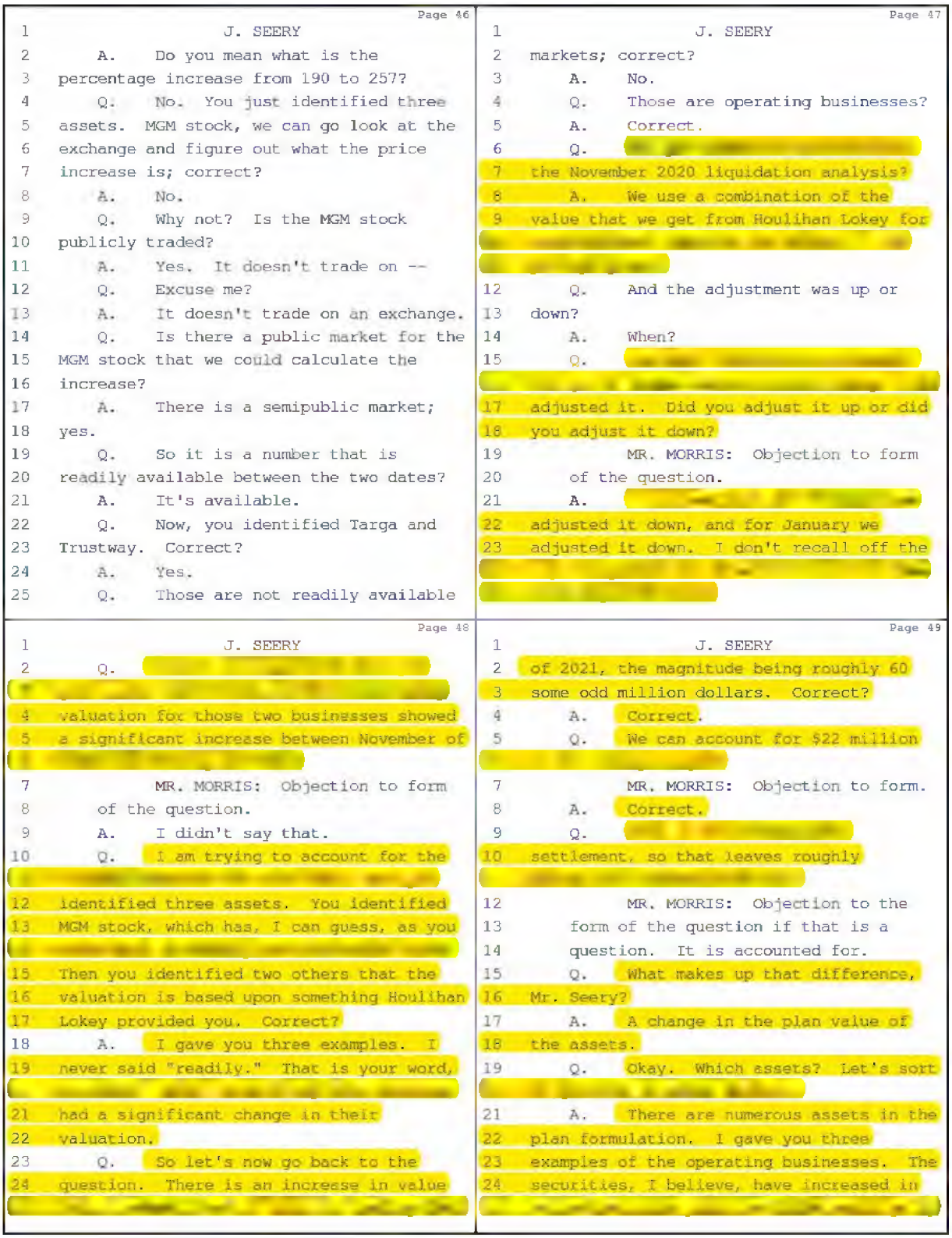
Q. Okay.

A. Secondly, there is a significant [redacted] assets over this time period.

Q. Which assets, Mr. Seery?

A. There are a number. They include MGM stock, they include Trustway, they include Targa.

Q. And what is the percentage increase from November to January, November of 2020 to January of 2021?



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J. SEERY

A. Do you mean what is the percentage increase from 190 to 257?
Q. No. You just identified three assets. MGM stock, we can go look at the exchange and figure out what the price increase is; correct?
A. No.
Q. Why not? Is the MGM stock publicly traded?
A. Yes. It doesn't trade on --
Q. Excuse me?
A. It doesn't trade on an exchange.
Q. Is there a public market for the MGM stock that we could calculate the increase?
A. There is a semipublic market; yes.
Q. So it is a number that is readily available between the two dates?
A. It's available.
Q. Now, you identified Targa and Trustway. Correct?
A. Yes.
Q. Those are not readily available

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J. SEERY

markets; correct?
A. No.
Q. Those are operating businesses?
A. Correct.
Q. [redacted] the November 2020 liquidation analysis?
A. We use a combination of the value that we get from Houlihan Lokey for [redacted]
Q. And the adjustment was up or down?
A. When?
Q. [redacted] adjusted it. Did you adjust it up or did you adjust it down?
MR. MORRIS: Objection to form of the question.
A. [redacted] adjusted it down, and for January we adjusted it down. I don't recall off the [redacted]

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J. SEERY

Q. [redacted] valuation for those two businesses showed a significant increase between November of [redacted]
MR. MORRIS: Objection to form of the question.
A. I didn't say that.
Q. I am trying to account for the [redacted] identified three assets. You identified MGM stock, which has, I can guess, as you [redacted] Then you identified two others that the valuation is based upon something Houlihan Lokey provided you. Correct?
A. I gave you three examples. I never said "readily." That is your word, [redacted] had a significant change in their valuation.
Q. So let's now go back to the question. There is an increase in value [redacted]

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J. SEERY

of 2021, the magnitude being roughly 60 some odd million dollars. Correct?
A. Correct.
Q. We can account for $22 million [redacted]
MR. MORRIS: Objection to form.
A. Correct.
Q. [redacted] settlement, so that leaves roughly [redacted]
MR. MORRIS: Objection to the form of the question if that is a question. It is accounted for.
Q. What makes up that difference, Mr. Seery?
A. A change in the plan value of the assets.
Q. Okay. Which assets? Let's sort [redacted]
A. There are numerous assets in the plan formulation. I gave you three examples of the operating businesses. The securities, I believe, have increased in [redacted]

J. SEERY

for one. On the operating businesses, we looked at each of them and made an assessment based upon where the market is [redacted] have moved those valuations.

Q. Let me look at some numbers again. In the liquidation analysis in November of 2020, the liquidation value is $149 million. Correct?

A. Yes.

Q. And in the liquidation analysis in January of 2021, you have $191 million?

A. Yes.

Q. You see that number. So there is $51 million there, right?

A. No.

Q. What is the difference between 191 and -- sorry. My math may be a little off. What is the difference between the two numbers, Mr. Seery?

A. Your math is off.

Q. Sorry. It is 41 million?

A. Correct.

Q. $22 million of that is the

J. SEERY

HarbourVest settlement, right?

A. I believe that's correct.

Q. Is that fair, Mr. Seery?

A. I believe that is correct, yes.

Q. And part of that differential are publicly traded or ascertainable securities. Correct?

A. Yes.

Q. And basically you can get, or under the plan analysis or trustee analysis, if it is a marketable security or where there is a market, the liquidation number should be the same for both. Is that fair?

A. No.

Q. And why not?

A. We might have a different price target for a particular security than the current trading value.

Q. I understand that, but I mean that is based upon the capability of the person making the decision as to when to sell. Correct?

MR. MORRIS: Objection to form

J. SEERY

of the question.

Q. Mr. Seery, yes or no?

A. I said no.

Q. What is that based on, then?

A. The person's ability to assess the market and timing.

Q. Okay. And again, couldn't a trustee hire somebody as capable as you to both, A, assess the market and, B, make a determination as to when to sell?

MR. MORRIS: Objection to form of the question.

A. I suppose a trustee could.

Q. And there are better people or people equally or better than you at assessing a market. Correct?

A. Yes.

MR. MORRIS: Objection to form of the question.

Q. So, again, let's go back to that. We have accounted for, out of $41 million where the liquidation analysis increases between the two dates, $22 million of it. That leaves

J. SEERY

$18 million. How much of that is publicly traded or ascertainable assets versus operating businesses?

A. I don't know off the top of my head the percentages.

Q. All right. The same question for the plan analysis where you have the differential between the November number and the January number. How much of it is marketable securities versus an operating business?

A. I don't recall off the top of my head.

MR. DRAPER: Let me take a few-minute break. Can we take a ten-minute break here?

THE WITNESS: Sure.

(Recess.)

BY MR. DRAPER:

Q. Mr. Seery, what I am going to show you and what I would ask you to look at is in the note E, in the statement of assumptions for the November 2020 disclosure statement. It discusses fixed

Sale of Assets of Affiliates or Controlled Entities

Asset	Sales Price
Structural Steel Products	$50 million
Life Settlements	$35 million
OmniMax	$50 million
Targa	$37 million

- These assets were sold over the contemporaneous objections of James Dondero, who was the Portfolio Manager and key-man on the funds.
- Mr. Seery admitted[1] that he must comply with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Protocols for the sale of major assets of the estate. We believe that a competitive bid process and court approval should have been required for the sale of each of these assets (as was done for the sale of the building at 2817 Maple Ave. [a $9 million asset] and the sale of the interest in PetroCap [a $3 million asset]).

[1] *See* Mr. Seery's Jan. 29, 2021 deposition testimony, Appendix p. A-20.

20 Largest Unsecured Creditors

Name of Claimant	Allowed Class 8	Allowed Class 9
Redeemer Committee of the Highland Crusader Fund	$136,696,610.00	
UBS AG, London Branch and UBS Securities LLC	$65,000,000.00	$60,000,000
HarbourVest entities	$45,000,000.00	$35,000,000
Acis Capital Management, L.P. and Acis Capital Management GP, LLC	$23,000,000.00	
CLO Holdco Ltd	$11,340,751.26	
Patrick Daugherty	$8,250,000.00	$2,750,000 (+$750,000 cash payment on Effective Date of Plan)
Todd Travers (Claim based on unpaid bonus due for Feb 2009)	$2,618,480.48	
McKool Smith PC	$2,163,976.00	
Davis Deadman (Claim based on unpaid bonus due for Feb 2009)	$1,749,836.44	
Jack Yang (Claim based on unpaid bonus due for Feb 2009)	$1,731,813.00	
Paul Kauffman (Claim based on unpaid bonus due for Feb 2009)	$1,715,369.73	
Kurtis Plumer (Claim based on unpaid bonus due for Feb 2009)	$1,470,219.80	
Foley Gardere	$1,446,136.66	
DLA Piper	$1,318,730.36	
Brad Borud (Claim based on unpaid bonus due for Feb 2009)	$1,252,250.00	
Stinson LLP (successor to Lackey Hershman LLP)	$895,714.90	
Meta-E Discovery LLC	$779,969.87	
Andrews Kurth LLP	$677,075.65	
Markit WSO Corp	$572,874.53	
Duff & Phelps, LLC	$449,285.00	
Lynn Pinker Cox Hurst	$436,538.06	
Joshua and Jennifer Terry	$425,000.00	
Joshua Terry	$355,000.00	
CPCM LLC (bought claims of certain former HCMLP employees)	Several million	
TOTAL:	**$309,345,631.74**	**$95,000,000**

Timeline of Relevant Events

Date	Description
10/29/2019	UCC appointed; members agree to fiduciary duties and not sell claims.
9/23/2020	Acis 9019 filed
9/23/2020	Redeemer 9019 filed
10/28/2020	Redeemer settlement approved
10/28/2020	Acis settlement approved
12/24/2020	HarbourVest 9019 filed
1/14/2021	Motion to appoint examiner filed
1/21/2021	HarbourVest settlement approved; transferred its interest in HCLOF to HCMLP assignee, valued at $22 million per Seery
1/28/2021	Debtor discloses that it has reached an agreement in principle with UBS
2/3/2021	Failure to comply with Rule 2015.3 raised
2/24/2021	Plan confirmed
3/9/2021	Farallon Cap. Mgmt. forms "Muck Holdings LLC" in Delaware
3/15/2021	Debtor files Jan. '21 monthly operating report indicating assets of $364 million, liabilities of $335 million (**inclusive of $267,607,000 in Class 8 claims, but exclusive of any Class 9 claims**), the last publicly filed summary of the Debtor's assets. The MOR states that no Class 9 distributions are anticipated at this time and Class 9 recoveries are not expected.
3/31/2021	UBS files friendly suit against HCMLP under seal
4/8/2021	Stonehill Cap. Mgmt. forms "Jessup Holdings LLC" in Delaware
4/15/2021	UBS 9019 filed
4/16/2021	Notice of Transfer of Claim - Acis to Muck (Farallon Capital)
4/29/2021	Motion to Compel Compliance with Rule 2015.3 Filed
4/30/2021	Notice of Transfer of Claim - Redeemer to Jessup (Stonehill Capital)
4/30/2021	Notice of Transfer of Claim - HarbourVest to Muck (Farallon Capital)
4/30/2021	Sale of Redeemer claim to Jessup (Stonehill Capital) "consummated"
5/27/2021	UBS settlement approved; included $18.5 million in cash from Multi-Strat
6/14/2021	UBS dismisses appeal of Redeemer award
8/9/2021	Notice of Transfer of Claim - UBS to Jessup (Stonehill Capital)
8/9/2021	Notice of Transfer of Claim - UBS to Muck (Farallon Capital)

Critical unknown dates and information:

- The date on which Muck entered into agreements with HarbourVest and Acis to acquire their claims and what negative and affirmative covenants those agreements contained.
- The date on which Jessup entered into an agreement with the Redeemer Committee and the Crusader Fund to acquire their claim and what negative and affirmative covenants the agreement contained.
- The date on which the sales actually closed versus the date on which notice of the transfer was filed (i.e., did UCC members continue to serve on the committee after they had sold their claims).

Debtor's October 15, 2020 Liquidation Analysis [Doc. 1173-1]

	Plan Analysis		**Liquidation Analysis**
Estimated cash on hand at 12/31/2020	$26,496		$26,496
Estimated proceeds from monetization of assets [1][2]	198,662		154,618
Estimated expenses through final distribution [1][3]	(29,864)		(33,804)
Total estimated $ available for distribution	**195,294**		**147,309**
Less: Claims paid in full			
Administrative claims [4]	(10,533)		(10,533)
Priority Tax/Settled Amount [10]	(1,237)		(1,237)
Class 1 – Jefferies Secured Claim	-		-
Class 2 – Frontier Secured Claim [5]	(5,560)		(5,560)
Class 3 – Priority non-tax claims [10]	(16)		(16)
Class 4 – Retained employee claims	-		-
Class 5 – Convenience claims [6][10]	(13,455)		-
Class 6 – Unpaid employee claims [7]	(2,955)		-
Subtotal	(33,756)		(17,346)
Estimated amount remaining for distribution to general unsecured claims	161,538		129,962
Class 5 – Convenience claims [8]	-		17,940
Class 6 – Unpaid employee claims	-		3,940
Class 7 – General unsecured claims [9]	174,609		174,609
Subtotal	174,609		196,489
% Distribution to general unsecured claims	92.51%		66.14%
Estimated amount remaining for distribution	-		-
Class 8 – Subordinated claims	*no distribution*		*no distribution*
Class 9 – Class B/C limited partnership interests	*no distribution*		*no distribution*
Class 10 – Class A limited partnership interests	*no distribution*		*no distribution*

Notable notations/disclosures in the Oct. 15, 2020 liquidation analysis include:

- Note [9]: General unsecured claims estimated using $0 allowed claims for HarbourVest and UBS. Ultimately, those two creditors were awarded $105 million of general unsecured claims and $95 million of subordinated claims.

Updated Liquidation Analysis (Feb. 1, 2021)[2]

	Plan Analysis		**Liquidation Analysis**
Estimated cash on hand at 1/31/2020 [sic]	$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	**222,658**		**174,178**
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	**(27,793)**		**(17,514)**
Estimated amount remaining for distribution to general unsecured claims	194,865		157,235
% Distribution to Class 7 (Class 7 claims including in Class 8 in Liquidation scenario)	85.00%		0.00%
Class 8 – General unsecured claims [8] [10]	273,219		286,100
Subtotal	273,219		286,100
% Distribution to general unsecured claims	71.32%		54.96%
Estimated amount remaining for distribution	-		-
Class 9 – Subordinated claims	*no distribution*		*no distribution*
Class 10 – Class B/C limited partnership interests	*no distribution*		*no distribution*
Class 11 – Class A limited partnership interests	*no distribution*		*no distribution*

Notable notations/disclosures in the Feb. 1, 2021 liquidation analysis include:

- 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

[2] Doc. 1895.

Summary of Debtor's January 31, 2021 Monthly Operating Report[3]

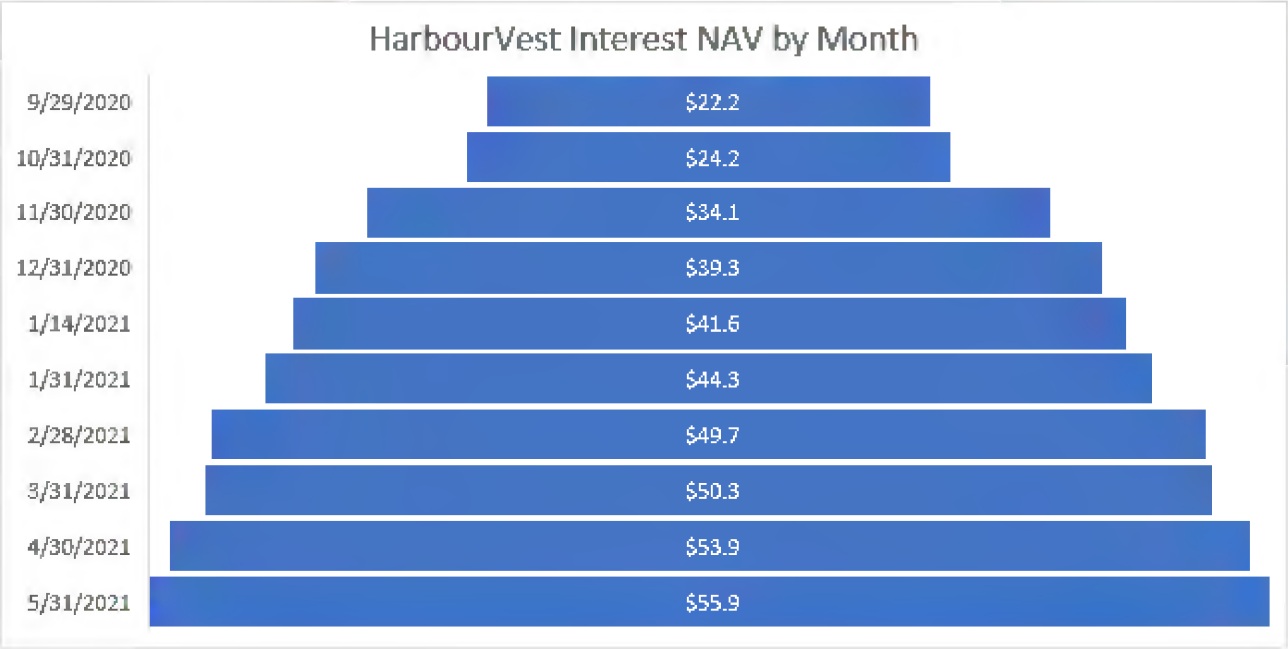
	10/15/2019	12/31/2020	1/31/2021
Assets			
Cash and cash equivalents	$2,529,000	$12,651,000	$10,651,000
Investments, at fair value	$232,620,000	$109,211,000	$142,976,000
Equity method investees	$161,819,000	$103,174,000	$105,293,000
mgmt and incentive fee receivable	$2,579,000	$2,461,000	$2,857,000
fixed assets, net	$3,754,000	$2,594,000	$2,518,000
due from affiliates	$151,901,000	$152,449,000	$152,538,000
reserve against notices receivable		($61,039,000)	($61,167,000)
other assets	$11,311,000	$8,258,000	$8,651,000
Total Assets	**$566,513,000**	**$329,759,000**	**$364,317,000**
Liabilities and Partners' Capital			
pre-petition accounts payable	$1,176,000	$1,077,000	$1,077,000
post-petition accounts payable		$900,000	$3,010,000
Secured debt			
Frontier	$5,195,000	$5,195,000	$5,195,000
Jefferies	$30,328,000	$0	$0
Accrued expenses and other liabilities	$59,203,000	$60,446,000	$49,445,000
Accrued re-organization related fees		$5,795,000	$8,944,000
Class 8 general unsecured claims	$73,997,000	$73,997,000	$267,607,000
Partners' Capital	$396,614,000	$182,347,000	$29,039,000
Total liabilities and partners' capital	**$566,513,000**	**$329,757,000**	**$364,317,000**

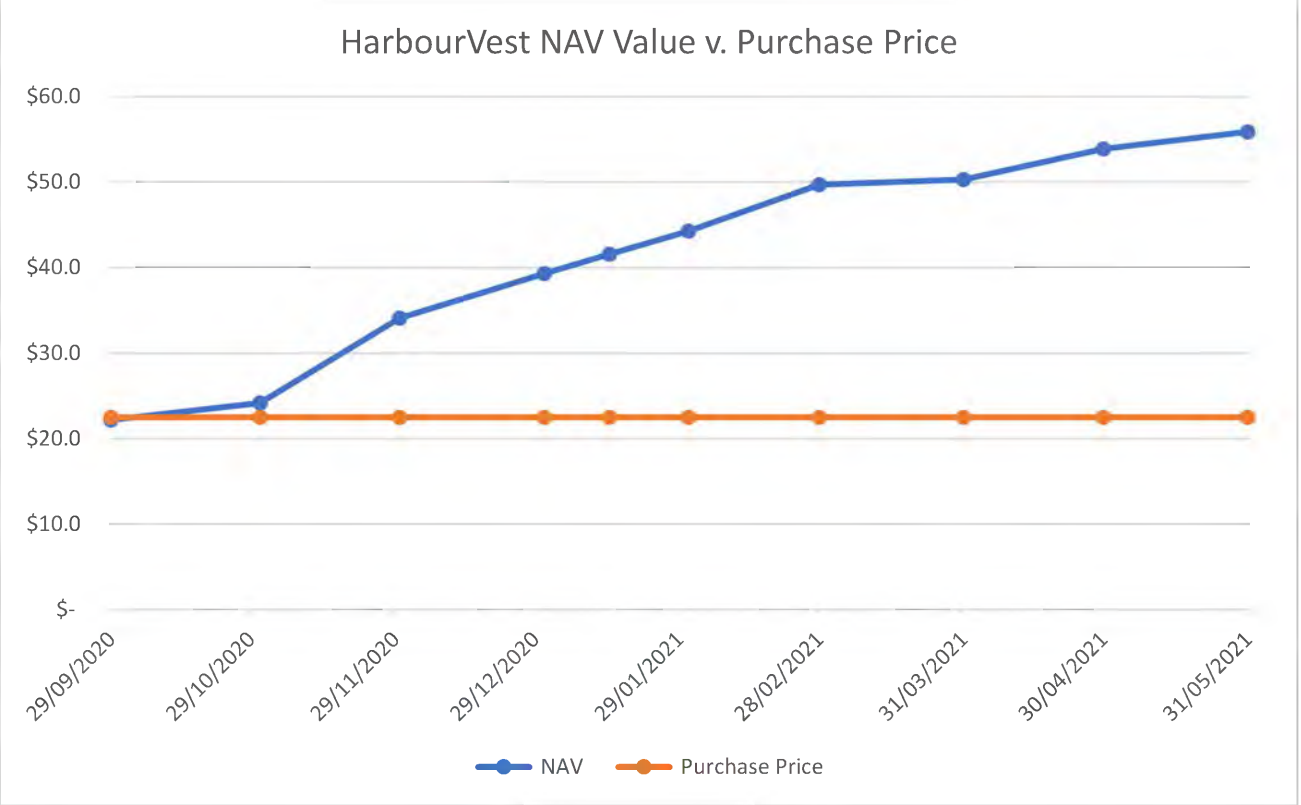
Notable notations/disclosures in the Jan. 31, 2021 MOR include:

- Class 8 claims totaled $267 million, a jump from $74 million in the prior month's MOR
- The MOR stated that no Class 9 recovery was expected, which was based on the then existing $267 million in Class 8 Claims.
- Currently, there are roughly $310 million of Allowed Class 8 Claims.

[3] [Doc. 2030] Filed on March 15, 2021, the last publicly disclosed information regarding the value of assets in the estate.

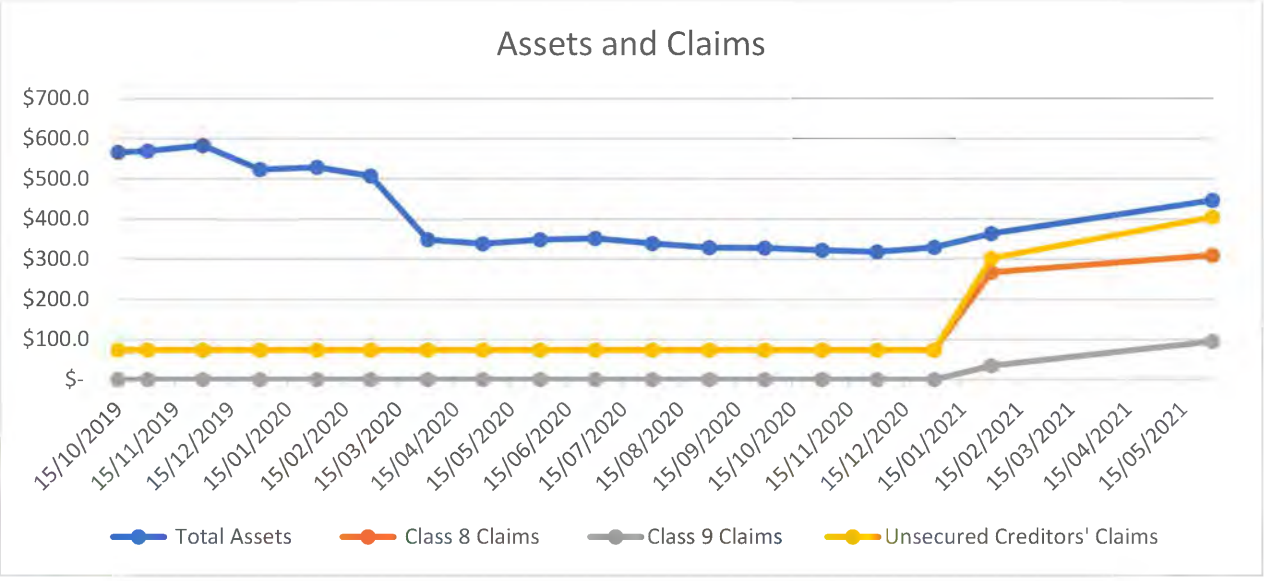
Value of HarbourVest Claim





Estate Value as of August 1, 2021 (in millions)[4]

Asset	Low	High
Cash as of 6/30/2021	$17.9	$17.9
Targa Sale	$37.0	$37.0
8/1 CLO Flows	$10.0	$10.0
Uchi Bldg. Sale	$9.0	$9.0
Siepe Sale	$3.5	$3.5
PetroCap Sale	$3.2	$3.2
HarbourVest trapped cash	$25.0	$25.0
Total Cash	**$105.6**	**$105.6**
Trussway	$180.0	$180.0
Cornerstone (125mm; 16%)	$18.0	$18.0
HarbourVest CLOs	$40.0	$40.0
CCS Medical (in CLOs and Highland Restoration)	$20.0	$20.0
MGM (direct ownership)	$32.0	$32.0
Multi-Strat (45% of 100mm; MGM; CCS)	$45.0	$45.0
Korea Fund	$18.0	$18.0
Celtic (in Credit-Strat)	$12.0	$40.0
SE Multifamily	$0.0	$20.0
Affiliate Notes	$0.0	$70.0
Other	$2.0	$10.0
TOTAL	**$472.6**	**$598.6**



[4] Values are based upon historical knowledge of the Debtor's assets (including cross-holdings) and publicly filed information.

HarbourVest Motion to Approve Settlement [Doc. 1625]

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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.	§	

DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND AUTHORIZING ACTIONS CONSISTENT THEREWITH

TO THE HONORABLE STACEY G. C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

[1] The last four digits of the Debtor's taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession ("Highland" or the "Debtor"), files this motion (the "Motion") for entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), approving a settlement agreement (the "Settlement Agreement"),[2] a copy of which is attached as Exhibit 1 to the *Declaration of John A. Morris in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* being filed simultaneously with this Motion ("Morris Dec."), that, among other things, fully and finally resolves the proofs of claim filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, "HarbourVest"). In support of this Motion, the Debtor represents as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 105(a) and 363 of title 11 of the United States Code (the "Bankruptcy Code"), and Rule 9019 of the Bankruptcy Rules.

[2] All capitalized terms used but not defined herein shall have the meanings given to them in the Settlement Agreement.

RELEVANT BACKGROUND

A. Procedural Background

3. 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").

4. On October 29, 2019, the official committee of unsecured creditors (the "Committee") was appointed by the U.S. Trustee in the Delaware Court.

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

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

7. In connection with the Settlement Order, an independent board of directors was constituted at the Debtor's general partner, Strand Advisors, Inc., and certain operating protocols were instituted.

8. On July 16, 2020, this Court entered an order appointing James P. Seery, Jr., as the Debtor's chief executive officer and chief restructuring officer [Docket No. 854].

9. 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.

[3] All docket numbers refer to the docket maintained by this Court.

B. Overview of HarbourVest's Claims

10. HarbourVest's claims against the Debtor's estate arise from its $80 million investment in Highland CLO Funding, f/k/a Acis Loan Funding, Ltd. ("HCLOF"), pursuant to which HarbourVest obtained a 49 percent interest in HCLOF (the "Investment").

11. In brief, HarbourVest contends that it was fraudulently induced into entering into the Investment based on the Debtor's misrepresentations and omissions concerning certain material facts, including that the Debtor: (1) failed to disclose that it never intended to pay an arbitration award obtained by a former portfolio manager, (2) failed to disclose that it engaged in a series of fraudulent transfers for the purpose of preventing the former portfolio manager from collecting on his arbitration award and misrepresented the reasons changing the portfolio manager for HCLOF immediately prior to the Investment, (3) indicated that the dispute with the former portfolio manager would not impact investment activities, and (4) expressed confidence in the ability of HCLOF to reset or redeem the collateralized loan obligations ("CLOs") under its control.

12. HarbourVest seeks to rescind its Investment and claims damages in excess of $300 million based on theories of fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, and breach of fiduciary duty (under Guernsey law), and on alleged violations of state securities laws and the Racketeer Influenced Corrupt Organization Act ("RICO").

13. HarbourVest's allegations are summarized below.[4]

[4] Solely for purposes of this Motion, and not for any other reason, the facts set forth herein are adopted largely from the *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "Response").

C. Summary of HarbourVest's Factual Allegations

14. At the time HarbourVest made its Investment, the Debtor was embroiled in an arbitration against Joshua Terry ("Mr. Terry"), a former employee of the Debtor and limited partner of Acis Capital Management, L.P. ("Acis LP"). Through Acis LP, Mr. Terry managed Highland's CLO business, including CLO-related investments held by Acis Loan Funding, Ltd. ("Acis Funding").

15. The litigation between Mr. Terry and the Debtor began in 2016, after the Debtor terminated Mr. Terry and commenced an action against him in Texas state court. Mr. Terry asserted counterclaims for wrongful termination and for the wrongful taking of his ownership interest in Acis LP and subsequently had certain claims referred to arbitration where he obtained an award of approximately $8 million (the "Arbitration Award") on October 20, 2017.

16. HarbourVest alleges that the Debtor responded to the Arbitration Award by engaging in a series of fraudulent transfers and corporate restructurings, the true purposes of which were fraudulently concealed from HarbourVest.

17. For example, according to HarbourVest, the Debtor changed the name of the target fund from Acis Funding to "Highland CLO Funding, Ltd." ("HCLOF") and "swapped out" Acis LP for Highland HCF Advisor, Ltd. as portfolio manager (the "Structural Changes"). The Debtor allegedly told HarbourVest that it made these changes because of the "reputational harm" to Acis LP resulting from the Arbitration Award. The Debtor further told HarbourVest that in lieu of redemptions, resetting the CLOs was necessary, and that it would be easier to reset them under the "Highland" CLO brand instead of the Acis CLO brand.

18. In addition, HarbourVest also alleges that the Debtor had no intention of allowing Mr. Terry to collect on his Arbitration Award, and orchestrated a scheme to "denude"

Acis of assets by fraudulently transferring virtually all of its assets and attempting to transfer its profitable portfolio management contracts to non-Acis, Debtor-related entities.

19. Unaware of the fraudulent transfers or the true purposes of the Structural Changes, and in reliance on representations made by the Debtor, HarbourVest closed on its Investment in HCLOF on November 15, 2017.

20. After discovering the transfers that occurred between Highland and Acis between October and December 2017 following the Arbitration Award (the "Transfers"), on January 24, 2018, Terry moved for a temporary restraining order (the "TRO") from the Texas state court on the grounds that the Transfers were pursued for the purpose of rendering Acis LP judgment-proof. The state court granted the TRO, enjoining the Debtor from transferring any CLO management contracts or other assets away from Acis LP.

21. On January 30, 2018, Mr. Terry filed involuntary bankruptcy petitions against Acis LP and its general partner, Acis Capital Management GP, LLC. *See In re Acis Capital Management, L.P.*, Case No. 18-30264-sgj11 (Bankr. N.D. Tex. 2018) and *In re Acis Capital Management GP, LLC*, Case No. 18-30265-sgj11 (Bankr. N.D. Tex. 2018) (collectively, the "Acis Bankruptcy Case"). The Bankruptcy Court overruled the Debtor's objection, granted the involuntary petitions, and appointed a chapter 11 trustee (the "Acis Trustee"). A long sequence of events subsequently transpired, all of which relate to HarbourVest's claims, including:

- On May 31, 2018, the Court issued a *sua sponte* TRO preventing any actions in furtherance of the optional redemptions or other liquidation of the Acis CLOs.
- On June 14, 2018, HCLOF withdrew optional redemption notices.
- The TRO expired on June 15, 2018, and HCLOF noticed the Acis Trustee that it was requesting an optional redemption.

- HCLOF's request was withdrawn on July 6, 2018, and on June 21, 2018, the Acis Trustee sought an injunction preventing Highland/HCLOF from seeking further redemptions (the "Preliminary Injunction").

- The Court granted the Preliminary Injunction on July 10, 2018, pending the Acis Trustee's attempts to confirm a plan or resolve the Acis Bankruptcy.

- On August 30, 2018, the Court denied confirmation of the First Amended Joint Plan for Acis, and held that the Preliminary Injunction must stay in place on the ground that the "evidence thus far has been compelling that numerous transfers after the Josh Terry judgment denuded Acis of value."

- After the Debtor made various statements implicating HarbourVest in the Transfers, the Acis Trustee investigated HarbourVest's involvement in such Transfers, including extensive discovery and taking a 30(b)(6) deposition of HarbourVest's managing director, Michael Pugatch, on November 17, 2018.

- On March 20, 2019, HCLOF sent a letter to Acis LP stating that it was not interested in pursuing, or able to pursue, a CLO reset transaction.

D. The Parties' Pleadings and Positions Concerning HarbourVest's Proofs of Claim

22. On April 8, 2020, HarbourVest filed proofs of claim against Highland that were subsequently denoted by the Debtor's claims agents as claim numbers 143, 147, 149, 150, 153, and 154, respectively (collectively, the "Proofs of Claim"). Morris Dec. Exhibits 2-7.

23. The Proofs of Claim assert, among other things, that HarbourVest suffered significant harm due to conduct undertaken by the Debtor and the Debtor's employees, including "financial harm resulting from (i) court orders in the Acis Bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise relegated the activity of HCLOF [*i.e.*, the Preliminary Injunction]; and (ii) significant fees and expenses related to the Acis Bankruptcy that were charged to HCLOF." *See, e.g.*, Morris Dec. Exhibit 2 ¶3.

24. HarbourVest also asserted "any and all of its right to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the forgoing harm, including for any amounts due or owed under the various

agreements with the Debtor in connection with relating to" the Operative Documents "and any and all legal and equitable claims or causes of action relating to the forgoing harm." *See, e.g.*, Morris Dec. Exhibit 2 ¶4.

25. Highland subsequently objected to HarbourVest's Proofs of Claim on the grounds that they were no-liability claims. [Docket No. 906] (the "Claim Objection").

26. On September 11, 2020, HarbourVest filed its Response. The Response articulated specified claims under U.S. federal and state and Guernsey law, including claims for fraud, fraudulent concealment, fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation (collectively, the "Fraud Claims"), U.S. State and Federal Securities Law Claims (the "Securities Claims"), violations of the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), breach of fiduciary duty and misuse of fund assets, and an unfair prejudice claim under Guernsey law (collectively, with the Proofs of Claim, the "HarbourVest Claims").

27. On October 18, 2020, HarbourVest filed its *Motion of HarbourVest Pursuant to Rule 3018 of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the "3018 Motion"). In its 3018 Motion, HarbourVest sought for its Claims to be temporarily allowed for voting purposes in the amount of more than $300 million (based largely on a theory of treble damages).

E. Settlement Discussions

28. In October, the parties discussed the possibility of resolving the Rule 3018 Motion.

29. In November, the parties broadened the discussions in an attempt to reach a global resolution of the HarbourVest Claims. In the pursuit thereof, the parties and their

counsel participated in several conference calls where they engaged in a spirited exchange of perspectives concerning the facts and the law.

30. During follow up meetings, the parties' interests became more defined. Specifically, HarbourVest sought to maximize its recovery while fully extracting itself from the Investment, while the Debtor sought to minimize the HarbourVest Claims consistent with its perceptions of the facts and law.

31. After the parties' interests became more defined, the principals engaged in a series of direct, arm's-length, telephonic negotiations that ultimately lead to the settlement, whose terms are summarized below.

F. Summary of Settlement Terms

32. The Settlement Agreement contains the following material terms, among others:

- HarbourVest shall transfer its entire interest in HCLOF to an entity to be designated by the Debtor;[5]
- HarbourVest shall receive an allowed, general unsecured, non-priority claim in the amount of $45 million and shall vote its Class 8 claim in that amount to support the Plan;
- HarbourVest shall receive a subordinated, allowed, general unsecured, non-priority claim in the amount of $35 million and shall vote its Class 9 claim in that amount to support the Plan;
- HarbourVest will support confirmation of the Debtor's Plan, including, but not limited to, voting its claims in support of the Plan;
- The HarbourVest Claims shall be allowed in the aggregate amount of $45 million for voting purposes;
- HarbourVest will support the Debtor's pursuit of its pending Plan of Reorganization; and
- The parties shall exchange mutual releases.

[5] The NAV for HarbourVest's 49.98% interest in HCLOF was estimated to be approximately $22 million as of December 1, 2020.

See generally Morris Dec. Exhibit 1.

BASIS FOR RELIEF REQUESTED

33. Bankruptcy Rule 9019 governs the procedural prerequisites to approval of a settlement, providing that:

> On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

FED. R. BANKR. P. 9019(a).

34. Settlements in bankruptcy are favored as a means of minimizing litigation, expediting the administration of the bankruptcy estate, and providing for the efficient resolution of bankruptcy cases. *See Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980). Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, "approval of a compromise is within the sound discretion of the bankruptcy court." *See United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Jackson Brewing*, 624 F.2d at 602–03.

35. In making this determination, the United States Court of Appeals for the Fifth Circuit applies a three-part test, "with a focus on comparing 'the terms of the compromise with the rewards of litigation.'" *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 356 (5th Cir. 1997) (citing *Jackson Brewing*, 624 F.2d at 602). The Fifth Circuit has instructed courts to consider the following factors: "(1) The probability of success in the litigation, with due consideration for the uncertainty of law and fact, (2) The complexity and likely duration of the litigation and any

attendant expense, inconvenience and delay, and (3) All other factors bearing on the wisdom of the compromise." *Id.* Under the rubric of the third factor referenced above, the Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. First, the court should consider "the paramount interest of creditors with proper deference to their reasonable views." *Id.*; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995). Second, the court should consider the "extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." *Age Ref. Inc.*, 801 F.3d at 540; *Foster Mortgage Corp.*, 68 F.3d at 918 (citations omitted).

36. There is ample basis to approve the proposed Settlement Agreement based on the Rule 9019 factors set forth by the Fifth Circuit.

37. First, although the Debtor believes that it has valid defenses to the HarbourVest Claims, there is no guarantee that the Debtor would succeed in its litigation with HarbourVest. Indeed, to establish its defenses, the Debtor would be required to rely, at least in part, on the credibility of witnesses whose veracity has already been called into question by this Court. Moreover, it will be difficult to dispute that the Transfers precipitated the Acis Bankruptcy, and, ultimately, the imposition of the Bankruptcy Court's TRO that restricted HCLOF's ability to reset or redeem the CLOs and that is at the core of the HarbourVest Claims.

38. The second factor—the complexity, duration, and costs of litigation—also weighs heavily in favor of approving the Settlement Agreement. As this Court is aware, the events forming the basis of the HarbourVest Claims—including the Terry Litigation and Acis Bankruptcy—proceeded *for years* in this Court and in multiple other forums, and has already cost the Debtor's estate millions of dollars in legal fees. If the Settlement Agreement is not approved, then the parties will expend significant resources litigating a host of fact-intensive

issues including, among other things, the substance and materiality of the Debtor's alleged fraudulent statements and omissions and whether HarbourVest reasonably relied on those statements and omissions.

39. Third, approval of the Settlement Agreement is justified by the paramount interest of creditors. Specifically, the settlement will enable the Debtor to: (a) avoid incurring substantial litigation costs; (b) avoid the litigation risk associated with HarbourVest's $300 million claim; and (c) through the plan support provisions, increase the likelihood that the Debtor's pending plan of reorganization will be confirmed.

40. Finally, the Settlement Agreement was unquestionably negotiated at arm's-length. The terms of the settlement are the result of numerous, ongoing discussions and negotiations between the parties and their counsel and represent neither party's "best case scenario." Indeed, the Settlement Agreement should be approved as a rational exercise of the Debtor's business judgment made after due deliberation of the facts and circumstances concerning HarbourVest's Claims.

NO PRIOR REQUEST

41. No previous request for the relief sought herein has been made to this, or any other, Court.

NOTICE

42. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) counsel for HarbourVest; (b) the Office of the United States Trustee; (c) the Office of the United States Attorney for the Northern District of Texas; (d) the Debtor's principal secured parties; (e) counsel to the Committee; and (f) parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtor respectfully requests entry of an order, substantially in the form attached hereto as Exhibit A, (a) granting the relief requested herein, and (b) granting such other relief as is just and proper.

Dated: December 23, 2020.

PACHULSKI STANG ZIEHL & JONES LLP

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Exhibit 1

Settlement Agreement

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into as of March 30, 2021, by and among (i) Highland Capital Management, L.P. ("HCMLP" or the "Debtor"), (ii) Highland Credit Opportunities CDO, L.P. (n/k/a Highland Multi Strategy Credit Fund, L.P.) ("Multi-Strat," and together with its general partner and its direct and indirect wholly-owned subsidiaries, the "MSCF Parties"), (iii) Strand Advisors, Inc. ("Strand"), and (iv) UBS Securities LLC and UBS AG London Branch (collectively, "UBS").

Each of HCMLP, the MSCF Parties, Strand, and UBS are sometimes referred to herein collectively as the "Parties" and individually as a "Party."

RECITALS

WHEREAS, in 2007, UBS entered into certain contracts with HCMLP and two funds managed by HCMLP—Highland CDO Opportunity Master Fund, L.P. ("CDO Fund") and Highland Special Opportunities Holding Company ("SOHC," and together with CDO Fund, the "Funds") related to a securitization transaction (the "Knox Agreement");

WHEREAS, in 2008, the parties to the Knox Agreement restructured the Knox Agreement;

WHEREAS, UBS terminated the Knox Agreement and, on February 24, 2009, UBS filed a complaint in the Supreme Court of the State of New York, County of New York (the "State Court") against HCMLP and the Funds seeking to recover damages related to the Knox Agreement, in an action captioned *UBS Securities LLC, et al. v. Highland Capital Management, L.P., et al.*, Index No. 650097/2009 (N.Y. Sup. Ct.) (the "2009 Action");

WHEREAS, UBS's lone claim against HCMLP in the 2009 Action for indemnification was dismissed in early 2010, and thereafter UBS amended its complaint in the 2009 Action to add five new defendants, Highland Financial Partners, L.P. ("HFP"), Highland Credit Strategies Master Funds, L.P. ("Credit-Strat"), Highland Crusader Offshore Partners, L.P. ("Crusader"), Multi-Strat, and Strand, and to add new claims for fraudulent inducement, fraudulent conveyance, tortious interference with contract, alter ego, and general partner liability;

WHEREAS, UBS filed a new, separate action against HCMLP on June 28, 2010, for, *inter alia*, fraudulent conveyance and breach of the implied covenant of good faith and fair dealing, captioned *UBS Securities LLC, et al. v. Highland Capital Management, L.P.*, Index No. 650752/2010 (N.Y. Sup. Ct.) (the "2010 Action");

WHEREAS, in November 2010, the State Court consolidated the 2009 Action and the 2010 Action (hereafter referred to as the "State Court Action"), and on May 11, 2011, UBS filed a Second Amended Complaint in the 2009 Action;

WHEREAS, in 2015, UBS entered into settlement agreements with Crusader and Credit-Strat, and thereafter UBS filed notices with the State Court in the State Court Action dismissing its claims against Crusader and Credit-Strat;

EXECUTION VERSION

WHEREAS, the State Court bifurcated claims asserted in the State Court Action for purposes of trial, with the Phase I bench trial deciding UBS's breach of contract claims against the Funds and HCMLP's counterclaims against UBS;

WHEREAS, on August 7, 2017, the Funds, along with Highland CDO Opportunity Fund, Ltd., Highland CDO Holding Company, Highland Financial Corp., and HFP, purportedly sold assets with a purported collective fair market value of $105,647,679 (the "Transferred Assets") and purported face value of over $300,000,000 to Sentinel Reinsurance, Ltd. ("Sentinel") pursuant to a purported asset purchase agreement (the "Purchase Agreement");

WHEREAS, Sentinel treated the Transferred Assets as payment for a $25,000,000 premium on a document entitled "Legal Liability Insurance Policy" (the "Insurance Policy");

WHEREAS, the Insurance Policy purports to provide coverage to the Funds for up to $100,000,000 for any legal liability resulting from the State Court Action (the "Insurance Proceeds");

WHEREAS, one of the Transferred Assets CDO Fund transferred to Sentinel was CDO Fund's limited partnership interests in Multi-Strat (the "CDOF Interests");

WHEREAS, Sentinel had also received from HCMLP limited partnership interests in Multi-Strat for certain cash consideration (together with the CDOF Interests, the "MSCF Interests");

WHEREAS, the existence of the Purchase Agreement and Insurance Policy were unknown to Strand's independent directors and the Debtor's bankruptcy advisors prior to late January 2021;

WHEREAS, in early February 2021, the Debtor disclosed the existence of the Purchase Agreement and Insurance Policy to UBS;

WHEREAS, prior to such disclosure, the Purchase Agreement and Insurance Policy were unknown to UBS;

WHEREAS, on November 14, 2019, following the Phase I trial, the State Court issued its decision determining that the Funds breached the Knox Agreement on December 5, 2008 and dismissing HCMLP's counterclaims;

WHEREAS, Sentinel purportedly redeemed the MSCF Interests in November 2019 and the redeemed MSCF Interests are currently valued at approximately $32,823,423.50 (the "Sentinel Redemption");

WHEREAS, on February 10, 2020, the State Court entered a Phase I trial judgment against the Funds in the amount of $1,039,957,799.44 as of January 22, 2020 (the "Phase I Judgment");

WHEREAS, Phase II of the trial of the State Court Action, includes, *inter alia*, UBS's claim for breach of implied covenant of good faith and fair dealing against HCMLP, UBS's

fraudulent transfer claims against HCMLP, HFP, and Multi-Strat, and UBS's general partner claim against Strand;

WHEREAS, on October 16, 2019, HCMLP filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Case"). The Bankruptcy Case was transferred to the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") on December 4, 2019;

WHEREAS, Phase II of the trial of the State Court Action was automatically stayed as to HCMLP by HCMLP's bankruptcy filing;

WHEREAS, on May 11, 2020, UBS, Multi-Strat, Highland Credit Opportunities CDO, Ltd., and Highland Credit Opportunities CDO Asset Holdings, L.P. (collectively, the "May Settlement Parties"), entered into a Settlement Agreement (the "May Settlement") pursuant to which the May Settlement Parties agreed to the allocation of the proceeds of certain sales of assets held by Multi-Strat, including escrowing a portion of such funds, and restrictions on Multi-Strat's actions;

WHEREAS, on June 26, 2020, UBS timely filed two substantively identical claims in the Bankruptcy Case: (i) Claim No. 190 filed by UBS Securities LLC; and (ii) Claim No. 191 filed by UBS AG London Branch (hereinafter collectively referred to as the "UBS Claim"). The UBS Claim asserts a general unsecured claim against HCMLP for $1,039,957,799.40;

WHEREAS, on August 3, 2020, the Bankruptcy Court entered an *Order Directing Mediation* [Docket No. 912] pursuant to which HCMLP, UBS, and several other parties were directed to mediate their Bankruptcy Case disputes before two experienced third-party mediators, Retired Judge Allan Gropper and Sylvia Mayer (together, the "Mediators"). HCMLP and UBS formally met with the Mediators together and separately on numerous occasions, including on August 27, September 2, 3, and 4, and December 17, 2020, and had numerous other informal discussions outside of the presence of the Mediators, in an attempt to resolve the UBS Claim;

WHEREAS, on August 7, 2020, HCMLP filed an objection to the UBS Claim [Docket No. 928]. Also on August 7, 2020, the Redeemer Committee of the Highland Crusader Fund, and Crusader, Highland Crusader Fund, L.P., Highland Crusader Fund, Ltd., and Highland Crusader Fund II, Ltd. (collectively, the "Redeemer Committee"), objected to the UBS Claim [Docket No. 933]. On September 25, 2020, UBS filed its response to these objections [Docket No. 1105];

WHEREAS, on October 16, 2020, HCMLP and the Redeemer Committee each moved for partial summary judgment on the UBS Claim [Docket Nos. 1180 and 1183, respectively], and on November 6, 2020, UBS opposed these motions [Docket No. 1337];

WHEREAS, by Order dated December 9, 2020, the Bankruptcy Court granted, as set forth therein, the motions for partial summary judgment filed by HCMLP and the Redeemer Committee and denied UBS's request for leave to file an amended proof of claim [Docket No. 1526];

WHEREAS, on November 6, 2020, UBS filed *UBS's Motion for Temporary Allowance of Claims for Voting Purposes Pursuant to Federal Rule of Bankruptcy Procedure 3018* [Docket No. 1338] (the "3018 Motion"), and on November 16, 2020, HCMLP and the Redeemer Committee each opposed the 3018 Motion [Docket Nos. 1404 and 1409, respectively];

WHEREAS, by Order dated December 8, 2020, the Bankruptcy Court granted the 3018 Motion and allowed the UBS Claim, on a temporary basis and for voting purposes only, in the amount of $94,761,076 [Docket No. 1518];

WHEREAS, on January 22, 2021, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P. (As Modified)* [Docket No. 1808] (as amended, and as may be further amended, supplemented, or otherwise modified, the "Plan");

WHEREAS, on March 29, 2021, the Debtor caused CDO Fund to make a claim on the Insurance Policy to collect the Insurance Proceeds pursuant to the Phase I Judgment;

WHEREAS, on March 29, 2021, UBS filed an adversary proceeding seeking injunctive relief and a motion for a temporary restraining order and preliminary injunction to, among other things, enjoin the Debtor from allowing Multi-Strat to distribute the Sentinel Redemption to Sentinel or any transferee of Sentinel (the "Multi-Strat Proceeding"), which relief the Debtor, in its capacity as Multi-Strat's investment manager and general partner, does not oppose;

WHEREAS, the Parties wish to enter into this Agreement to settle all claims and disputes between and among them, to the extent and on the terms and conditions set forth herein, and to exchange the mutual releases set forth herein, without any admission of fault, liability, or wrongdoing on the part of any Party; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to Federal Rule of Bankruptcy Procedure 9019 ("Rule 9019") and section 363 of the Bankruptcy Code;

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

AGREEMENT

1. Settlement of Claims. In full and complete satisfaction of the UBS Released Claims (as defined below):

(a) The UBS Claim will be allowed as (i) a single, general unsecured claim in the amount of $65,000,000 against HCMLP, which shall be treated as a Class 8 General Unsecured Claim under the Plan;[1] and (ii) a single, subordinated unsecured claim in the amount of $60,000,000 against HCMLP, which shall be treated as a Class 9 Subordinated General Unsecured Claim under the Plan.

[1] Capitalized terms used but not defined herein shall have the meanings attributed to them in the Plan.

(b) Multi-Strat will pay UBS the sum of $18,500,000 (the "Multi-Strat Payment") as follows: (i) within two (2) business days after the Order Date, the May Settlement Parties will submit a Joint Release Instruction (as defined in the May Settlement) for the release of the amounts held in the Escrow Account (as defined in the May Settlement) to be paid to UBS in partial satisfaction of the Multi-Strat Payment on the date that is ten (10) business days following the Order Date; and (ii) Multi-Strat will pay UBS the remainder of the Multi-Strat Payment in immediately available funds on the date that is ten (10) business days following the Order Date, provided that, for the avoidance of doubt, the amounts held in the Escrow Account will not be paid to UBS until and unless the remainder of the Multi-Strat Payment is made.

(c) Subject to applicable law, HCMLP will use reasonable efforts to (i) cause CDO Fund to pay the Insurance Proceeds in full to UBS as soon as practicable, but no later than within 5 business days of CDO Fund actually receiving the Insurance Proceeds from or on behalf of Sentinel; (ii) if Sentinel refuses to pay the Insurance Proceeds, take legal action reasonably designed to recover the Insurance Proceeds or the MSCF Interests or to return the Transferred Assets to the Funds to satisfy the Phase I Judgment and in addition shall provide reasonable assistance to UBS in connection with any legal action UBS takes to recover the Insurance Proceeds or to return the Transferred Assets to the Funds to satisfy the Phase I Judgment or obtain rights to the MSCF interests, including but not limited to the redemption payments in connection with the MSCF Interests; (iii) cooperate with UBS and participate (as applicable) in the investigation or prosecution of claims or requests for injunctive relief against the Funds, Multi-Strat, Sentinel, James Dondero, Isaac Leventon, Scott Ellington, Andrew Dean, Christopher Walter, Jean Paul Sevilla, Matthew DiOrio, Katie Irving, and/or any other current or former employee or director of the Funds or Sentinel and/or any other former employee or former director of any of the HCMLP Parties that is believed to be involved with the Purchase Agreement, Insurance Policy, Transferred Assets, the transfer of the MSCF Interests, or any potentially fraudulent transfer of assets from the Funds to Sentinel, excluding the individuals listed on the schedule provided to UBS on March 25, 2021 (the "HCMLP Excluded Employees"); (iv) as soon as reasonably practicable, provide UBS with all business and trustee contacts at the Funds, HFP, Greenbriar CLO Ltd., Greenbriar CLO Corp., Aberdeen Loan Funding Ltd, Eastland CLO Ltd, Grayson CLO Ltd, Valhalla CLO Ltd, and Governance Re Ltd, if any, that are actually known by the Debtor after reasonable inquiry; (v) as soon as reasonably practicable, provide UBS with a copy of the governing documents, prospectuses, and indenture agreements for the Funds, HFP, Greenbriar CLO Ltd., Greenbriar CLO Corp., Aberdeen Loan Funding Ltd, Eastland CLO Ltd, Grayson CLO Ltd, Valhalla CLO Ltd, and Governance Re Ltd, as applicable, that are in the Debtor's actual possession, custody, or control, (vi) as soon as reasonably practicable, provide, to the extent possible, any CUSIP numbers of the securities of the Funds, HFP, Greenbriar CLO Ltd., Greenbriar CLO Corp., Aberdeen Loan Funding Ltd, Eastland CLO Ltd, Grayson CLO Ltd, Valhalla CLO Ltd, and Governance Re Ltd., as applicable, including information regarding the location and amount of any cash related to those entities' holdings, in each case only to the extent actually known by the Debtor after reasonable inquiry; (vii) cooperate with UBS to assign or convey any such assets described in Section 1(c)(vi) or any other assets owned or controlled by the Funds and/or HFP, including for avoidance of doubt any additional assets currently unknown to the Debtor that the Debtor discovers in the future after the Agreement Effective Date; (viii) respond as promptly as reasonably possible to requests by UBS for access to relevant documents and approve as promptly as reasonably possible requests for access to relevant documents from third parties as needed with respect to the Transferred Assets, the Purchase Agreement, the Insurance Policy, the

MSCF Interests and any other assets currently or formerly held by the Funds or HFP, including without limitation the requests listed in **Appendix A** (provided, however, that the provision of any such documents or access will be subject to the common interest privilege and will not constitute a waiver of any attorney-client or other privilege in favor of HCMLP) that are in the Debtor's actual possession, custody, or control; (ix) preserve all documents in HCMLP's possession, custody, or control regarding or relating to the Purchase Agreement, the Insurance Policy, the MSCF Interests, or any transfer of assets from the Funds to Sentinel, including but not limited to the documents requested in Appendix A, from 2016 to present, and issue a litigation hold to all individuals deemed reasonably necessary regarding the same; and (x) otherwise use reasonable efforts to assist UBS to collect its Phase I Judgment against the Funds and HFP and assets the Funds and/or HFP may own, or have a claim to under applicable law ahead of all other creditors of the Funds and HFP; provided, however, that, from and after the date hereof, HCMLP shall not be required to incur any out-of-pocket fees or expenses, including, but not limited to, those fees and expenses for outside consultants and professionals (the "Reimbursable Expenses"), in connection with any provision of this Section 1(c) in excess of $3,000,000 (the "Expense Cap"), and provided further that, for every dollar UBS recovers from the Funds (other than the assets related to Greenbriar CLO Ltd. or Greenbriar CLO Corp.), Sentinel, Multi-Strat (other than the amounts set forth in Section 1(b) hereof), or any other person or entity described in Section 1(c)(iii) in connection with any claims UBS has that arise out of or relate to the Phase I Judgment, the Purchase Agreement, the Insurance Policy, the Transferred Assets, the MSCF Interests, or the Insurance Proceeds (the "UBS Recovery"), UBS will reimburse HCMLP ten percent of the UBS Recovery for the Reimbursable Expenses incurred by HCMLP, subject to: (1) the occurrence of the Agreement Effective Date and (2) UBS's receipt and review of invoices and time records (which may be redacted as reasonably necessary) for outside consultants and professionals in connection with such efforts described in this Section 1(c), up to but not exceeding the Expense Cap after any disputes regarding the Reimbursable Expenses have been resolved pursuant to procedures to be agreed upon, or absent an agreement, in a manner directed by the Bankruptcy Court; and provided further that in any proceeding over the reasonableness of the Reimbursable Expenses, the losing party shall be obligated to pay the reasonable fees and expenses of the prevailing party; and provided further that any litigation in which HCMLP is a co-plaintiff with UBS or a plaintiff pursuing claims on behalf of or for UBS's benefit pursuant to this Section 1(c) shall be conducted in consultation with UBS, including but not limited to the selection of necessary outside consultants and professionals to assist in such litigation; and provided further that UBS shall have the right to approve HCMLP's selection of outside consultants and professionals to assist in any litigation in which HCMLP is a co-plaintiff with UBS or a plaintiff pursuing claims on behalf of or for UBS's benefit pursuant to this Section 1(c).

(d) Redeemer Appeal.

(i) On the Agreement Effective Date, provided that neither the Redeemer Committee nor any entities acting on its behalf or with any assistance from or coordination with the Redeemer Committee have objected to this Agreement or the 9019 Motion (as defined below), UBS shall withdraw with prejudice its appeal of the *Order Approving Debtor's Settlement with (A) the Redeemer Committee of the Highland Crusader Fund (Claim No. 72) and (B) the Highland Crusader Funds (Claim No. 81), and Authorizing Actions Consistent Therewith* [Docket No. 1273] (the "Redeemer Appeal"); and

(ii) The Parties have stipulated to extend the deadline for the filing of any briefs in the Redeemer Appeal to June 30, 2021 and will agree to such further extensions as necessary to facilitate this Settlement Agreement.

(e) As of the Agreement Effective Date, the restrictions and obligations set forth in the May Settlement, other than those in Section 7 thereof, shall be extinguished in their entirety and be of no further force or effect.

(f) On the Agreement Effective Date, the Debtor shall instruct the claims agent in the Bankruptcy Case to adjust the claims register in accordance with this Agreement.

(g) On the Agreement Effective Date, any claim the Debtor may have against Sentinel or any other party, and any recovery related thereto, with respect to the MSCF Interests shall be automatically transferred to UBS, without any further action required by the Debtor. For the avoidance of doubt, the Debtor shall retain any and all other claims it may have against Sentinel or any other party, and the recovery related thereto, unrelated to the MSCF Interests.

2. Definitions.

(a) "Agreement Effective Date" shall mean the date the full amount of the Multi-Strat Payment defined in Section 1(b) above, including without limitation the amounts held in the Escrow Account (as defined in the May Settlement), is actually paid to UBS.

(b) "HCMLP Parties" shall mean (a) HCMLP, in its individual capacity; (b) HCMLP, as manager of Multi-Strat; and (c) Strand.

(c) "Order Date" shall mean the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019 and section 363 of the Bankruptcy Code.

(d) "UBS Parties" shall mean UBS Securities LLC and UBS AG London Branch.

3. Releases.

(a) UBS Releases. Upon the occurrence of the Agreement Effective Date, and to the maximum extent permitted by law, each of the UBS Parties hereby forever, finally, fully, unconditionally, irrevocably, and completely releases, relieves, acquits, remises, exonerates, forever discharges, and covenants never to sue (A) the HCMLP Parties and each of their current and former advisors, attorneys, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (each in their capacities as such), except as expressly set forth below, and (B) the MSCF Parties and each of their current and former advisors, attorneys, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (each in their capacities as such), except as expressly set forth below, for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorneys' 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, or statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those that have been or could have been alleged or asserted in the State Court Action or the Bankruptcy Case (collectively, the "UBS Released Claims"), provided, however, that notwithstanding anything to the contrary herein, such releases shall not apply to (1) the obligations of the HCMLP Parties and MSCF Parties under this Agreement, including without limitation the allowance of or distributions on account of the UBS Claim or the settlement terms described in Sections 1(a)-(g) above; (2) the Funds or HFP, including for any liability with respect to the prosecution, enforcement, collection, or defense of the Phase I Judgment, Purchase Agreement, and/or Insurance Policy, or such prosecution, enforcement, collection, or defense of the Phase I Judgment, Purchase Agreement, and/or Insurance Policy by UBS; (3) James Dondero or Mark Okada, or any entities, including without limitation Hunter Mountain Investment Trust, Dugaboy Investment Trust, and NexBank, SSB, owned or controlled by either of them, other than the HCMLP Parties and MSCF Parties (but for the avoidance of doubt, such releases of the HCMLP Parties and MSCF Parties shall be solely with respect to such entities and shall not extend in any way to James Dondero or Mark Okada in their individual capacity or in any other capacity, including but not limited to as an investor, officer, trustee, or director in the HCMLP Parties or MSCF Parties); (4) Sentinel or its subsidiaries, parents, affiliates, successors, designees, assigns, employees, or directors, including James Dondero, Isaac Leventon, Scott Ellington, Andrew Dean, Christopher Walter, Jean Paul Sevilla, Matthew DiOrio, Katie Irving, and/or any other current or former employee or director of the Funds or Sentinel and/or any other former employee or former director of any of the HCMLP Parties that is believed to be involved with the Purchase Agreement, Insurance Policy, MSCF Interests, or Transferred Assets, including for any liability with respect to the prosecution, enforcement, collection, or defense of the Phase I Judgment, Purchase Agreement, the MSCF Interests, any potentially fraudulent transfer of assets from the Funds to Sentinel and/or Insurance Policy, excluding the HCMLP Excluded Employees; (5) the economic rights or interests of UBS in its capacity as an investor, directly or indirectly (including in its capacity as an investment manager and/or investment advisor), in any HCMLP-affiliated entity, including without limitation in the Redeemer Committee and Credit Strat, and/or in such entities' past, present or future subsidiaries and feeders funds (the "UBS Unrelated Investments"); and (6) any actions taken by UBS against any person or entity, including any HCMLP Party or MSCF Party, to enjoin a distribution on the Sentinel Redemption or the transfer of any assets currently held by or within the control of CDO Fund to Sentinel or a subsequent transferee or to seek to compel any action that only such person or entity has standing to pursue or authorize in order to permit UBS to recover the Insurance Proceeds, Transferred Assets, the Phase I Judgment or any recovery against HFP; provided, however, that, from and after the date hereof, any out-of-pocket fees or expenses incurred by HCMLP in connection with this Section 3(a)(6) will be considered Reimbursable Expenses and shall be subject to, and applied against, the Expense Cap as if they were incurred by HCMLP pursuant to Section 1(c) subject to the occurrence of the Agreement Effective Date and after any disputes regarding such Reimbursable Expenses have been resolved in the manner described in Section 1(c).

(b) **HCMLP Release.** Upon the occurrence of the Agreement Effective Date, and to the maximum extent permitted by law, each of the HCMLP Parties hereby forever, finally, fully, unconditionally, irrevocably, and completely releases, relieves, acquits, remises, exonerates, forever discharges, and covenants never to sue any of the UBS Parties and each of

their current and former advisors, attorneys, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (each in their capacities as such), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorneys' 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, or statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those that have been or could have been alleged or asserted in the State Court Action or the Bankruptcy Case (collectively, the "HCMLP Released Claims"), provided, however, that notwithstanding anything to the contrary herein, such releases shall not apply to the obligations of the UBS Parties under this Agreement or Section 7 of the May Settlement; and (b) the obligations of the UBS Parties in connection with the UBS Unrelated Investments.

(c) **Multi-Strat Release.** Upon the occurrence of the Agreement Effective Date, and to the maximum extent permitted by law, each of the MSCF Parties hereby forever, finally, fully, unconditionally, irrevocably, and completely releases, relieves, acquits, remises, exonerates, forever discharges, and covenants never to sue any of the UBS Parties and each of their current and former advisors, attorneys, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (each in their capacities as such), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorneys' 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, or statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those that have been or could have been alleged or asserted in the State Court Action or the Bankruptcy Case (collectively, the "Multi-Strat Released Claims"), provided, however, that notwithstanding anything to the contrary herein, such releases shall not apply to the obligations of the UBS Parties under this Agreement or Section 7 of the May Settlement.

4. **No Third Party Beneficiaries.** Except for the parties released by this Agreement, no other person or entity shall be deemed a third-party beneficiary of this Agreement.

5. **UBS Covenant Not to Sue.** Subject to the occurrence of the Agreement Effective date, if UBS ever controls any HCMLP-affiliated defendant in the State Court Action by virtue of the prosecution, enforcement, or collection of the Phase I Judgment (collectively, the "Controlled State Court Defendants"), UBS covenants on behalf of itself and the Controlled State Court Defendants, if any, that neither UBS nor the Controlled State Court Defendants will assert or pursue any claims that any Controlled State Court Defendant has or may have against any of the HCMLP Parties; provided, however, that nothing shall prohibit UBS or a Controlled State Court Defendant from taking any of the actions set forth in Section 3(a)(1)-(6); provided further, however, if and to the extent UBS receives any distribution from any Controlled State Court Defendant that is derived from a claim by a Controlled State Court Defendant against the Debtor, subject to the exceptions set forth in Section 3(a), which distribution is directly

attributable to any property the Controlled State Court Defendant receives from the Debtor and separate and distinct from property owned or controlled by CDO Fund, SOHC, or Multi-Strat, then such recovery shall be credited against all amounts due from the Debtor's estate on account of the UBS Claim allowed pursuant to Section 1(a) of this Agreement, or if such claim has been paid in full, shall be promptly turned over to the Debtor or its successors or assigns.

6. Agreement Subject to Bankruptcy Court Approval.

(a) The force and effect of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement and the releases herein by the Bankruptcy Court. The Parties agree to use reasonable efforts to have this Agreement expeditiously approved by the Bankruptcy Court by cooperating in the preparation and prosecution of a mutually agreeable motion and proposed order (the "9019 Motion") to be filed by the Debtor no later than five business days after execution of this Agreement by all Parties unless an extension is agreed to by both parties.

7. Representations and Warranties.

(a) Each UBS Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the UBS Released Claims and has not sold, transferred, or assigned any UBS Released Claim to any other person or entity, and (ii) no person or entity other than such UBS Party has been, is, or will be authorized to bring, pursue, or enforce any UBS Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) such UBS Party.

(b) Each HCMLP Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HCMLP Released Claims and has not sold, transferred, or assigned any HCMLP Released Claim to any other person or entity, and (ii) no person or entity other than such HCMLP Party has been, is, or will be authorized to bring, pursue, or enforce any HCMLP Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) such HCMLP Party.

(c) Each MSCF Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the Multi-Strat Released Claims and has not sold, transferred, or assigned any Multi-Strat Released Claim to any other person or entity, and (ii) no person or entity other than such MSCF Party has been, is, or will be authorized to bring, pursue, or enforce any Multi-Strat Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) such MSCF Party.

8. **No Admission of Liability**. The Parties acknowledge that there is a bona fide dispute with respect to the UBS Claim. Nothing in this Agreement shall be construed, expressly or by implication, as an admission of liability, fault, or wrongdoing by HCMLP, the MSCF Parties, Strand, UBS, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of HCMLP, the MSCF Parties, Strand, UBS, or any other person.

9. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their representatives, successors, and assigns.

10. **Notice**. Each notice and other communication hereunder shall be in writing and will, unless otherwise subsequently directed in writing, be delivered by email and overnight delivery, as set forth below, and will be deemed to have been given on the date following such mailing.

HCMLP Parties or the MSCF Parties

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: General Counsel
Telephone No.: 972-628-4100
E-mail: notices@HighlandCapital.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
E-mail: jpomerantz@pszjlaw.com

UBS

UBS Securities LLC
UBS AG London Branch
Attention: Elizabeth Kozlowski, Executive Director and Counsel
1285 Avenue of the Americas
New York, NY 10019
Telephone No.: 212-713-9007
E-mail: elizabeth.kozlowski@ubs.com

UBS Securities LLC
UBS AG London Branch
Attention: John Lantz, Executive Director
1285 Avenue of the Americas
New York, NY 10019

Telephone No.: 212-713-1371
E-mail: john.lantz@ubs.com

with a copy (which shall not constitute notice) to:

Latham & Watkins LLP
Attention: Andrew Clubok
Sarah Tomkowiak
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004-1304
Telephone No.: 202-637-3323
Email: andrew.clubok@lw.com
sarah.tomkowiak@lw.com

11. **Advice of Counsel**. Each of the Parties represents that such Party has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

12. **Entire Agreement**. This Agreement contains the entire agreement and understanding concerning the subject matter of this Agreement, and supersedes and replaces all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation, or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation, or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

13. **No Party Deemed Drafter**. The Parties acknowledge that the terms of this Agreement are contractual and are the result of arm's-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

14. **Future Cooperation**. The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

15. **Counterparts**. This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement.

Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

16. Governing Law; Venue; Attorneys' Fees and Costs. The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of New York without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Borough of Manhattan, New York, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: _____
Name: James P. Seery, Jr.
Its: Authorized Signatory

HIGHLAND MULTI STRATEGY CREDIT FUND, L.P. (f/k/a Highland Credit Opportunities CDO, L.P.)

By: _____
Name: James P. Seery, Jr
Its: Authorized Signatory

HIGHLAND CREDIT OPPORTUNITIES CDO, Ltd.

By: _____
Name: James P. Seery, Jr
Its: Authorized Signatory

HIGHLAND CREDIT OPPORTUNITIES CDO ASSET HOLDINGS, L.P.

By: _____
Name: James P. Seery, Jr
Its: Authorized Signatory

STRAND ADVISORS, INC.

By: _____
Name: James P. Seery, Jr.
Its: Authorized Signatory

EXECUTION VERSION

UBS SECURITIES LLC

By: _____
Name: John Lantz
Its: Authorized Signatory

By: _____
Name: Elizabeth Kozlowski
Its: Authorized Signatory

UBS AG LONDON BRANCH

By: _____
Name: William Chandler
Its: Authorized Signatory

By: _____
Name: Elizabeth Kozlowski
Its: Authorized Signatory

EXECUTION VERSION

APPENDIX A

- The search parameters (custodians, date ranges, search terms) used to locate the documents produced to UBS on February 27, 2021 (and any additional parameters used for the previous requests from UBS);
- Identity of counsel to, and trustees of, CDO Fund or SOHC;
- Current or last effective investment manager agreements for CDO Fund and SOHC, including any management fee schedule, and any documentation regarding the termination of those agreements;
- The tax returns for the CDO Fund and SOHC from 2017-present;
- Communications between any employees of Sentinel (or its affiliates) and any employees of the HCMLP Parties, CDO Fund, SOHC, or any of Dondero, Leventon, or Ellington from 2017-present;
- Documents or communications regarding or relating to the Purchase Agreement, Insurance Policy, or June 30, 2018 Memorandum entitled "Tax Consequences of Sentinel Acquisition of HFP/CDO Opportunity Assets" (the "Tax Memo"), including without limitation (i) amendments to these documents, (ii) transfer of assets pursuant to these documents, (iii) board minutes or resolutions regarding or relating to these documents, (iv) claims made on the Insurance Policy; (v) communications with the IRS regarding the asset transfer pursuant to these documents; and (vi) any similar asset purchase agreements, capital transfer agreements, or similar agreements;
- Documents or communications regarding or relating to the value of any assets transferred pursuant to the Insurance Policy or Purchase Agreement, including without limitation those assets listed in Schedule A to the Purchase Agreement, from 2017 to present, including documentation supporting the $105,647,679 value of those assets as listed in the Tax Memo;
- Documents showing the organizational structure of Sentinel and its affiliated entities, including information on Dondero's relationship to Sentinel;
- Any factual information provided by current or former employees of the HCMLP Parties, CDO Fund, SOHC, or Sentinel regarding or relating to the Purchase Agreement, Insurance Policy, Tax Memo, and/or transfer of assets pursuant to those documents;
- Debtor's settlement agreements with Ellington and Leventon;
- Copies of all prior and future Monthly Reports and Valuation Reports (as defined in the Indenture, dated as of December 20, 2007, among Greenbriar CLO Ltd., Greenbriar CLO Corp., and State Street Bank and Trust Company); and
- Identity of any creditors of CDO Fund, SOHC, or HFP and amount of debts owed to those creditors by CDO Fund, SOHC, or HFP, including without limitation any debts owed to the Debtor.

Hellman & Friedman Seeded Farallon Capital Management

OUR FOUNDER

RETURN TO ABOUT (/ABOUT/)

Warren Hellman: One of the good guys

Warren Hellman was a devoted family man, highly successful businessman, active philanthropist, dedicated musician, arts patron, endurance athlete and all-around good guy. Born in New York City in 1934, he grew up in the Bay Area, graduating from the University of California at Berkeley. After serving in the U.S. Army and attending Harvard Business School, Warren began his finance career at Lehman Brothers, becoming the youngest partner in the firm's history at age 26 and subsequently serving as President. After a distinguished career on Wall Street, Warren moved back west and co-founded Hellman & Friedman, building it into one of the industry's leading private equity firms.

Warren deeply believed in the power of people to accomplish incredible things and used his success to improve and enrich the lives of countless people. Throughout his career, Warren helped found or seed many successful businesses including Matrix Partners, Jordan Management Company, Farallon Capital Management and Hall Capital Partners.

Within the community, Warren and his family were generous supporters of dozens of organizations and causes in the arts, public education, civic life, and public health, including creating and running the San Francisco Free Clinic. Later in life, Warren became an accomplished 5-string banjo player and found great joy in sharing the love of music with others. In true form, he made something larger of this avocation to benefit others by founding the Hardly Strictly Bluegrass Festival, an annual three-day, free music festival that draws hundreds of thousands of people together from around the Bay Area.

An accomplished endurance athlete, Warren regularly completed 100-mile runs, horseback rides and combinations of the two. He also was an avid skier and national caliber master ski racer and served as president of the U.S. Ski Team in the late 1970s, and is credited with helping revitalize the Sugar Bowl ski resort in the California Sierras.

In short, Warren Hellman embodied the ideal of living life to the fullest. He had an active mind and body, and a huge heart. We are lucky to call him our founder. **Read more about Warren. (https://hf.com/wp-content/uploads/2015/09/Warren-Hellman-News-Release.pdf)**

SFChronicle/SFGate/Liz Hafalia

Robert Holmgren

no caption

Hellman & Friedman Owned a Portion of Grosvenor until 2020

Grosvenor Capital Management

GCM GROSVENOR

In 2007, H&F invested in Grosvenor, one of the world's largest and most diversified independent alternative asset management firms. The Company offers comprehensive public and private markets solutions and a broad suite of investment and advisory choices that span hedge funds, private equity, and various credit and specialty strategies. Grosvenor specializes in developing customized investment programs tailored to each client's specific investment goals.

SECTOR

Financial Services

STATUS

Past

www.gcmlp.com (http://www.gcmlp.com)

CONTACT (HTTPS://HF.COM/CONTACT/) INFO@HF.COM (MAILTO:INFO@HF.COM) LP LOGIN (HTTPS://SERVICES.SUNGARDDX.COM/CLIENT/HELLMAN) BACK
GP LOGIN (HTTPS://SERVICES.SUNGARDDX.COM/DOCUMENT/2720045) TERMS OF USE (HTTPS://HF.COM/TERMS-OF-USE/)
PRIVACY POLICY (HTTPS://HF.COM/PRIVACY-POLICY/)
KNOW YOUR CALIFORNIA RIGHTS (HTTPS://HF.COM/YOUR-CALIFORNIA-CONSUMER-PRIVACY-ACT-RIGHTS/) (HTTPS://WWW.LINKEDIN.COM/COMPANY/HELLMAN-&-FRIEDMAN)

CORNER OFFICE

GCM Grosvenor to Go Public

Julie Segal

The $57 billion alternatives manager will become a public company after merging with a SPAC backed by Cantor Fitzgerald.

August 03, 2020

Chicago, IL (Tim Boyle/Bloomberg)

In a sign of the times, GCM Grosvenor will become a public company through a SPAC.

The Chicago-based alternative investments firm is planning to go public by merging with a special purpose acquisition company in a deal valued at $2 billion. The 50-year-old firm has $57 billion in assets in private equity, infrastructure, real estate, credit, and absolute return investments.

"We have long valued having external shareholders and we wanted to preserve the accountability and focus that comes with that," Michael Sacks, GCM Grosvenor's chairman and CEO, said in a statement.

GCM Grosvenor will combine with CF Finance Special Acquisition Corp, a SPAC backed by Cantor Fitzgerald, according to an announcement from both companies on Monday. After the company goes public, Sacks will continue to lead GCM Grosvenor, which is owned by management and Hellman & Friedman, a private equity firm. Hellman & Friedman, which has owned a minority stake of the Chicago asset manager since 2007, will sell its equity as

Farallon was a Significant Borrower for Lehman

Case Study – Large Loan Origination

Debt origination for an affiliate of Simon Property Group Inc. and Farallon Capital Management

Date	June 2007
Asset Class	Retail
Asset Size	1,808,506 Sq. Ft.
Sponsor	Simon Property Group Inc. / Farallon Capital Management
Transaction Type	Refinance
Total Debt Amount	Lehman Brothers: $121 million JP Morgan: $200 million

Transaction Overview

- In June 2007, Lehman Brothers co-originated a loan in the aggregate amount of $321 million (Lehman portion: $121 million) with JP Morgan to a special purpose affiliate of a joint venture between Simon Property Group Inc ("Simon") and Farallon Capital Management ("Farallon") secured by the shopping center known as Gurnee Mills Mall (the "Property") located in Gurnee, IL .
- The Property consists of a one-story, 200 store discount mega-mall comprised of 1,808,506 square feet anchored by Burlington Coat Factory, Marshalls, Bed Bath & Beyond and Kohls among other national retailers. Built in 1991, the Property underwent a $5 million interior renovation in addition to a $71 million redevelopment between 2004 and 2005. As of March 2007, the Property had a in-line occupancy of 99.5%.

Lehman Brothers Role

- Simon and Farallon comprised the sponsorship which eventually merged with The Mills Corporation in early 2007 for $25.25 per common share in cash. The total value of the transaction was approximately $1.64 billion for all of the outstanding common stock, and approximately $7.9 billion including assumed debt and preferred equity.
- Lehman and JP Morgan subsequently co-originated $321 million loan at 79.2% LTV based on an appraisal completed in March by Cushman & Wakefield. The Loan was used to refinance the indebtedness secured by the Property.

Sponsorship Overview

- The Mills Corporation, based in Chevy Chase MD is a developer owner and manager of a diversified portfolio of retail destinations including regional shopping malls and entertainment centers. They currently own 38 properties in the United States totaling 47 million square feet.

LEHMAN BROTHERS 32

Mr. Seery Represented Stonehill While at Sidley

James P. Seery, Jr.
John G. Hutchinson
John J. Lavelle
Martin B. Jackson
Sidley Austin LLP
787 Seventh Avenue
New York, New York 10019
(212) 839-5300 (tel)
(212) 839-5599 (fax)

Attorneys for the Steering Group

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

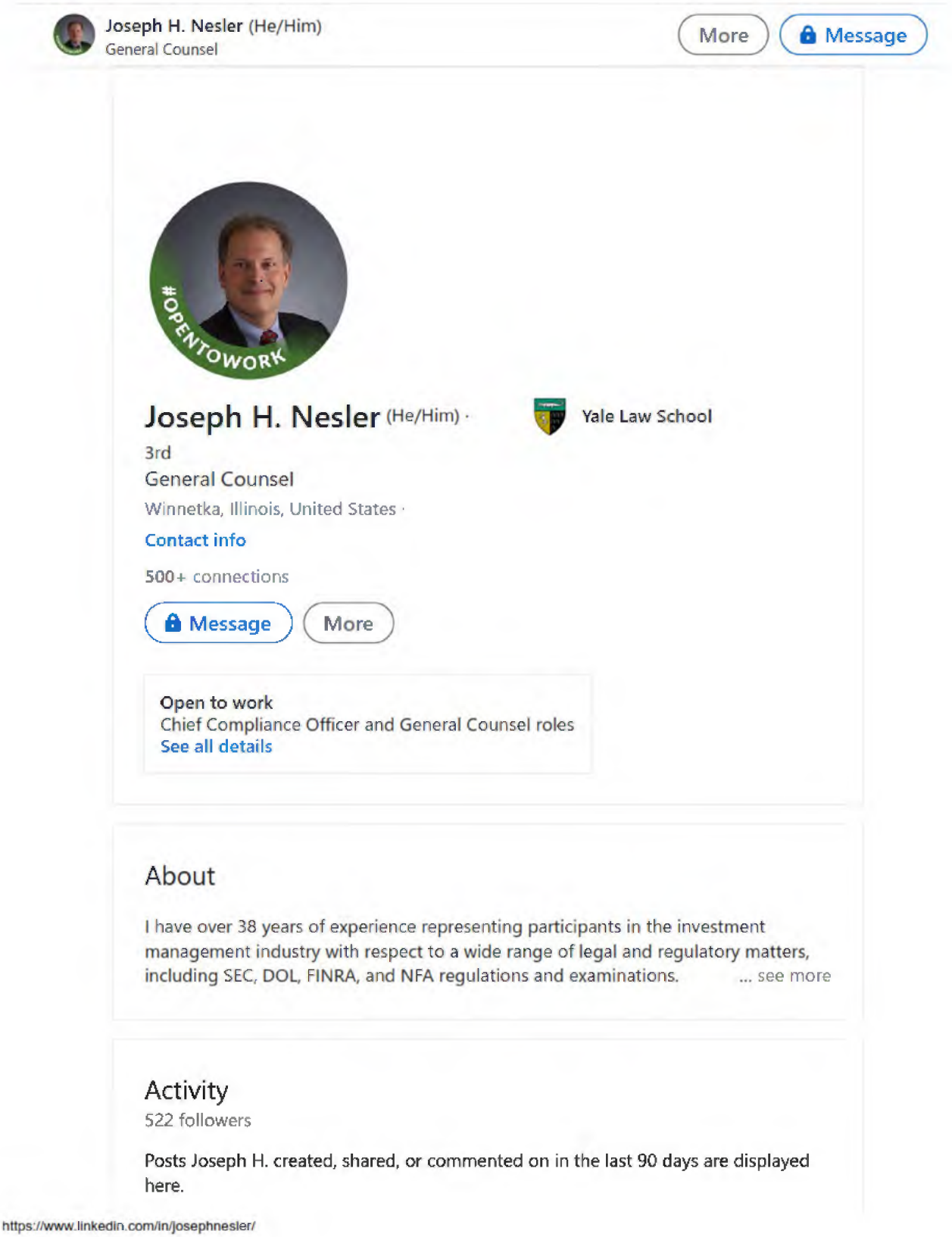
In re:	:	Chapter 11
BLOCKBUSTER INC., *et al.*,	:	Case No. 10-14997 (BRL)
Debtors.	:	(Jointly Administered)

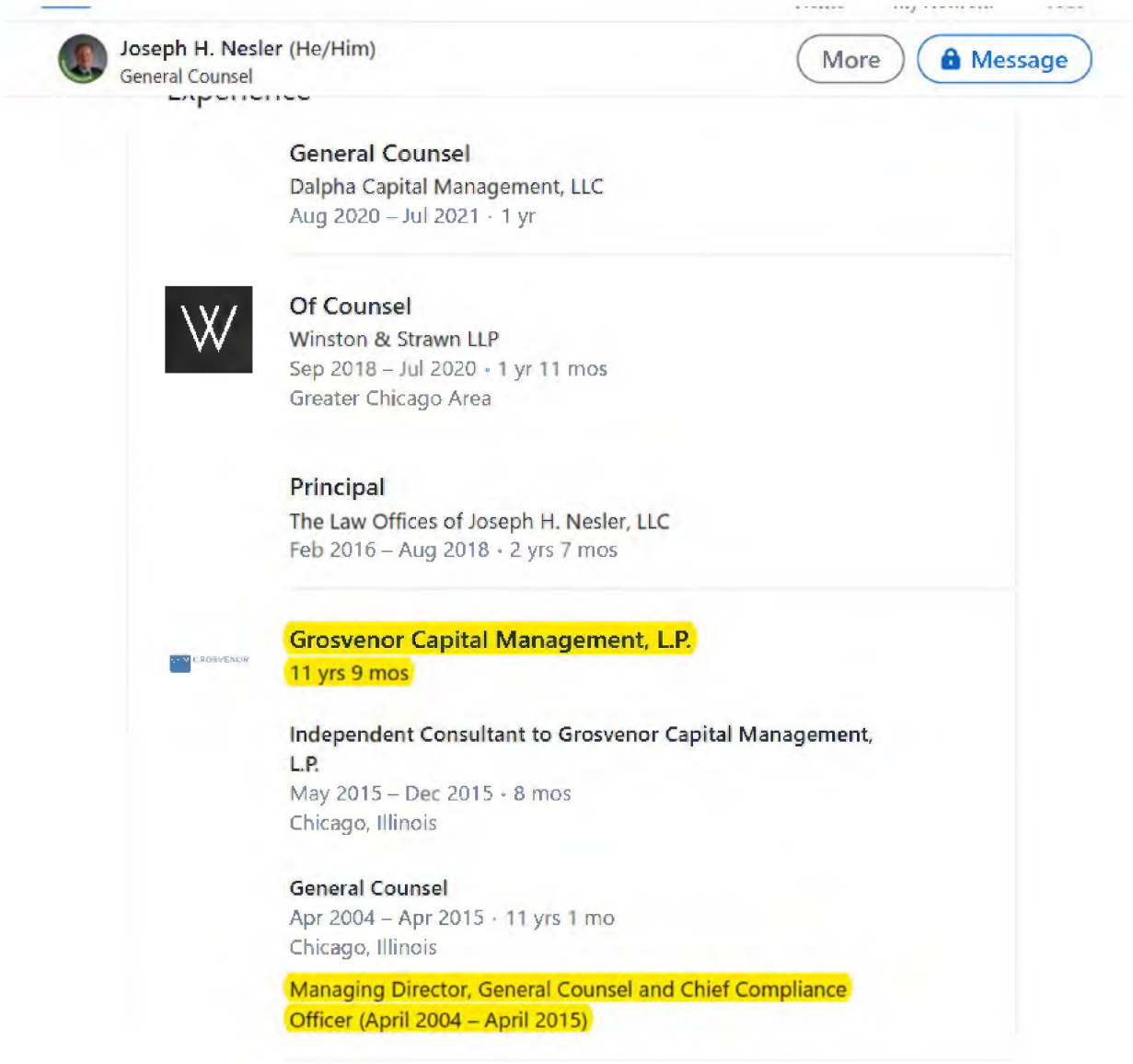
THE BACKSTOP LENDERS' OBJECTION TO THE MOTION OF LYME REGIS TO ABANDON CERTAIN CAUSES OF ACTION OR, IN THE ALTERNATIVE, TO GRANT STANDING TO LYME REGIS TO PURSUE CLAIMS ON BEHALF OF THE ESTATE

1. The Steering Group of Senior Secured Noteholders who are Backstop Lenders -- Icahn Capital LP, Monarch Alternative Capital LP, Owl Creek Asset Management, L.P., Stonehill Capital Management LLC, and Värde Partners, Inc. (collectively, the "Backstop Lenders") -- hereby file this objection (the "Objection") to the Motion of Lyme Regis Partners, LLC ("Lyme Regis") to Abandon Certain Causes of Action or, in the Alternative, to Grant Standing to Lyme Regis to Pursue Claims on Behalf of the Estate (the "Motion") [Docket No. 593].

Stonehill Founder (Motulsky) and Grosvenor's G.C. (Nesler) Were Law School Classmates

Over 25 years earlier, here is a group at a party. From the left, Bob Zinn, Dave Lowenthal, Rory Little, Joe Nesler, Jon Polonsky (in front of Joe), John Motulsky and Mark Windfeld-Hansen (behind bottle!) Motulsky circulated this photo at the reunion. Thanks John!


Joseph H. Nesler (He/Him)
General Counsel
More
Message
#OPENTOWORK
Joseph H. Nesler (He/Him) ·
Yale Law School
3rd
General Counsel
Winnetka, Illinois, United States ·
Contact info
500+ connections
Message
More
Open to work
Chief Compliance Officer and General Counsel roles
See all details
About
I have over 38 years of experience representing participants in the investment management industry with respect to a wide range of legal and regulatory matters, including SEC, DOL, FINRA, and NFA regulations and examinations. ... see more
Activity
522 followers
Posts Joseph H. created, shared, or commented on in the last 90 days are displayed here.
https://www.linkedin.com/in/josephnesler/


Joseph H. Nesler (He/Him)
General Counsel
More
Message
General Counsel
Dalpha Capital Management, LLC
Aug 2020 – Jul 2021 · 1 yr
Of Counsel
Winston & Strawn LLP
Sep 2018 – Jul 2020 · 1 yr 11 mos
Greater Chicago Area
Principal
The Law Offices of Joseph H. Nesler, LLC
Feb 2016 – Aug 2018 · 2 yrs 7 mos
Grosvenor Capital Management, L.P.
11 yrs 9 mos
Independent Consultant to Grosvenor Capital Management, L.P.
May 2015 – Dec 2015 · 8 mos
Chicago, Illinois
General Counsel
Apr 2004 – Apr 2015 · 11 yrs 1 mo
Chicago, Illinois
Managing Director, General Counsel and Chief Compliance Officer (April 2004 – April 2015)

Investor Communication to Highland Crusader Funds Stakeholders

Alvarez & Marsal
Management, LLC 2029 Ce
Park East Suite 2060
Angeles, CA 9

July 6, 2021

Re: Update & Notice of Distribution

Dear Highland Crusader Funds Stakeholder,

As you know, in October 2020, the Bankruptcy Court approved a settlement of the Redeemer Committee's and the Crusader Funds' claims against Highland Capital Management L.P. ("HCM"), as a result of which the Redeemer Committee was allowed a general unsecured claim of $137,696,610 against HCM and the Crusader Funds were allowed a general unsecured claim of $50,000 against HCM (collectively, the "Claims"). In addition, as part of the settlement, various interests in the Crusader Funds held by HCM and certain of its affiliates are to be extinguished (the "Extinguished Interests"), and the Redeemer Committee and the Crusader Funds received a general release from HCM and a waiver by HCM of any claim to distributions or fees that it might otherwise receive from the Crusader Funds (the "Released Claims" and, collectively with the Extinguished Interests, the "Retained Rights").

A timely appeal of the settlement was taken by UBS (the "UBS Appeal) in the United States District Court for the Northern District of Texas, Dallas Division. However, the Bankruptcy Court subsequently approved a settlement between HCM and UBS, resulting in dismissal of the UBS Appeal with prejudice on June 14, 2021.

On April 30, 2021, the Crusader Funds and the Redeemer Committee consummated the sale of the Claims against HCM and the majority of the remaining investments held by the Crusader Funds to Jessup Holdings LLC ("Jessup") for $78 million in cash, which was paid in full to the Crusader Funds at closing. The sale specifically excluded the Crusader Funds' investment in Cornerstone Healthcare Group Holding Inc. and excluded certain specified provisions of the settlement agreement with HCM (the "Settlement Agreement"), including, but not limited to, the Retained Rights. The sale of the Claims and investments was made with no holdbacks or escrows.

The sale to Jessup resulted from a solicitation of offers to purchase the Claims commenced by Alvarez & Marsal CRF Management LLC ("A&M CRF"), as Investment Manager of the Crusader Funds, in consultation with the Redeemer Committee. Ultimately, the Crusader Funds and the Redeemer Committee entered exclusive negotiations with Jessup, culminating in the sale to Jessup.

A&M CRF, pursuant to the Plan and Scheme and with the approval of House Hanover, the Redeemer Committee and the Board of the Master Fund, now intends to distribute the proceeds from the Jessup transaction ($78 million), net of any applicable tax withholdings and with no reserves for the Extinguished Claims or the Released Claims. In addition, the distribution will include approximately $9.4 million in proceeds that have been redistributed due to the cancellation

and extinguishment of the interests and shares in the Crusader Funds held by HCM, Charitable DAF and Eames in connection with the Settlement Agreement, resulting in a total gross distribution of $87.4 million. Distributions will be based on net asset value as of June 30, 2021.

Please note that A&M CRF intends to make the distributions by wire transfer no later than July 31, 2021. Please confirm your wire instructions on or before **July 20, 2021**. If there are any revisions to your wire information, please use the attached template to provide SEI and A&M CRF your updated information on investor letterhead. This information should be sent on or before **July 20, 2021** to Alvarez & Marsal CRF and SEI at CRFInvestor@alvarezandmarsal.com and AIFS-IS_Crusader@seic.com, respectively.

The wire payments will be made to the investor bank account on file with an effective and record date of July 1, 2021. Should you have any questions, please contact SEI or A&M CRF at the e-mail addresses listed above.

Sincerely,

Alvarez & Marsal CRF Management, LLC

By: _____
Steven Varner
Managing Director

MUNSCH HARDT
DALLAS / HOUSTON / AUSTIN

Ross Tower
500 N. Akard Street, Suite 3800
Dallas, Texas 75201-6659
Main 214.855.7500
Fax 214.855.7584
munsch.com

Direct Dial 214.855.7587
Direct Fax 214.978.5359
drukavina@munsch.com

November 3, 2021

Via E-Mail and Federal Express
Ms. Nan R. Eitel
Office of the General Counsel
Executive Office for U.S. Trustees
20 Massachusetts Avenue, NW
8th Floor
Washington, DC 20530
Nan.r.Eitel@usdoj.gov

Re: Highland Capital Management, L.P. Bankruptcy Case
Case No. 19-34054 (SGJ) Bankr. N.D. Tex.

Dear Ms. Eitel:

I am a senior bankruptcy practitioner who has worked closely with Douglas Draper (representing separate, albeit aligned, clients) in the above-referenced Chapter 11 case. I have represented debtors-in-possession on multiple occasions, have served as an adjunct professor of law teaching advanced corporate restructuring, and consider myself not only a bankruptcy expert, but an expert on the practicalities and realities of how estates and cases are administered and, therefore, how they could be manipulated for personal interests. I write to follow up on the letter that Douglas sent to your offices on October 4, 2021, on account of additional information my clients have learned in this matter. So that you understand, my clients in the case are NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P., both of whom are affiliated with and controlled by James Dondero, and I write this letter on their behalf and based on information they have obtained.

I share Douglas' view that serious abuses of the bankruptcy process occurred during the bankruptcy of Texas-headquartered Highland Capital Management, L.P. ("Highland" or the "Debtor") which, left uninvestigated and unaddressed, may represent a systemic issue that I believe would be of concern to your office and within your office's sphere of authority. Those abuses include potential insider trading and breaches of fiduciary duty by those charged with protecting creditors, understated estimations of estate value seemingly designed to benefit insiders and management, gross mistreatment of employees who were key to the bankruptcy process, and ultimately a plan aimed at liquidating an otherwise viable estate, to the detriment of third-party investors in Debtor-managed funds. To be clear, I recognize that the Bankruptcy Court has ruled the way that it has and I am not criticizing the Bankruptcy Court or seeking to attack any of its orders. Rather, as has been and will be shown, the Bankruptcy Court acted on misinformation presented to it, intentional lack of transparency, and manipulation of the facts and circumstances by the fiduciaries of the estate. I therefore wish to add my voice to Douglas' aforementioned letter, provide additional information, encourage your investigation, and offer whatever information or assistance I can.

The abuses here are akin to the type of systemic abuse of process that took place in the bankruptcy of Neiman Marcus (in which a core member of the creditors' committee admittedly attempted to perpetrate a massive fraud on creditors), and which is something that lawmakers should be concerned

about, particularly to the extent that debtor management and creditors' committee members are using the federal bankruptcy process to shield themselves from liability for otherwise harmful, illegal, or fraudulent acts.

BACKGROUND

Highland Capital Management and its Founder, James Dondero

Highland Capital Management, L.P. is an SEC-registered investment advisor co-founded by James Dondero in 1993. A graduate of the University of Virginia with highest honors, Mr. Dondero has over thirty years of experience successfully overseeing investment and business activities across a range of investment platforms. Of note, Mr. Dondero is chiefly responsible for ensuring that Highland weathered the global financial crisis, evolving the firm's focus from high-yield credit to other areas, including real estate, private equity, and alternative investments. Prior to its bankruptcy, Highland served as advisor to a suite of registered funds, including open-end mutual funds, closed-end funds, and an exchange-traded fund.

In addition to managing Highland, Mr. Dondero is a dedicated philanthropist who has actively supported initiatives in education, veterans' affairs, and public policy. He currently serves as a member of the Executive Board of the Southern Methodist University Cox School of Business and sits on the Executive Advisory Council of the George W. Bush Presidential Center.

Circumstances Precipitating Bankruptcy

Notwithstanding Highland's historical success with Mr. Dondero at the helm, Highland's funds—like many other investment platforms—suffered losses during the financial crisis, leading to myriad lawsuits by investors. One of the most contentious disputes involved a group of investors who had invested in Highland-managed funds collectively termed the "Crusader Funds." During the financial crisis, to avoid a run on the Crusader Funds at low-watermark prices, the funds' manager temporarily suspended redemptions, leading investors to sue. That dispute resolved with the formation of an investor committee self-named the "Redeemer Committee" and the orderly liquidation of the Crusader Funds, which resulted in investors' receiving a return of their investments plus a return, as opposed to the 20 cents on the dollar they would have received had their redemption requests been honored when made.

Despite this successful liquidation, the Redeemer Committee sued Highland again several years later, claiming that Highland had improperly delayed the liquidation and paid itself fees not authorized under the parties' earlier settlement agreement. The dispute went to arbitration, ultimately resulting in an arbitration award against Highland of $189 million (of which Highland expected to make a net payment of $110 million once the award was confirmed).

Believing that a restructuring of its judgment liabilities was in Highland's best interest, on October 16, 2019, Highland—a Delaware limited partnership—filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the District of Delaware.[1]

On October 29, 2019, the Bankruptcy Court appointed the Official Committee of Unsecured Creditors ("Creditors' Committee"). The Creditors' Committee Members (and the contact individuals for those members) are: (1) The Redeemer Committee of the Highland Crusader Fund (Eric Felton), (2) Meta e-Discovery (Paul McVoy), (3) UBS Securities LLC and UBS AG London Branch (Elizabeth

[1] *In re Highland Capital Mgmt., L.P.*, Case No. 19-12239-CSS (Bankr. D. Del.) ("Del. Case"), Dkt. 1.

Kozlowski), and (4) Acis Capital Management, L.P. and Acis Capital Management GP, LLP (Joshua Terry).[2] At the time of their appointment, creditors agreeing to serve on the Creditors' Committee were given an Instruction Sheet by the Office of the United States Trustee, instructing as follows:

> **Creditors wishing to serve as fiduciaries on any official committee are advised that they may not purchase, sell or otherwise trade in or transfer claims against the Debtor while they are committee members absent an order of the Court. By submitting the enclosed Questionnaire and accepting membership on an official committee of creditors, you agree to this prohibition. The United States Trustee reserves the right to take appropriate action, including removing the creditor from any committee, if the information provided in the Questionnaire is inaccurate, if the foregoing prohibition is violated, or for any other reason the United States Trustee believes is proper in the exercise of her discretion.**

See Instruction Sheet, Ex. A (emphasis in original).

In response to a motion by the Creditors' Committee, on December 4, 2019, the Delaware Bankruptcy Court unexpectedly transferred the bankruptcy case to the Northern District of Texas, to Judge Stacey G.C. Jernigan's court.[3]

SYSTEMIC PROBLEMS OCCURRING IN THE CONTEXT OF HIGHLAND'S COURT-ADMINISTERED BANKRUPTCY

Mr. Dondero Gets Pushed Out of Management and New Debtor Management Announces Plans to Liquidate the Estate

From the outset of the case, the Creditors' Committee and the U.S. Trustee's Office in Dallas pushed to replace Mr. Dondero as the sole director of the Debtor's general partner, Strand Advisors, Inc. ("Strand"). To avoid a protracted dispute and to facilitate the restructuring, on January 9, 2020, Mr. Dondero agreed to resign as the sole director, on the condition that he would be replaced by three independent directors who would act as fiduciaries of the estate and work to restructure Highland's business so it could continue operating and emerge from bankruptcy as a going concern. As Mr. Draper previously has explained, the agreement approved by the Bankruptcy Court allowed Mr. Dondero, UBS (which held one of the largest claims against the estate), and the Redeemer Committee each to choose one director, and also established protocols for operations going forward. Mr. Dondero chose The Honorable Former Judge Russell F. Nelms, UBS chose John Dubel, and the Redeemer Committee chose James Seery.[4]

In brokering the agreement, Mr. Dondero made clear his expectations that new, independent management would not only preserve Highland's business by expediting an exit from bankruptcy in three to six months, but would also preserve jobs and enable continued collaboration with charitable causes supported by Highland and Mr. Dondero. Unfortunately, those expectations did not materialize. Rather, it quickly became clear that Strand's and Highland's management was being dominated by one of the

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[2] Del. Case, Dkt. 65.

[3] *See In re Highland Capital Mgmt., L.P.*, Case No. 19-34054 (Bankr. N.D. Tex.), Dkt. 186. All subsequent docket references are to the docket of the Bankruptcy Court for the Northern District of Texas.

[4] *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 the Ordinary Course, Dkt. 338; Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course, Dkt. 339.

independent directors, Mr. Seery (as will be seen, for his self-gain). Shortly after his placement on the Board, on March 15, 2020, Mr. Seery became de facto Chief Executive Officer, after which he immediately took steps to freeze Mr. Dondero out of operations completely, to the detriment of Highland's business and its employees. The Bankruptcy Court formally approved Mr. Seery's appointment as CEO and Chief Restructuring Officer on July 14, 2020.[5] Although Mr. Seery publicly represented that his goal was to restructure the Debtor's business and enable it to emerge as a going concern, privately he was engineering a much different plan. Less than two months after Mr. Seery's appointment as CEO/CRO, the Debtor filed its initial plan of reorganization, disclosing for the first time its intention to terminate substantially all employees by the end of 2020 and to liquidate Highland's assets by 2022.[6]

Over objections by Mr. Dondero and numerous other stakeholders, the Bankruptcy Court confirmed Highland's Fifth Amended Plan of Reorganization on February 22, 2021 (the "Plan").[7] There are appeals of that Plan, as well as many of the other rulings made by the Bankruptcy Court, currently pending before the United States District Court and the Court of Appeals for the Fifth Circuit.

Transparency Problems Pervade the Bankruptcy Proceedings

The Regulatory Framework

As you are aware, one of the most important features of federal bankruptcy proceedings is transparency. The EOUST instructs that "Debtors-in-possession and trustees must account for the receipt, administration, and disposition of all property; provide information concerning the estate and the estate's administration as parties in interest request; and file periodic reports and summaries of a debtor's business, including a statement of receipts and disbursements, and such other information as the United States Trustee or the United States Bankruptcy Court requires." *See* http://justice.gov/ust/chapter-11-information (citing 11 U.S.C. § 1106(a)(1), 1107(a)). And Federal Rule of Bankruptcy Procedure 2015.3(a) states that "the trustee or debtor in possession shall file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest." This rule requires the trustee or a debtor in possession to file a report for each non-debtor affiliate prior to the first meeting of creditors and every six months thereafter until the effective date of a plan of reorganization. Fed R. Bankr. P. 2015.3(b). Importantly, the rule does not absolve a debtor from filing reports due prior to the effective date merely because a plan has become effective.[8] Notably, the U.S. Trustee has the duty to ensure that debtors in possession properly and timely file all required reports. 28 U.S.C. § 1112(b)(4)(F), (H).

The entire purpose of these guidelines and rules is to ensure that external stakeholders can fairly evaluate the progress of bankruptcy proceedings, including compliance with legal requirements. Particularly in large bankruptcies, creditors and investors alike should expect that debtors, their

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[5] *See* Order Approving 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, Dkt. 854.

[6] *See* Plan of Reorganization of Highland Capital Management, L.P. dated August 12, 2020, Dkt. 944.

[7] *See* Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified); and (II) Granting Related Relief, Dkt. 1943.

[8] After notice and a hearing, the bankruptcy court may grant relief from the Rule 2015.3 disclosure requirement "for cause," including that "the trustee or debtor in possession is not able, after a good faith effort, to comply with th[e] reporting requirements, or that the information required by subdivision (a) is publicly available." Fed. R. Bankr. 2015.3(d).

management, and representatives on creditors' committees abide by their reporting obligations and all other legal requirements. Bankruptcy is not meant to be a safe haven for lawlessness, nor is it designed to obfuscate the operations of the debtor. Instead, transparency is mandatory so that the debtor is accountable to stakeholders and so that stakeholders can ensure that all insiders are operating for the benefit of the estate.

In Highland's Bankruptcy, the Regulatory Framework Is Ignored

Against this regulatory backdrop, and on the heels of high-profile bankruptcy abuses like those that occurred in the context of the Neiman Marcus bankruptcy, the Highland bankruptcy offered almost no transparency to stakeholders. Traditional reporting requirements were ignored. This opened the door to numerous abuses of process and potential violations of federal law, as detailed below.

As Mr. Draper already has highlighted, one significant problem in Highland's bankruptcy was the Debtor's failure to file *any* of the reports required under Bankruptcy Rule 2015.3, either on behalf of itself or its affiliated entities. Typically, such reports would include information like asset value, income from financial operations, profits, and losses for each non-publicly traded entity in which the estate has a substantial or controlling interest. This was very important here, where the Debtor held the bulk of its value—hundreds of millions of dollars—in non-debtor subsidiaries. The Debtor's failure to file the required Rule 2015.3 reports was brought to the attention of the Debtor, the Bankruptcy Court, and the U.S. Trustee's Office. During the hearing on Plan confirmation, the Debtor was questioned about the failure to file the reports. The sole excuse offered by the Debtor's Chief Restructuring Officer and Chief Executive Officer, Mr. Seery, was that the task "fell through the cracks."[9] Nor did the Debtor or its counsel ever attempt to show "cause" to gain exemption from the reporting requirement. That is because there was no good reason for the Debtor's failure to file the required reports. In fact, although the Debtor and the Creditors' Committee often refer to the Debtor's structure as a "byzantine empire," the assets of the estate fall into a handful of discrete investments, most of which have audited financials and/or are required to make monthly or quarterly net-asset-value or fair-value determinations.[10] Rather than disclose financial information that was readily available, the Debtor appears to have taken deliberate and strategic steps to avoid transparency.

In stark contrast to its non-existent public disclosures, the Debtor provided the Creditors' Committee with robust weekly information regarding transactions involving assets held by the Debtor or its wholly-owned subsidiaries, transactions involving managed entities and non-managed entities in which the Debtor held an interest, transactions involving non-discretionary accounts, and weekly budget-to-actuals reports referencing non-Debtor affiliates' 13-week cash flow budget. In other words, the Committee member had real-time financial information with respect to the affairs of non-debtor affiliates, which is precisely the type of information that should have been disclosed to the public pursuant to Rule 2015.3. Yet, the fact that the Committee members alone had this information enabled some of them to trade on it, for their personal benefit.

The Debtor's management failed and refused to make other critical disclosures as well. As explained in detail below, during the bankruptcy proceedings, the Debtor sold off sizeable assets without any notice and without seeking Bankruptcy Court approval. The Debtor characterized these transactions as the "ordinary course of business" (allowing it to avoid the Bankruptcy Court approval process), but

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[9] *See* Dkt. 1905 (Feb. 3, 2021 Hr'g Tr. at 49:5-21).

[10] During a deposition, Mr. Seery identified most of the Debtor's assets "[o]ff the top of [his] head" and acknowledged that he had a subsidiary ledger that detailed the assets held by entities below the Debtor. *See* Exh. A (Jan. 29, 2021 Dep. Tr. at 22:4-10; 23:1-29:10).

they were anything but ordinary. In addition, the Debtor settled the claims of at least one creditor—former Highland employee Patrick Daugherty—without seeking court approval of the settlement pursuant to Federal Rule of Bankruptcy Procedure 9019. We understand that the Debtor paid Mr. Daugherty $750,000 in cash as part of that settlement, done as a "settlement" to obtain Mr. Daugherty's withdrawal of his objection to the Debtor's plan.

Despite all of these transparency problems, the Debtor's confirmed Plan contains provisions that effectively release the Debtor from its obligation to file *any* of the reports due for *any* period prior to the effective date—thereby sanctioning the Debtor's failure and refusal to follow the rules. The U.S. Trustee also failed to object to this portion of the Court's order of confirmation, which is directly at odds with the spirit and mandate of the Periodic Reporting Requirements recently adopted by the EOUST and historical rules mandating transparency.[11]

As will become apparent, because neither the federal Bankruptcy Court nor the U.S. Trustee advocated or demanded compliance with the rules, the Debtor, its newly-appointed management, and the Creditors' Committee charged with protecting the interests of all creditors were able to manipulate the estate for the benefit of a handful of insiders, seemingly in contravention of law.

Debtor And Debtor-Affiliate Assets Were Deliberately Hidden and Mischaracterized

Largely because of the Debtor's failure to file Rule 2015.3 reports for affiliate entities, interested parties and creditors wishing to evaluate the worth and mix of assets held in non-Debtor affiliates could not do so. This is particularly problematic, because during proceedings, the Debtor sold $172 million in assets, which altered the mix of assets and liabilities of the Debtor's affiliates and controlled entities. In addition, the estate's asset value decreased by approximately $200 million in a matter of months. Absent financial reporting, it was impossible for stakeholders to determine whether the $200 impairment in asset value reflected actual realized losses or merely temporary mark-downs precipitated by problems experienced by certain assets during the pandemic (including labor shortages, supply-chain issues, travel interruptions, and the like). Although the Bankruptcy Court held that such sales did not require Court approval, a Rule 2015.3 report would have revealed the mix of assets and the corresponding reduction in liabilities of the affiliated or controlled entity—information that was critical in evaluating the worth of claims against the estate or future investments into it.

One transaction that was particularly problematic involved alleged creditor HarbourVest, a private equity fund with approximately $75 billion under management. Prior to Highland's bankruptcy, HarbourVest had invested $80 million into (and obtained 49.98% of the outstanding shares of) a Highland fund called Acis Loan Funding, later rebranded as Highland CLO Funding, Ltd. ("HCLOF"). A charitable fund called Charitable DAF Fund, L.P. ("DAF") held 49.02% member interests in HCLOF, and the remaining □2.00% was held by Highland and certain of its employees. Prior to Highland's bankruptcy proceedings, a dispute arose between HarbourVest and Highland, in which HarbourVest claimed it was duped into making the investment because Highland allegedly failed to disclose key facts relating to the investment (namely, that Highland was engaged in ongoing litigation with former employee, Josh Terry,

[11] *See* "*Procedures for Completing Uniform Periodic Reports in Non-Small Business Cases Filed Under Chapter 11 of Title 11*" (the "Periodic Reporting Requirements"). The Periodic Reporting Requirements reaffirmed the EOUST's commitment to maintaining "uniformity and transparency regarding a debtor's financial condition and business activities" and "to inform creditors and other interested parties of the debtor's financial affairs." 85 Fed. Reg. 82906.

which would result in HCLOF's incurring legal fees and costs). HarbourVest alleged that, as a result of the Terry lawsuit, HCLOF incurred approximately $15 million in legal fees and costs.[12]

In the context of Highland's bankruptcy, however, HarbourVest filed a proof of claim alleging that it was due over $300 million in damages in the dispute, a claim that bore no relationship to economic reality. As a result, Debtor management initially valued HarbourVest's claims at $0, a value consistently reflected in the Debtor's publicly-filed financial statements, up through and including its December 2020 Monthly Operating Report.[13] Eventually, however, the Debtor announced a settlement with HarbourVest which entitled HarbourVest to $45 million in Class 8 claims and $35 million in Class 9 claims.[14] At the time, the Debtor's public disclosures reflected that Class 8 creditors could expect to receive approximately 70% payout on their claims, and Class 9 creditors could expect 0.00%. In other words, HarbourVest's total $80 million in allowed claims would allow HarbourVest to realize a $31.5 million return.[15]

As consideration for this potential payout, HarbourVest agreed to convey its interest in HCLOF to a special-purpose entity ("SPE") designated by the Debtor (a transaction that involved a trade of securities) and to vote in favor of the Debtor's Plan. In its pleadings and testimony in support of the settlement, the Debtor represented that the value of HarbourVest's interest in HCLOF was $22.5 million. It later came to light, however, that the actual value of that asset was at least $44 million.

There are numerous problems with this transaction which may not have occurred with the requisite transparency. As a registered investment advisor, the Debtor had a fiduciary obligation to disclose the true value of HarbourVest's interest in HCLOF to investors in that fund. The Debtor also had a fiduciary obligation to offer the investment opportunity to the other investors prior to purchasing HarbourVest's interest for itself. Mr. Seery has acknowledged that his fiduciary duties to the Debtor's managed funds and investors supersedes any fiduciary duties owed to the Debtor and its creditors in bankruptcy. Nevertheless, the Debtor and its management appear to have misrepresented the value of the HarbourVest asset, brokered a purchase of the asset without disclosure to investors, and thereafter placed the HarbourVest interest into a non-reporting SPE.[16] This meant that no outside stakeholder had any ability to assess the value of that interest, nor could any outsider possibly ascertain how the acquisition of that interest impacted the bankruptcy estate. In the absence of Rule 2015.3 reports or listing of the HCLOF interest on the Debtor's balance sheet, it was impossible to determine at the time of the HarbourVest settlement (or thereafter) whether the Debtor properly accounted for the asset on its balance sheet.

Highland engaged in several other asset sales in bankruptcy without disclosing those sales in advance to outside stakeholders or investors, and without offering investors in funds impacted by the sales the opportunity to purchase the assets. For example:

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[12] Assuming that HarbourVest were entitled to fraud damages as it claimed, the true amount of its damages was less than $7.5 million (because HarbourVest only would have borne 49.98% of the $15 million in legal fees).
[13] *See* Monthly Operating Report for Highland Capital Management for the Month Ending December 2020, Dkt. 1949.
[14] Class 8 consists of general unsecured claims; Class 9 consists of subordinated claims.
[15] We have reason to believe that HarbourVest's Class 8 and Class 9 claims were contemporaneously sold to Farallon Capital Management—an SEC-registered investment advisor—for approximately $28 million.
[16] Even former Highland employee Patrick Daugherty recognized the problematic nature of asset dispositions like the one involving HarbourVest, commenting that such transactions "have left [Mr. Seery] and Highland vulnerable to a counter-attack under the [Investment] Advisors Act." *See* Ex. B.

- The Debtor sold approximately $25 million of NexPoint Residential Trust shares that today are valued at over $70 million; the Debtor likewise sold $6 million of PTLA shares that were taken over less than 60 days later for $18 million.

- The Debtor divested interests worth $145 million held in certain life settlements (which paid on the death of the individuals covered, whose average age was 90) for $35 million rather than continuing to pay premiums on the policies, and did so without obtaining updated estimates of the life settlements' value, to the detriment of the fund and investors (today two of the covered individuals have a life expectancy of less than one year);

- The Debtor sold interests in OmniMax without informing the Bankruptcy Court, without engaging in a competitive bidding process, and without cooperating with other funds managed by Mr. Dondero, resulting in what we believe is substantially lesser value to investors;

- The Debtor sold interests in Structural Steel Products (worth $50 million) and Targa (worth $37 million), again without any process or notice to the Bankruptcy Court or outside stakeholders, resulting in what we believe is diminished value for the estate and investors.

Because the Bankruptcy Code does not define what constitutes a transaction in the "ordinary course of business," the Debtor's management was able to characterize these massive sales as ordinary course transactions when they were anything but ordinary, resulting in diminution in value to the estate and its creditors.

In summary, the consistent lack of transparency throughout bankruptcy proceedings facilitated sales and deal-making that failed to maximize value for the estate and precluded outside stakeholders from evaluating or participating in asset purchases or claims trading that might have benefitted the estate and outside investors in Debtor-managed funds.

The Debtor Reneged on Its Promise to Pay Key Employees, Contrary to Sworn Testimony

Highland's bankruptcy also diverges from the norm in its treatment of key employees, who usually can expect to be fairly compensated for pre-petition work and post-petition work done for the benefit of the estate. That did not happen here, despite the Debtor's representation to the Bankruptcy Court that it would.

By way of background, prior to its bankruptcy, Highland offered employees two bonus plans: an Annual Bonus Plan and a Deferred Bonus Plan. Under the Annual Bonus Plan, all of Highland's employees were eligible for a yearly bonus payable in up to four equal installments, at six-month intervals, on the last business day of each February and August. Under the Deferred Bonus Plan, Highland's employees were awarded shares of a designated publicly traded stock, the right to which vested 39 months later. Under both bonus plans, the only condition to payment was that the employee be employed by Highland at the time the award (or any portion of it) vested.

At the outset of the bankruptcy proceedings, the Debtor promised that pre-petition bonus plans would be honored. Specifically, in its Motion For Entry of an Order Authorizing the Debtor to Pay and Honor Ordinary Course Obligations Under Employee Bonus Plans and Granting Related Relief, the Debtor informed the Court that employee bonuses "continue[d] to be earned on a post-petition basis," and that "employee compensation under the Bonus Plans [was] critical to the Debtor's ongoing

operations and that any threat of nonpayment under such plans *would have a potentially catastrophic impact on the Debtor's reorganization efforts.*"[17] Significantly, the Debtor explained to the Court that its operations were leanly staffed, such that all employees were critical to ongoing operations and such that it expected to compensate all employees. As a result of these representations, key employees continued to work for the Debtor, some of whom invested significant hours at work ensuring that the Debtor's new management had access to critical information for purposes of reorganizing the estate.

Having induced Highland's employees to continue their employment, the Debtor abruptly changed course, refusing to pay key employees awards earned pre-petition under the Annual Bonus Plan and bonuses earned pre-petition under the Deferred Bonus Plan that vested post-petition. In fact, Mr. Seery chose to terminate four key employees just before the vesting date in an effort to avoid payment, despite his repeated assurances to the employees that they would be "made whole." Worse still, notwithstanding the Debtor's failure and refusal to pay bonuses earned and promised to these terminated employees, in Monthly Operating Reports signed by Mr. Seery under penalty of perjury, the Debtor continued to treat the amounts owed to the employees as post-petition obligations, which the Debtor continued to accrue as post-petition liabilities even after termination of their employment.

The Debtor's misrepresentations to the Bankruptcy Court and to the employees themselves fly in the face of usual bankruptcy procedure. As the Fifth Circuit has explained, administrative expenses like key employee salaries are an "'actual and necessary cost'" that provides a "benefit to the state and its creditors."[18] It is undisputed that these employees continued to work for the Debtor, providing an unquestionable benefit to the estate post-petition, but were not provided the promised compensation, for reasons known only to the Debtor.

Again, this is not business as usual in bankruptcy proceedings, and if we are to ensure the continued success of debtors in reorganization proceedings, it is important that key employees be paid in the ordinary course for their efforts in assisting debtors and that debtor management be made to live up to promises made under penalty of perjury to the bankruptcy courts.

There Is Substantial Evidence that Insider Trading Occurred

Perhaps one of the biggest problems with the lack of transparency at every step is that it facilitated potential insider trading. The Debtor (as well as its advisors and professionals) and the Creditors' Committee (and its counsel) had access to critical information upon which any reasonable investor would rely. But because of the lack of reporting, the public did not.

Mr. Draper's October 4, 2021 letter sets forth in detail the reasons for suspecting that insider trading occurred, but his explanation bears repeating here. In the context of a non-transparent bankruptcy proceeding, three of the four members of the Creditors' Committee and one non-committee member sold their claims to two buyers, Muck Holdings LLC ("Muck") and Jessup Holdings LLC ("Jessup"). The four claims sold comprise the largest four claims in the Highland bankruptcy by a substantial margin,[19] collectively totaling almost $270 million in Class 8 claims and $95 million in Class 9 claims:

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[17] *See* Dkt. 177, ¶ 25 (emphasis added).
[18] *Texas v. Lowe (In re H.L.S. Energy Co.)*, 151 F.3d 434, 437 (5th Cir. 1998) (quoting *Transamerican Natural Gas Corp.*, 978 F.2d 1409, 1416 (5th Cir. 1992)).
[19] *See* Ex. C.

Claimant	Class 8 Claim	Class 9 Claims	Date Claim Settled
Redeemer Committee	$136,696,610	N/A	October 28, 2020
Acis Capital	$23,000,000	N/A	October 28, 2020
HarbourVest	$45,000,000	$35,000,000	January 21, 2021
UBS	$65,000,000	$60,000,000	May 27, 2021
TOTAL:	**$269,6969,610**	**$95,000,000**	

Muck is owned and controlled by Farallon Capital Management ("Farallon"), and we believe Jessup is owned and controlled by Stonehill Capital Management ("Stonehill"). As the purchasers of the four largest claims in the bankruptcy, Muck (Farallon) and Jessup (Stonehill) will oversee the liquidation of the reorganized Debtor and the payment over time to creditors who have not sold their claims. These two hedge funds also will determine the performance bonus due to Mr. Seery for liquidating the estate. As set forth in the attached balance sheet dated August 31, 2021, we estimate that the estate today is worth nearly $600 million,[20] which could result in Mr. Seery's receipt of a performance bonus approximating $50 million.

This is concerning because there is substantial evidence that Farallon and Stonehill may have been provided material, non-public information to induce their purchase of these claims. We agree with Mr. Draper that there are three primary reasons to believe that non-public information was made available to facilitate these claims purchases:

- The scant publicly-available information regarding the Debtor's estate ordinarily would have dissuaded sizeable investment in purchases of creditors' claims;
- The information that actually was publicly available ordinarily would have compelled a prudent investor to conduct robust due diligence prior to purchasing the claims;
- Yet these claims purchasers spent in excess of $100 million (and likely closer to $150 million) on claims, ostensibly without any idea of what they were purchasing.

Credible information indicates that the claims purchases of Stonehill and Farallon can be summarized as follows:

Creditor	Class 8	Class 9	Purchaser	Purchase Price
Redeemer	$137.0	$0.0	Stonehill	$78.0[21]
ACIS	$23.0	$0.0	Farallon	$8.0
HarbourVest	$45.0	$35.0	Farallon	$27.0
UBS	$65.0	$60.0	Stonehill and Farallon	$50.0

[20] *See* Ex. D.
[21] *See* Ex. E. Because the transaction included "the majority of the remaining investments held by the Crusader Funds," the net amount paid by Stonehill for the Claims was approximately $65 million.

An analysis of publicly-available information would have revealed to any potential investor that:

- The estate's asset value had decreased by $200 million, from $556 million on October 16, 2019, to $328 million as of September 30, 2020 (increasing only slightly to $364 million as of January 31, 2021).[22]

- Allowed claims against the estate increased by a total amount of $236 million.

- Due to the decrease in the value of the Debtor's assets and the increase in the allowed claims amount, the ultimate projected recovery for creditors in bankruptcy decreased from 87.44% to 62.99% in just a matter of months.[23]

No prudent investor or hedge fund investing third-party money would purchase substantial claims out of the Highland estate based on this publicly-available information absent robust due diligence demonstrating that the investment was sound.

As discussed by Mr. Draper, the very close relationships between the claims purchasers, on the one hand, and the selling Creditors' Committee members and the Debtor's management, on the other hand also raise red flags. In particular:

- Farallon and Stonehill have long-standing, material relationships with the members of the Creditors' Committee and Mr. Seery. Mr. Seery formerly was the Global Head of Fixed Income Loans at Lehman Bros. until its collapse in 2009. While Mr. Seery was Global Head, Lehman Bros. did substantial business with Farallon. After Lehman's collapse, Mr. Seery joined Sidley & Austin as co-head of the corporate restructuring and bankruptcy group, where he worked with Matt Clemente, counsel to the Creditors' Committee in Highland's bankruptcy proceedings.

- In addition, Grovesnor, one of the lead investors in the Crusader Funds from the Redeemer Committee (which appointed Seery as its independent director) both played a substantial role on the Creditors' Committee and is a large investor in Farallon and Stonehill. It is unclear whether Grovesnor, a registered investment advisor, notified minority investors in the Crusader Funds or Farallon and Stonehill of these facts.

- According to Farallon principals Raj Patel and Michael Linn, while at Sidley, Mr. Seery assisted Farallon in its acquisition of claims in the Lehman estate, and Farallon realized more than $100 million in claims on those trades.

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[22] *Compare* Jan. 31, 2021 Monthly Operating Report [Dkt. 2030], *with* Disclosure Statement (approved on Nov. 24, 2020) [Dkt. 1473]. The increase in value between September 2020 and January 2021 is attributable to the Debtor's settlement with HarbourVest, which granted HarbourVest a Class 8 claim of $45 million and a Class 9 Claim of $35 million, and in exchange the Debtor received HarbourVest's interest in HCLOF, which in reality was worth approximately $44.3 million as of January 31, 2021. *See* Ex. C. It is also notable that the January 2021 monthly financial report values Class 8 claims at $267 million, an exponential increase over their estimated value of $74 million in December 2020.

[23] *See* Ex. F.

- Also while at Sidley, Mr. Seery represented the Steering Committee in the Blockbuster Video bankruptcy; Stonehill (through its Managing Member, John Motulsky) was one of the five members of the Steering Committee.

- Mr. Seery left Sidley in 2013 to become the President and Senior Investment Partner of River Birch Capital, a hedge fund founded by his former Lehman colleagues. He left River Birch in October 2017 just before the fund imploded. In 2017, River Birch and Stonehill Capital were two of the biggest note holders in the Toys R Us bankruptcy and were members of the Toys R Us creditors' committee.

I strongly agree with Mr. Draper that it is suspicious that two firms with such significant ties to Mr. Seery have purchased $365 million in claims. The aggregate $150 million purchase price paid by Farallon and Stonehill is 56% of all Class 8 claims, virtually the full plan value expected to be realized after two years. We believe it is worth investigating whether these claims buyers had access to material, non-public information regarding the actual value of the estate.

Other transactions occurring during the Highland bankruptcy also reinforce the suspicion that insider trading occurred. In particular, it appears that one of the claims buyers, Stonehill, used non-public information obtained incident to the bankruptcy to purchase stock in NexPoint Strategic Opportunities Fund (NYSE: NHF), a publicly traded, closed-end '40 Act fund with many holdings in common with assets held in the Highland estate outlined above. Stonehill is a registered investment adviser with $3 billion under management that has historically owned very few equity interests, particularly equity interests in a closed-end fund. As disclosed in SEC filings, Stonehill acquired enough stock in NHF during the second quarter of 2021 to make it Stonehill's eighth largest equity position.

The timing of the acquisitions of claims by Farallon and Stonehill also raises suspicion. For example, although notices of the transfer of the claims were filed immediately after the confirmation of the Debtor's Plan and prior to the effective date of the Plan, it seems likely that negotiations began much earlier. Transactions of this magnitude do not take place overnight and typically require robust due diligence. Muck was formed on March 9, 2021, more than a month before it filed notice that it was purchasing the Acis claim. If the negotiation or execution of a definitive agreement for the purchase began before or contemporaneously with Muck's formation, then there is every reason to believe that selling Creditors' Committee members and/or Debtor management provided Farallon with critical non-public information well before the Creditors' Committee members sold their claims and withdrew from the Committee. Indeed, Mr. Patel and Mr. Linn have stated to others that they purchased the Acis and HarbourVest claims in late January or early February. This is strong evidence that negotiation and/or agreements relating to the purchase of claims from Creditors' Committee members preceded the confirmation of the Debtor's Plan and the resignation of those members from the Committee.

Likewise, correspondence from the fund adviser to the Crusader Funds indicates that the Crusader Funds and the Redeemer Committee had "consummated" the sale of the Redeemer Committee's claims and other assets on April 30, 2021, "for $78 million in cash, which was paid in full to the Crusader Funds at closing."[24] In addition, that there was a written agreement among Stonehill, the Crusader Funds, and the Redeemer Committee that sources indicate dates back to the fourth quarter of 2020. That agreement presumably imposed affirmative and negative covenants upon the seller and granted the purchaser discretionary approval rights during the pendency of the sale. Such an agreement would necessarily conflict with the Creditors' Committee members' fiduciary obligations.

[24] *See* Ex. E.

The sale of the claims by the members of the Creditors' Committee also violates the instructions provided to committee members by the U.S. Trustee that required a selling committee member to obtain approval from the Bankruptcy Court prior to any sale of such member's claim. No such Court approval was ever sought or obtained, and the Dallas U.S. Trustee's Office took no action to enforce this guideline. The Creditors' Committee members were sophisticated entities, and they were privy to inside information that was not available to other unsecured creditors. For example, valuations of assets placed into a specially-created affiliated entities, such as the assets acquired in the HarbourVest settlement, and valuations of assets held by other entities owned or controlled by the Debtor, were available to the selling Creditors' Committee members, but not to other creditors or parties-in-interest.

While claims trading itself is not prohibited, there is reason to believe that the claims trading that occurred in the Highland bankruptcy violated federal law:

a) The selling parties were *three* of the four Creditors' Committee members, and each one had access to information they received in a fiduciary capacity;

b) Some of the information they received would have been available to other parties-in-interest if Rule 2015.3 had been enforced;

c) The projected recovery to creditors decreased significantly between the approval of the Disclosure Statement and the confirmation of the Debtor's Plan; and

d) There was a suspicious purchase of stock by Stonehill in NHF, a closed-end fund previously affiliated with Highland (and now managed by NexPoint Advisors, L.P.) that is publicly traded on the New York stock exchange.The Debtor's assets and the positions held by the closed-end fund are similar.

Mr. Seery's Compensation Structure Encouraged Misrepresentations Regarding the Value of the Estate and Assets of the Estate

An additional problem in Highland's bankruptcy is that Mr. Seery, as an Independent Director as well as the Debtor's CEO and CRO, received financial incentives that encouraged claims trading and dealing in insider information.

Mr. Seery received sizeable compensation for his heavy-handed role in Highland's bankruptcy. Upon his appointment as an Independent Director in January 2020, Mr. Seery received compensation from the Debtor of $60,000 per month for the first three months, $50,000 per month for the following three months, and $30,000 per month for remaining months, subject to adjustment by agreement with the Debtor.[25] When Mr. Seery subsequently was appointed the Debtor's CEO and CRO in July 2020, he received additional compensation, including base compensation of $150,000 per month retroactive to March 2020 and for so long as he served in those roles, as well as a "Restructuring Fee."[26] Mr. Seery's employment agreement contemplated that the Restructuring Fee could be calculated in one of two ways:

(1) If Mr. Seery were able to resolve a material amount of outstanding claims against the estate, he would be entitled to $1 million on confirmation of what the Debtor termed a

[25] *See* Dkt. 339, ¶ 3.
[26] *See* Dkt. 854, Ex. 1.

"Case Resolution Plan," $500,000 at the effective date of the Case Resolution Plan, and $750,000 upon completion of distributions to creditors under the plan.

(2) If, by contrast, Mr. Seery were not able to resolve the estate and instead achieved a "Monetization Vehicle Plan," he would be entitled to $500,000 on confirmation of the Monetization Vehicle Plan, $250,000 at the effective date of that plan, and—most importantly—a to-be-determined "contingent restructuring fee" based on "performance under the plan after all material distributions" were made.

The Restructuring Fee owed for a Case Resolution Plan was materially higher than that payable under the Monetization Vehicle Plan and provided a powerful economic incentive for Mr. Seery to resolve creditor claims in any way possible. Notably, at the time of Mr. Seery's formal appointment as CEO/CRO, he had already negotiated settlements in principle with Acis and the Redeemer Committee, leaving only the HarbourVest and UBS claims to resolve.

Further, after the Plan's effective date, as appointed Claimant Trustee, Mr. Seery was promised compensation of $150,000 per month (termed his "Base Salary"), subject to the negotiation of additional "go-forward" compensation, including a "success fee" and severance pay.[27] Mr. Seery's success fee presumably will be based on whether the Plan outperforms what was disclosed in the Plan Analysis. In other words, Mr. Seery had a financial incentive to grossly understate the value of the estate in public disclosures, not only to facilitate claims trading and resolution of the biggest claims in bankruptcy (for purposes of obtaining the larger Case Resolution Fee) but also to ensure that he eventually receives a large "success fee." Again, we estimate that, based on the estate's nearly $600 million value today, Mr. Seery's success fee could approximate $50 million.

One excellent example of the way in which Mr. Seery facilitated claims trading and thereby lined his own pockets is the sale of UBS's claim. Based on the publicly-available information at the time Stonehill and Farallon purchased the UBS claim, the purchase made no economic sense. At the time, the publicly-disclosed Plan Analysis estimated that there would be a 71.32% distribution to Class 8 creditors and a 0.00% distribution to Class 9 creditors, which would mean believe is that, at the time of their claims purchase, the estate actually was worth much, much more (between $472-$600 million). If, prior to their claims purchases, Mr. Seery (or others in the Debtor's management) apprised Stonehill and Farallon of the true estate value (which was material, non-public information at the time), then the value they paid for the UBS claim made sense, because they would have known they were likely to recover close to 100% on Class 8 and Class 9 claims.

But perhaps the most important evidence of mismanagement of this bankruptcy proceeding and misalignment of financial incentives is the Debtor's repeated refusal to resolve the estate in full despite dozens of opportunities to do so. Immediately prior to the Plan confirmation hearing, Judge Jernigan suggested that the Creditors' Committee and Mr. Dondero attempt to reach a settlement. Mr. Dondero, through counsel, already had made 35 offers of settlement that would have maximized the estate's recovery, even going so far as to file a proposed plan of reorganization. Some of these offers were valued between $150 and $232 million. And we now believe that as of August 1, 2020, the Debtor's estate had an actual value of at least $460 million, including $105 million in cash and a $50 million revolving credit facility. With Mr. Dondero's offer, the Debtor's cash and the credit facility could have resolved the estate, which would have enabled the Debtor to pay all proofs of claim, leave a residual estate intact for equity holders, and allow the company to continue to operate as a going concern.

[27] *See* Plan Supplement, Dkt. 1875, § 3.13(a)(i).

Nonetheless, neither the Debtor nor the Creditors' Committee responded to Mr. Dondero's offers. It was not until The Honorable Former Judge D. Michael Lynn, counsel for Mr. Dondero, reminded the Creditors' Committee counsel that its members had a fiduciary duty to respond that a response was forthcoming. We believe Mr. Dondero's proposed plan offered a materially greater recovery than what the Debtor had reported would be the expected Plan recovery. The Creditors' Committee's failure to timely respond to that offer suggests that Debtor management, the Creditors' Committee, or both were financially disincentivized from accepting a case resolution offer and that some members of the Creditors' Committee were contractually constrained from doing so.

What happened instead was that the Debtor, its management, and the Creditors' Committee brokered deals that allowed grossly inflated claims and sales of those claims to a small group of investors with significant ties to Debtor management. In a transparent bankruptcy proceeding, we question whether any of this could have happened. What we do know is that the Debtor's non-transparent bankruptcy has ensured there will be nothing left for residual stakeholders, while enriching a handful of intimately connected individuals and investors.

The Debtor's Management and Advisors Are Almost Totally Insulated From Liability

Despite the mismanagement of bankruptcy proceedings, the Bankruptcy Court has issued a series of orders ensuring that the Debtor and its management cannot not be held liable for their actions in bankruptcy.

In particular, the Court issued a series of orders protecting Mr. Seery from potential liability for any act undertaken in the management of the Debtor or the disposition of its assets:

- In its order approving the settlement between the Creditors' Committee and Mr. Dondero, the Court barred any Debtor entity "from commenc[ing] or pursu[ing] 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" unless the Court first (1) determined the claim was a "colorable" claim for willful misconduct or gross negligence, and (2) authorized an entity to bring the claim. The Court also retained "sole jurisdiction" over any such claim.[28]

- In its order approving the Debtor's retention of Mr. Seery as its Chief Executive Officer and Chief Restructuring Officer, the Court issued an identical injunction barring any claims against Mr. Seery in his capacity as CEO/CRO without prior court approval.[29] The same order authorized the Debtor to indemnify Mr. Seery for any claims or losses arising out of his engagement as CEO/CRO.[30]

Worse still, the Plan approved by the Bankruptcy Court contains sweeping release and exculpation provisions that make it virtually impossible for third parties, including investors in the Debtor's managed funds, to file claims against the Debtor, its related entities, or their management. The Plan's exculpation provisions contain also contain a requirement that any potential claims be vetted and approved by the Bankruptcy Court. As Mr. Draper already explained, these provisions violate the holding

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[28] Dkt. 339, ¶ 10.
[29] Order Approving Debtor's Motion Under Bankruptcy Code Sections 105(a) and 363(b) Authorizing Retention of James P. Seery, Jr. as Chief Executive Office, Chief Restructuring Officer, and Foreign Representative Nunc Pro Tunc to March 15, 2020, Dkt. 854, ¶ 5.
[30] Dkt. 854, ¶ 4 & Exh. 1.

of *In re Pacific Lumber Co.*, in which the United States Court of Appeals for the Fifth Circuit rejected similarly broad exculpation clauses.[31]

The fundamental problem with the Plan's broad exculpation and release provisions has been brought into sharp focus in recent days, with the filing of a lawsuit by the Litigation Trustee against Mr. Dondero, other individuals formerly affiliated with Highland, and several trusts and entities affiliated with Mr. Dondero.[32] Among other false accusations, that lawsuit alleges that the aggregate amount of allowed claims in bankruptcy was high because the Debtor and its management were forced to settle with various purported judgment creditors who had engaged in pre-petition litigation with Mr. Dondero and Highland. But it was Mr. Seery and Debtor's management, not Mr. Dondero and the other defendants, who negotiated those settlements with creditors in bankruptcy and who decided what value to assign to their claims. Ordinarily, Mr. Dondero and the other defendants could and would file compulsory counterclaims against the Debtor and its management for their role in brokering and settling claims in bankruptcy. But the Bankruptcy Court has effectively precluded such counterclaims (absent the defendants obtaining the Court's advance permission to assert them) by releasing the Debtor and its management from virtually all liability in relation to their roles in the bankruptcy case. That is a violation of due process.

Notably, the U.S. Trustee's Office recently has argued in the context of the bankruptcy of Purdue Pharma that release and exculpations clauses akin to those contained in Highland's Plan violate both the Bankruptcy Code and the Due Process Clause of the United States Constitution.[33] In addition, the U.S. Trustee explained that the bankruptcy courts lack constitutional authority to release state-law causes of action against debtor management and non-debtor entities.[34] Indeed, it has been the U.S. Trustee's position that where, as here, third parties whose claims are being released did not receive notice of the releases and had no way of knowing, based on the applicable plan's language, what claims were extinguished, third-party releases are contrary to law.[35] This position comports with Fifth Circuit case law, which makes clear that releases must be consensual, and that the released party must make a substantial contribution in exchange for any release.

As a result of the release and exculpation provisions of the Plan, employees and third-party investors in entities managed by the Debtor who are harmed by actions taken by the Debtor and its management in bankruptcy are barred from asserting their claims without prior Bankruptcy Court approval. Those third parties' claims are barred notwithstanding that they were not notified of the releases and have never been given any information with which to evaluate their potential claims (as mentioned, the Debtor has not disclosed several major assets sales, nor does the Plan require the Debtor to disclose post-confirmation asset sales). Conversely, the releases insulate claims purchasers from the risk of potential actions by investors in funds managed by the Debtor (for breach of fiduciary duty, diminution in value, or otherwise). These releases are directly at odds with investors' expectations and the written documents delivered to and approved by investors when they invest in managed funds—i.e., that fund managers will act in a fiduciary capacity to maximize investors' returns and that investors will have recourse for any failure to do so.

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[31] 584 F.3d 229 (5th Cir. 2009).
[32] The Plan created a Litigation Sub-Trust to be managed by a Litigation Trustee, whose sole mandate is to file lawsuits in an effort to realize additional value for the estate.
[33] *See* Memorandum of Law in Support of United States Trustee's Expedited Motion for Stay of Confirmation Order, *In re Purdue Pharma, L.P.*, Case No. 19-23649 (RDD) (Bankr. S.D.N.Y.), Doc. 3778 at 17-25.
[34] *Id.* at 26-28.
[35] *See id.* at 22.

As an example, the Court approved the settlement of UBS's claim against the Debtor and two funds managed by the Debtor (collectively referred to as "MultiStrat"). Pursuant to that settlement, MultiStrat agreed to pay UBS $18.5 million. But the settlement made no sense for several reasons. First, Highland owns approximately 48% of MultiStrat, so causing MultiStrat to make such a substantial payment to settle a claim in Highland's bankruptcy necessarily negatively impacted its other non-Debtor investors. Second, in its lawsuit, UBS alleged that MultiStrat wrongfully received a $6 million payment, but MultiStrat paid more than three times this amount to settle allegations against it—a deal that made little economic sense. Finally, as part of the settlement, MultiStrat represented that it was advised by "independent legal counsel" in the negotiation of the settlement, a representation that was patently untrue.[36] In reality, the only legal counsel advising MultiStrat was the Debtor's counsel, who had economic incentives to broker the deal in a manner that benefited the Debtor rather than MultiStrat and its investors.[37] If (as it seems) that representation and/or the terms of the UBS/MultiStrat settlement unfairly impacted MultiStrat's investors, they now have no recourse against the Debtor. The release and exculpation provisions in Highland's Plan do not afford third parties any meaningful recourse, even when they are negatively impacted by misrepresentations of the type contained in the UBS/MultiStrat settlement or when their interests are impaired by fund managers' failure to obtain fairness opinions to resolve conflicts of interest.

Bankruptcy Proceedings Are Used As an End-Run Around Applicable Legal Duties

The UBS deal is but one example of how Highland's bankruptcy proceedings, including the settlement of claims and claims trading that occurred, seemingly provided a safe harbor for violations of multiple state and federal laws. For example, the Investment Advisors Act of 1940 requires registered investment advisors like the Debtor to act as fiduciaries of the funds that they manage. Indeed, the Act imposes an "affirmative duty of 'utmost good faith' and full and fair disclosure of material facts" as part of advisors' duties of loyalty and care to investors. *See* 17 C.F.R. Part 275. Adherence to these duties means that investment advisors cannot buy securities for their account prior to buying them for a client, cannot make trades that may result in higher commissions for the advisor or their investment firm, and cannot trade using material, non-public information. In addition, investment advisors must ensure that they provide investors with full and accurate information regarding the assets managed.

State blue sky laws similarly prohibit firms holding themselves out as investment advisors from breaching these core fiduciary duties to investors. For example, the Texas Securities Act prohibits any registered investment advisor from trading on material, non-public information. The Act also conveys a private right of action to investors harmed by breaches of an investment advisor's fiduciary duties.

As explained above, Highland executed numerous transactions during its bankruptcy that may have violated the Investment Advisors Act and state blue sky laws. Among other things:

- Highland facilitated the purchase of HarbourVest's interest in HCLOF (placing that interest in an SPE designated by the Debtor) without disclosing the true value of the interest and without first offering it to other investors in the fund;

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[36] *See* Doc. 2389 (Order Approving Debtor's Settlement With UBS Securities LLC and UBS AG London Branch) at Ex. 1, §§ 1(b), 11; *see* Appendix, p. A-57.

[37] The Court's order approving the UBS settlement is under appeal in part based on MultiStrat's lack of independent legal counsel.

- Highland concealed the estate's true value from investors in its managed funds, making it impossible for those investors to fairly evaluate the estate or its assets during bankruptcy;

- Highland facilitated the settlement of UBS's claim by causing MultiStrat, a non-Debtor managed entity, to pay $18.5 million to the Debtor, to the detriment of MultiStrat's investors; and

- Highland and its CEO/CRO, Mr. Seery, brokered deals between three of four Creditors' Committee members and Farallon and Stonehill—deals that made no sense unless Farallon and Stonehill were supplied material, non-public information regarding the true value of the estate.

In short, Mr. Seery effectuated trades that seemingly lined his own pockets, in transactions that we believe detrimentally impacted investors in the Debtor's managed funds.

CONCLUSION

The Highland bankruptcy is an example of the abuses that can occur if the Bankruptcy Code and Bankruptcy Rules are not enforced and are allowed to be manipulated, and if federal law enforcement and federal lawmakers abdicate their responsibilities. Bankruptcy should not be a safe haven for perjury, breaches of fiduciary duty, and insider trading, with a plan containing third-party releases and sweeping exculpation sweeping everything under the rug. Nor should it be an avenue for opportunistic venturers to prey upon companies, their investors, and their creditors to the detriment of third-party stakeholders and the bankruptcy estate. My clients and I join Mr. Draper in encouraging your office to investigate, fight, and ultimately eliminate this type of abuse, now and in the future.

Best regards,

MUNSCH HARDT KOPF & HARR, P.C.

By: _____
Davor Rukavina, Esq.

DR:pdm

Appendix

Table of Contents

Relationships Among Debtor's CEO/CRO, the UCC, and Claims Purchasers

*Is there an affiliate relationship between Stonehill, Grosvenor, and Farallon? Has it been adequately disclosed to the Court and investors?

Debtor Protocols [Doc. 466-1]

I. **Definitions**

A. "Court" means the United States Bankruptcy Court for the Northern District of Texas.

B. "NAV" means (A) with respect to an entity that is not a CLO, the value of such entity's assets less the value of its liabilities calculated as of the month end prior to any Transaction; and (B) with respect to a CLO, the CLO's gross assets less expenses calculated as of the quarter end prior to any Transaction.

C. "Non-Discretionary Account" means an account that is managed by the Debtor pursuant to the terms of an agreement providing, among other things, that the ultimate investment discretion does not rest with the Debtor but with the entity whose assets are being managed through the account.

D. "Related Entity" means collectively (A)(i) any non-publicly traded third party in which Mr. Dondero, Mr. Okada, or Mr. Grant Scott, or Mr. John Honis (with respect to Messrs. Okada, Scott and Honis, only to the extent known by the Debtor) has any direct or indirect economic or ownership interest, including as a beneficiary of a trust; (ii) any entity controlled directly or indirectly by Mr. Dondero, Mr. Okada, Mr. Grant Scott, or Mr. John Honis (with respect to Messrs. Okada, Scott and Honis, only to the extent known by the Debtor); (iii) MGM Holdings, Inc.; (iv) any publicly traded company with respect to which the Debtor or any Related Entity has filed a Form 13D or Form 13G; (v) any relative (as defined in Section 101 of the Bankruptcy Code) of Mr. Dondero or Mr. Okada each solely to the extent reasonably knowable by the Debtor; (vi) the Hunter Mountain Investment Trust and Dugaboy Investment Trust; (vii) any entity or person that is an insider of the Debtor under Section 101(31) the Bankruptcy Code, including any "non-statutory" insider; and (viii) to the extent not included in (A)(i)-(vii), any entity included in the listing of related entities in **Schedule B** hereto (the "Related Entities Listing"); and (B) the following Transactions, (x) any intercompany Transactions with certain affiliates referred to in paragraphs 16.a through 16.e of the Debtor's cash management motion [Del. Docket No. 7]; and (y) any Transactions with Charitable DAF Fund, L.P. (provided, however, that additional parties may be added to this subclause (y) with the mutual consent of the Debtor and the Committee, such consent not to be unreasonably withheld).

E. "Stage 1" means the time period from the date of execution of a term sheet incorporating the protocols contained below the ("Term Sheet") by all applicable parties until approval of the Term Sheet by the Court.

F. "Stage 2" means the date from the appointment of a Board of Independent Directors at Strand Advisors, Inc. until 45 days after such appointment, such appointment being effective upon Court approval.

G. "Stage 3" means any date after Stage 2 while there is a Board of Independent Directors at Strand Advisors, Inc.

H. "Transaction" means (i) any purchase, sale, or exchange of assets, (ii) any lending or borrowing of money, including the direct payment of any obligations of another entity, (iii) the satisfaction of any capital call or other contractual

requirement to pay money, including the satisfaction of any redemption requests, (iv) funding of affiliates and (v) the creation of any lien or encumbrance.

I. "Ordinary Course Transaction" means any transaction with any third party which is not a Related Entity and that would otherwise constitute an "ordinary course transaction" under section 363(c) of the Bankruptcy Code.

J. "Notice" means notification or communication in a written format and shall include supporting documents necessary to evaluate the propriety of the proposed transaction.

K. "Specified Entity" means any of the following entities: ACIS CLO 2017-7 Ltd., 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, PamCo Cayman Ltd., Rockwall CDO II Ltd., Rockwall CDO Ltd., Southfork CLO Ltd., Stratford CLO Ltd., Westchester CLO, Ltd., Aberdeen Loan Funding, Ltd., Bristol Bay 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.

II. Transactions involving the (i) assets held directly on the Debtor's balance sheet or the balance sheet of the Debtor's wholly-owned subsidiaries, including Jefferies Prime Account, and (ii) the Highland Select Equity Fund, L.P., Highland Multi Strategy Credit Fund, L.P., and Highland Restoration Capital Partners

A. **Covered Entities**: N/A (See entities above).

B. **Operating Requirements**

1. Ordinary Course Transactions do not require Court approval (All Stages).

a) Stage 1 and Stage 2: ordinary course determined by the CRO.

b) Stage 3: ordinary course determined by the Debtor.

2. Related Entity Transactions

a) Stage 1 and Stage 2: Transactions with Related Entities require prior approval of CRO and five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) Stage 3:

(1) Transactions with Related Entities greater than $1,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

(2) Transactions with Related Entities greater than $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require Court approval, which the Committee agrees may be sought on an expedited basis.

3. Third Party Transactions (All Stages)

a) Except as set forth in (b) and (c) below, Transactions in excess of $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require three business days advance notice to Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) The Debtor may satisfy any redemption requests from entities that are not Related Entities without advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable. The Debtor will provide the Committee with five business days advance notice of any redemption requests made by and payable to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

c) The Debtor may satisfy margin calls and short covers without providing the Committee advance notice if the exigencies do not allow advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable.

C. **Weekly Reporting**: The Debtor will provide the Committee with weekly reports showing all Transactions under this category.

III. Transactions involving entities the Debtor manages and in which the Debtor holds a direct or indirect interest (other than the entities discussed in Section I above)

A. **Covered Entities**: See **Schedule A** hereto. **Schedule A** includes or will include all entities the Debtor manages and in which the Debtor holds a direct or indirect interest (other than the entities discussed in Section I above).[1]

B. **Operating Requirements**

1. Ordinary Course Transactions do not require Court approval (All Stages).

a) Stage 1 and Stage 2: ordinary course determined by the CRO.

b) Stage 3: ordinary course determined by the Debtor.

2. Related Entity Transactions

[1] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

a) Stage 1 and Stage 2: Transactions with Related Entities require prior approval of CRO and five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) Stage 3:

(1) Transactions with Related Entities greater than $1,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

(2) Transactions with Related Entities greater than $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require Court approval, which the Committee agrees may be sought on an expedited basis.

3. Third Party Transactions (All Stages)

a) Except as set forth in (b) and (c) below, Transactions in excess of $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require three business days advance notice to Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) The Debtor may satisfy any redemption requests from entities that are not Related Entities without advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable. The Debtor will provide the Committee with five business days advance notice of any redemption requests made by and payable to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

c) The Debtor may satisfy margin calls and short covers without providing the Committee advance notice if the exigencies do not allow advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable.

C. **Weekly Reporting**: The Debtor will provide the Committee with weekly reports showing all Transactions under this category.

IV. Transactions involving entities that the Debtor manages but in which the Debtor does not hold a direct or indirect interest

A. **Covered Entities**: See **Schedule A** hereto. **Schedule A** includes or will include all entities that the Debtor manages but in which the Debtor does not hold a direct or indirect interest.[2]

B. **Operating Requirements**

1. Ordinary Course Transactions do not require Court approval (All Stages).

   a) Stage 1 and Stage 2: ordinary course determined by the CRO.

   b) Stage 3: ordinary course determined by the Debtor.

2. Related Entity Transactions

   a) Stage 1 and Stage 2: Transactions with Related Entities require prior approval of CRO and five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

   b) Stage 3:

      (1) Transactions with Related Entities greater than $1,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require five business days advance notice to the Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

      (2) Transactions with Related Entities greater than $2,000,000 (either individually or in the aggregate basis on a rolling 30 day period) require Court approval, which the Committee agrees may be sought on an expedited basis.

3. Third Party Transactions (All Stages):

   a) Except (x) as set forth in (b) and (c) below and (y) for any Transaction involving a Specified Entity and the sale or purchase by such Specified Entity of an asset that is not an obligation or security issued or guaranteed by any of the Debtor, a Related Entity or a fund, account, portfolio company owned, controlled or managed by the Debtor or a Related Entity, where such Transaction is effected in compliance with the collateral management agreement to which such Specified Entity is party, any Transaction that decreases the NAV of an entity managed by the Debtor in excess of the greater of (i) 10% of NAV or (ii) $3,000,000 requires five business days advance notice to

[2] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

Committee and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

b) The Debtor may satisfy any redemption requests from entities that are not Related Entities without advance notice so long as the Debtor provides notice of such Transactions to the Committee as soon as reasonably practicable. The Debtor will provide the Committee with five business days advance notice of any redemption requests made by and payable to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

c) The Debtor may take such steps as may be reasonably necessary to winddown any managed entity and make distributions as may be required in connection with such winddown to any required parties. The Debtor will provide the Committee with five business days advance notice of any distributions to be made to a Related Entity, and if the Committee objects, the burden is on the Debtor to seek Court approval, which the Committee agrees may be sought on an expedited basis.

C. **Weekly Reporting**: The Debtor will provide the Committee with weekly reports showing all Transactions under this category. Such reports will include Transactions involving a Specified Entity unless the Debtor is prohibited from doing so under applicable law or regulation or any agreement governing the Debtor's relationship with such Specified Entity.

V. Transactions involving entities that the Debtor does not manage but in which the Debtor holds a direct or indirect interest

A. Covered Entities: See **Schedule A** hereto. **Schedule A** includes or will include all entities that the Debtor does not manage but in which the Debtor holds a direct or indirect interest.[3]

B. Ordinary Course Transactions (All Stages): N/A

C. Operating Requirements: N/A

D. Weekly Reporting: Debtor will provide weekly reports of all cross-held asset Transactions, i.e. Transactions in which the Debtor or a Related Entity also holds a direct or indirect interest.

[3] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

VI. Transactions involving entities that the Debtor does not manage and in which the Debtor does not hold a direct or indirect interest

A. Covered Entities: See **Schedule A** hereto. **Schedule A** includes or will include all entities that the Debtor does not manage and in which the Debtor does not hold a direct or indirect interest.[4]

B. Ordinary Course Transactions (All Stages): N/A

C. Operating Requirements: N/A

D. Weekly Reporting: Debtor will provide weekly reports of all cross-held asset Transactions, i.e. Transactions in which the Debtor or a Related Entity also holds a direct or indirect interest.

VII. Transactions involving Non-Discretionary Accounts

A. Covered Entities: See **Schedule A** hereto. **Schedule A** includes or will include all non-discretionary accounts.[5]

B. Ordinary Course Transactions (All Stages): N/A

C. Operating Requirements: N/A

D. Weekly Reporting: Debtor will provide weekly reports of all cross-held asset Transactions, i.e. Transactions in which the Debtor or a Related Entity also holds a direct or indirect interest.

VIII. Additional Reporting Requirements – All Stages (to the extent applicable)

A. DSI will provide detailed lists and descriptions of internal financial and operational controls being applied on a daily basis for a full understanding by the Committee and its professional advisors three (3) business days in advance of the hearing on the approval of the Term Sheet and details of proposed amendments to said financial and operational controls no later than seven (7) days prior to their implementation.

B. The Debtor will continue to provide weekly budget to actuals reports referencing their 13-week cash flow budget, such reports to be inclusive of all Transactions with Related Entities.

IX. Shared Services

A. The Debtor shall not modify any shared services agreement without approval of the CRO and Independent Directors and seven business days' advance notice to counsel for the Committee.

B. The Debtor may otherwise continue satisfying its obligations under the shared services agreements.

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[4] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

[5] The Debtor is continuing to review the Related Entities List and to determine whether any additional parties or entities should be included on Schedule A. The Debtor will update Schedule A as soon as reasonably practicable to the extent necessary.

X. Representations and Warranties

A. The Debtor represents that the Related Entities Listing included as **Schedule B** attached hereto lists all known persons and entities other than natural persons included in the definitions of Related Entities covered by Section I.D parts A(i)-(vii) above at the time of the execution of the Term Sheet.

B. The Debtor represents that the list included as **Schedule C** attached hereto lists all known natural persons included in the definitions of Related Entities covered by Section I.D parts A(i)-(vii) above at the time of the execution of the Term Sheet.

C. The Debtor represents that, if at any time the Debtor becomes aware of any person or entity, including natural persons, meeting the definition of Related Entities covered by Section I.D parts A(1)-(vii) above that is not included in the Related Entities Listing or Schedule C, the Debtor shall update the Related Entities Listing or Schedule C, as appropriate, to include such entity or person and shall give notice to the Committee thereof.

Schedule A[6]

Entities the Debtor manages and in which the Debtor holds a direct or indirect interest

1. Highland CLO Funding, Ltd. (0.63% Ownership Interest)
2. Dynamic Income Fund (0.26% Ownership Interest)

Entities that the Debtor manages but in which the Debtor does not hold a direct or indirect interest

1. Highland Prometheus Master Fund L.P.
2. NexAnnuity Life Insurance Company
3. PensionDanmark
4. Highland Argentina Regional Opportunity Fund
5. Longhorn A
6. Longhorn B
7. Collateralized Loan Obligations
   a) Rockwall II CDO Ltd.
   b) Grayson CLO Ltd.
   c) Eastland CLO Ltd.
   d) Westchester CLO, Ltd.
   e) Brentwood CLO Ltd.
   f) Greenbriar CLO Ltd.
   g) Highland Park CDO Ltd.
   h) Liberty CLO Ltd.
   i) Gleneagles CLO Ltd.
   j) Stratford CLO Ltd.
   k) Jasper CLO Ltd.
   l) Rockwall DCO Ltd.
   m) Red River CLO Ltd.
   n) Hi V CLO Ltd.
   o) Valhalla CLO Ltd.
   p) Aberdeen CLO Ltd.
   q) South Fork CLO Ltd.
   r) Legacy CLO Ltd.
   s) Pam Capital
   t) Pamco Cayman

Entities that the Debtor does not manage but in which the Debtor holds a direct or indirect interest

1. Highland Opportunistic Credit Fund
2. Highland Healthcare Opportunities Fund f/k/a Highland Long/Short Healthcare Fund
3. NexPoint Real Estate Strategies Fund
4. Highland Merger Arbitrage Fund
5. NexPoint Strategic Opportunities Fund
6. Highland Small Cap Equity Fund
7. Highland Global Allocation Fund

[6] NTD: Schedule A is work in process and may be supplemented or amended.

8. Highland Socially Responsible Equity Fund
9. Highland Income Fund
10. Stonebridge-Highland Healthcare Private Equity Fund ("Korean Fund")
11. SE Multifamily, LLC

Entities that the Debtor does not manage and in which the Debtor does not hold a direct or indirect interest

1. The Dugaboy Investment Trust
2. NexPoint Capital LLC
3. NexPoint Capital, Inc.
4. Highland IBoxx Senior Loan ETF
5. Highland Long/Short Equity Fund
6. Highland Energy MLP Fund
7. Highland Fixed Income Fund
8. Highland Total Return Fund
9. NexPoint Advisors, L.P.
10. Highland Capital Management Services, Inc.
11. Highland Capital Management Fund Advisors L.P.
12. ACIS CLO Management LLC
13. Governance RE Ltd
14. PCMG Trading Partners XXIII LP
15. NexPoint Real Estate Partners, LLC f/k/a HCRE Partners LLC
16. NexPoint Real Estate Advisors II LP
17. NexPoint Healthcare Opportunities Fund
18. NexPoint Securities
19. Highland Diversified Credit Fund
20. BB Votorantim Highland Infrastructure LLC
21. ACIS CLO 2017 Ltd.

Transactions involving Non-Discretionary Accounts

1. NexBank SSB Account
2. Charitable DAF Fund LP

Schedule B

Related Entities Listing (other than natural persons)

Schedule C

1. James Dondero
2. Mark Okada
3. Grant Scott
4. John Honis
5. Nancy Dondero
6. Pamela Okada
7. Thomas Surgent
8. Scott Ellington
9. Frank Waterhouse
10. Lee (Trey) Parker

Seery Jan. 29, 2021 Testimony

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

In Re:	Chapter 11
HIGHLAND CAPITAL	Case No.
MANAGEMENT, LP,	19-34054-SGJ 11
Debtor	

REMOTE DEPOSITION OF JAMES P. SEERY, JR.

January 29, 2021

10:11 a.m. EST

Reported by:
Debra Stevens, RPR-CRR
JOB NO. 189212

January 29, 2021
9:00 a.m. EST

Remote Deposition of JAMES P. SEERY, JR., held via Zoom conference, before Debra Stevens, RPR/CRR and a Notary Public of the State of New York.

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EXAMINATIONS

EXHIBITS

SEERY DYD

INFORMATION/PRODUCTION REQUESTS

MARKED FOR RULING

COURT REPORTER: My name is Debra Stevens, court reporter for TSG Reporting and notary public of the State of New York. Due to the severity of the COVID-19 pandemic and following the practice of social distancing, I will not be in the same room with the witness but will report this deposition remotely and will swear the witness in remotely. If any party has any objection, please so state before we proceed.

Whereupon,

JAMES SEERY,

having been first duly sworn/affirmed, was examined and testified as follows:

EXAMINATION BY
MR. DRAPER:

Q. Mr. Seery, my name is Douglas Draper, representing the Dugaboy Trust. I have series of questions today in connection with the 30(b) Notice that we filed. The first question I have for you, have you seen the Notice of Deposition

J. SEERY

the screen, please?
A. Page what?
Q. I think it is page 174.
A. Of the PDF or of the document?
Q. Of the disclosure statement that was filed. It is up on the screen right now.
COURT REPORTER: Do you intend this as another exhibit for today's deposition?
MR. DRAPER: We'll mark this Exhibit 2.
(So marked for identification as Seery Exhibit 2.)
Q. If you look to the recovery to Class 8 creditors in the November 2020 disclosure statement was a recovery of 87.44 percent?
A. That actually says the percent distribution to general unsecured creditors was 87.44 percent. Yes.
Q. And in the new document that was filed, given to us yesterday, the recovery is 62.5 percent?

J. SEERY

A. It says the percent distribution to general unsecured creditors is 62.14 percent.
Q. Have you communicated the reduced recovery to anybody prior to the date -- to yesterday?
MR. MORRIS: Objection to the form of the question.
A. I believe generally, yes. I don't know if we have a specific number, but generally yes.
Q. And would that be members of the Creditors' Committee who you gave that information to?
A. Yes.
Q. Did you give it to anybody other than members of the Creditors' Committee?
A. Yes.
Q. Who?
A. HarbourVest.
Q. And when was that?
A. Within the last two months.
Q. You did not feel the need to communicate the change in recovery to

J. SEERY

anybody else?
A. I said Mr. Doherty.
Q. In looking at the two elements, and what I have asked you to look at is the claims pool. If you look at the November disclosure statement, if you look down Class 8, unsecured claims?
A. Yes.
Q. You have 176,000 roughly?
A. Million.
Q. 176 million. I am sorry. And the number in the new document is 313 million?
A. Correct.
Q. What accounts for the difference?
A. An increase in claims.
Q. When did those increases occur? Were they yesterday? A month ago? Two months ago?
A. Over the last couple months.
Q. So in fact over the last couple months you knew in fact that the recovery in the November disclosure statement was

J. SEERY

not accurate?
A. Yes. We secretly disclosed it to the Bankruptcy Court in open court hearings.
Q. But you never did bother to calculate the reduced recovery; you just increased --
(Reporter interruption.)
Q. You just advised as to the increased claims pool. Correct?
MR. MORRIS: Objection to the form of the question.
A. I don't understand your question.
Q. What I am trying to get at is, as you increase the claims pool, the recovery reduces. Correct?
A. No. That is not how a fraction works.
Q. Well, if the denominator increases, doesn't the recovery ultimately decrease if --
A. No.
Q. -- if the numerator stays the

J. SEERY

were amended without consideration a few years ago. So, for our purposes we didn't make the assumption, which I am sure will happen, a fraudulent conveyance claim on those notes, that a fraudulent conveyance action would be brought. We just assumed that we'd have to discount the notes heavily to sell them because nobody would respect the ability of the counterparties to fairly pay.

Q. And the same discount was applied in the liquidation analysis to those notes?

A. Yes.

Q. Now --

A. The difference -- there would be a difference, though, because they would pay for a while because they wouldn't want to accelerate them. So there would be some collections on the notes for P and I.

Q. But in fact as of January you have accelerated those notes?

A. Just one of them, I believe.

Q. Which note was that?

J. SEERY

A. NexPoint, I said. They defaulted on the note and we accelerated it.

Q. So there is no need to file a fraudulent conveyance suit with respect to that note. Correct, Mr. Seery?

MR. MORRIS: Objection to the form of the question.

A. Disagree. Since it was likely intentional fraud, there may be other recoveries on it. But to collect on the note, no.

Q. My question was with respect to that note. Since you have accelerated it, you don't need to deal with the issue of when it's due?

MR. MORRIS: Objection to the form of the question.

A. That wasn't your question. But to that question, yes, I don't need to deal with when it's due.

Q. Let me go over certain assets. I am not going to ask you for the valuation of them but I am going to ask

J. SEERY

you whether they are included in the asset portion of your $257 million number, all right? Mr. Morris didn't want me to go into specific asset value, and I don't intend to do that.

The first question I have for you is, the equity in Trustway Highland Holdings, is that included in the $257 million number?

A. There is no such entity.

Q. Then I will do it in a different way. In connection with the sale of the hard assets, what assets are included in there specifically?

A. Off the top of my head -- it is all of the assets, but it includes Trustway Holdings and all the value that flows up from Trustway Holdings. It includes Targa and all the value that flows up from Targa. It includes CCS Medical and all the value that would flow to the Debtor from CCS Medical. It includes Cornerstone and all the value that would flow from Cornerstone. It

J. SEERY

includes any other securities and all the value that would flow from Cornerstone. It includes HCLOF and all the value that would flow up from HCLOF. It includes Korea and all the value that would flow up from Korea.

There may be others off the top of my head. I don't recall them. I don't have a list in front of me.

Q. Now, with respect to those assets, have you started the sale process of those assets?

A. No. Well, each asset is different. So, the answer is, with respect to any securities, we do seek to sell those regularly and we do seek to monetize those assets where we can depending on whether there is a restriction or not and whether there is liquidity in the market.

With respect to the PE assets or the companies I described -- Targa, CCS, Cornerstone, JHT -- we have not -- Trustway. We have not sought to sell

J. SEERY

A. I don't recall the specific limitation on the trust. But if there was a reason to hold on to the asset, if there is a limitation, we can seek an extension.

Q. Let me ask a question. With respect to these businesses, the Debtor merely owns an equity interest in them. Correct?

A. Which business?

Q. The ones you have identified as operating businesses earlier?

A. It depends on the business.

Q. Well, let me -- again, let's try to be specific. With respect to SSP, it was your position that you did not need to get court approval for the sale. Correct?

A. That's correct.

Q. Which one of the operating businesses that are here, that you have identified, do you need court authority for a sale?

MR. MORRIS: Objection to the form of the question.

A. Each of the businesses will be a

J. SEERY

different analysis that we'll undertake with bankruptcy counsel to determine what we would need depending on what is going to happen and what the restrictions either under the code are or under the plan.

Q. Is there anything that would stop you from selling these businesses if the Chapter 11 went on for a year or two years?

MR. MORRIS: Objection to form of the question.

A. Is there anything that would stop me? We'd have to follow the strictures of the code and the protocols, but there would be no prohibition -- let me rephrase, please.

There would be no prohibition that I am aware of.

Q. Now, in connection with your differential between the liquidation of what I will call the operating businesses under the liquidation analysis and the plan analysis, who arrived at the discount

J. SEERY

or determined the discount that has been placed between the two, plan analysis versus liquidation analysis?

MR. MORRIS: Objection to form of the question.

A. To which document are you referring?

Q. Both the June -- the January and the November analysis has a different estimated proceeds for monetization for the plan analysis versus the liquidation analysis. Do you see that?

A. Yes.

Q. And there is a note under there. "Assumes Chapter 7 trustee will not be able to achieve the same sales proceeds as Claimant trustee."

A. I see that, yes.

Q. Do you see that note?

A. Yes.

Q. Who arrived at that discount?

A. I did.

Q. What percentage did you use?

A. Depended on the asset. Each one

J. SEERY

is different.

Q. Is the discount a function of capability of a trustee versus your capability, or is the discount a function of timing?

MR. MORRIS: Objection to form.

A. It could be a combination.

Q. So, let's -- let me walk through this. Your plan analysis has an assumption that everything is sold by December 2022. Correct?

A. Correct.

Q. And the valuations that you have used here for the monetization assume a sale between -- a sale prior to December of 2022. Correct?

A. Sorry. I don't quite understand your question.

Q. The 257 number, and then let's take out the notes. Let's use the 210 number.

MR. MORRIS: Can we put the document back on the screen, please? Sorry, Douglas, to interrupt, but it

J. SEERY

would be helpful.

MR. DRAPER: That is fine, John.

(Pause.)

MR. MORRIS: Thank you very much.

Q. Mr. Seery, do you see the 257?

A. In the one from yesterday?

Q. Yes.

A. Second line, 257,941. Yes.

Q. That assumes a monetization of all assets by December of 2022?

A. Correct.

Q. And so everything has been sold by that time; correct?

A. Yes.

Q. So, what I am trying to get at is, there is both the capability between you and a trustee, and then the second issue is timing. So, what discount was put on for timing, Mr. Seery, between when a trustee would sell it versus when you would sell it?

MR. MORRIS: Objection.

Q. What is the percentage you

J. SEERY

applied?

A. Each of the assets is different.

Q. Is there a general discount that you used?

A. Not a general discount, no. We looked at each individual asset and went through and made an assessment.

Q. Did you apply a discount for your capability versus the capability of a trustee?

A. No.

Q. So a trustee would be as capable as you are in monetizing these assets?

MR. MORRIS: Objection to the form of the question.

Q. Excuse me? The answer is?

A. The answer is maybe.

Q. Couldn't a trustee hire somebody as capable as you are?

MR. MORRIS: Objection to the form of the question.

A. Perhaps.

Q. Sir, that is a yes or no question. Could the trustee hire somebody

J. SEERY

as capable as you are?

MR. MORRIS: Objection to the form of the question.

A. I don't know.

Q. Is there anybody as capable as you are?

MR. MORRIS: Objection to the form of the question.

A. Certainly.

Q. And they could be hired. Correct?

A. Perhaps. I don't know.

Q. And if you go back to the November 2020 liquidation analysis versus plan analysis, it is also the same note about that a trustee would bring less, and there is the same sort of discount between the estimated proceeds under the plan and under the liquidation analysis.

MR. MORRIS: If that is a question, I object.

Q. Is that correct, Mr. Seery, looking at the document?

A. There are discounts, yes.

J. SEERY

Q. Again, the discounts are applied for timing and capability?

A. Yes.

Q. Now, in looking at the November plan analysis number of $190 million and the January number of $257 million, what accounts for the increase between the two dates? What assets specifically?

A. There are a number of assets. Firstly, the HCLOF assets are added.

Q. How much are those?

A. Approximately 22 and a half million dollars.

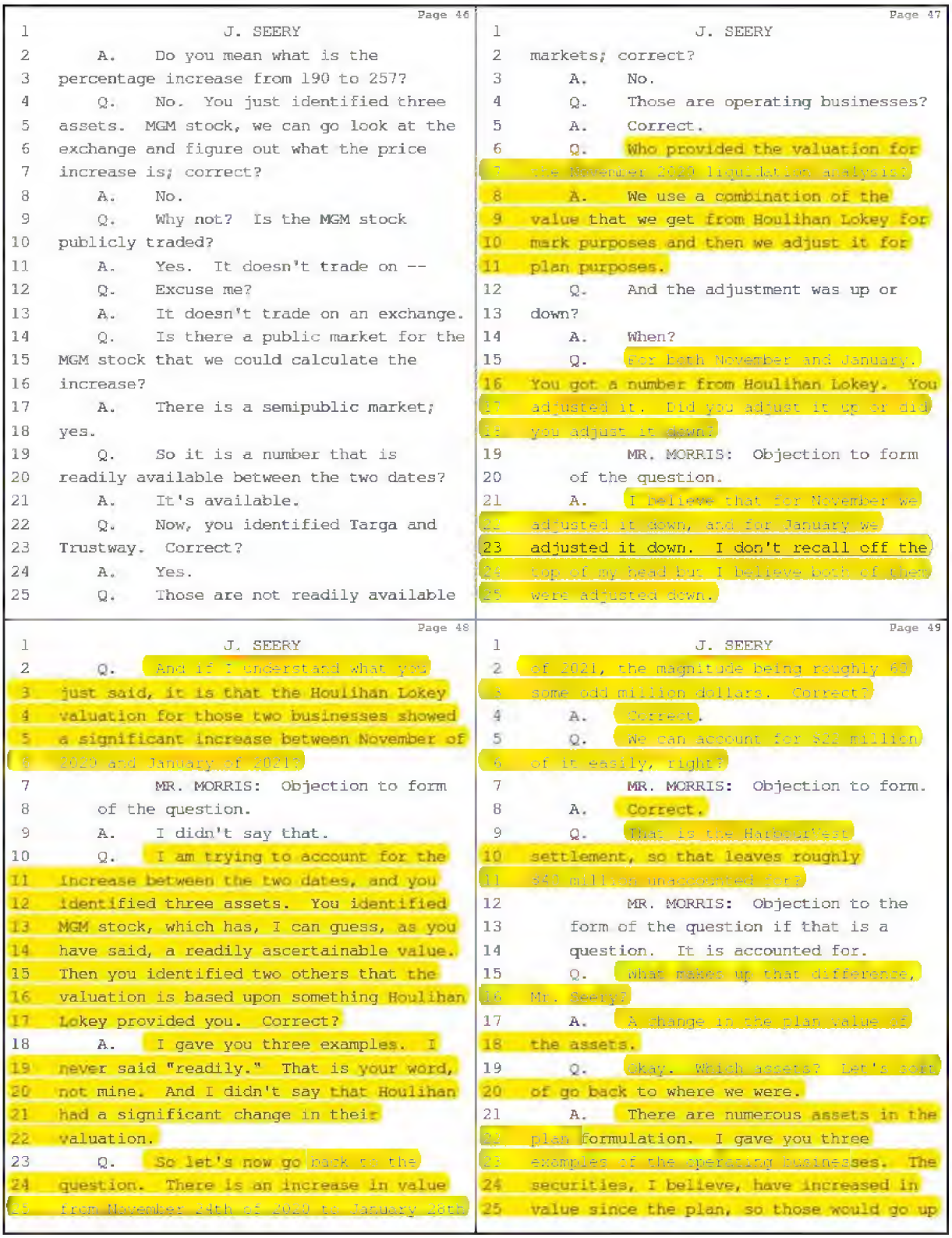
Q. Okay.

A. Secondly, there is a significant increase in the value of certain of the assets over this time period.

Q. Which assets, Mr. Seery?

A. There are a number. They include MGM stock, they include Trustway, they include Targa.

Q. And what is the percentage increase from November to January, November of 2020 to January of 2021?



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J. SEERY

A. Do you mean what is the percentage increase from 190 to 257?
Q. No. You just identified three assets. MGM stock, we can go look at the exchange and figure out what the price increase is; correct?
A. No.
Q. Why not? Is the MGM stock publicly traded?
A. Yes. It doesn't trade on --
Q. Excuse me?
A. It doesn't trade on an exchange.
Q. Is there a public market for the MGM stock that we could calculate the increase?
A. There is a semipublic market; yes.
Q. So it is a number that is readily available between the two dates?
A. It's available.
Q. Now, you identified Targa and Trustway. Correct?
A. Yes.
Q. Those are not readily available

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J. SEERY

markets; correct?
A. No.
Q. Those are operating businesses?
A. Correct.
Q. Who provided the valuation for the November 2020 liquidation analysis?
A. We use a combination of the value that we get from Houlihan Lokey for mark purposes and then we adjust it for plan purposes.
Q. And the adjustment was up or down?
A. When?
Q. For both November and January. You got a number from Houlihan Lokey. You adjusted it. Did you adjust it up or did you adjust it down?
MR. MORRIS: Objection to form of the question.
A. I believe that for November we adjusted it down, and for January we adjusted it down. I don't recall off the top of my head but I believe both of them were adjusted down.

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J. SEERY

Q. And if I understand what you just said, it is that the Houlihan Lokey valuation for those two businesses showed a significant increase between November of 2020 and January of 2021?
MR. MORRIS: Objection to form of the question.
A. I didn't say that.
Q. I am trying to account for the increase between the two dates, and you identified three assets. You identified MGM stock, which has, I can guess, as you have said, a readily ascertainable value. Then you identified two others that the valuation is based upon something Houlihan Lokey provided you. Correct?
A. I gave you three examples. I never said "readily." That is your word, not mine. And I didn't say that Houlihan had a significant change in their valuation.
Q. So let's now go back to the question. There is an increase in value from November 24th of 2020 to January 28th

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J. SEERY

of 2021, the magnitude being roughly 60 some odd million dollars. Correct?
A. Correct.
Q. We can account for 522 million of it easily, right?
MR. MORRIS: Objection to form.
A. Correct.
Q. That is the Harbourvest settlement, so that leaves roughly 340 million unaccounted for?
MR. MORRIS: Objection to the form of the question if that is a question. It is accounted for.
Q. What makes up that difference, Mr. Seery?
A. A change in the plan value of the assets.
Q. Okay. Which assets? Let's sort of go back to where we were.
A. There are numerous assets in the plan formulation. I gave you three examples of the operating businesses. The securities, I believe, have increased in value since the plan, so those would go up

J. SEERY

for one. On the operating businesses, we looked at each of them and made an assessment based upon where the market is and what we believe the values are, and we have moved those valuations.

Q. Let me look at some numbers again. In the liquidation analysis in November of 2020, the liquidation value is $149 million. Correct?

A. Yes.

Q. And in the liquidation analysis in January of 2021, you have $191 million?

A. Yes.

Q. You see that number. So there is $51 million there, right?

A. No.

Q. What is the difference between 191 and -- sorry. My math may be a little off. What is the difference between the two numbers, Mr. Seery?

A. Your math is off.

Q. Sorry. It is 41 million?

A. Correct.

Q. $22 million of that is the

J. SEERY

HarbourVest settlement, right?

A. I believe that's correct.

Q. Is that fair, Mr. Seery?

A. I believe that is correct, yes.

Q. And part of that differential are publicly traded or ascertainable securities. Correct?

A. Yes.

Q. And basically you can get, or under the plan analysis or trustee analysis, if it is a marketable security or where there is a market, the liquidation number should be the same for both. Is that fair?

A. No.

Q. And why not?

A. We might have a different price target for a particular security than the current trading value.

Q. I understand that, but I mean that is based upon the capability of the person making the decision as to when to sell. Correct?

MR. MORRIS: Objection to form

J. SEERY

of the question.

Q. Mr. Seery, yes or no?

A. I said no.

Q. What is that based on, then?

A. The person's ability to assess the market and timing.

Q. Okay. And again, couldn't a trustee hire somebody as capable as you to both, A, assess the market and, B, make a determination as to when to sell?

MR. MORRIS: Objection to form of the question.

A. I suppose a trustee could.

Q. And there are better people or people equally or better than you at assessing a market. Correct?

A. Yes.

MR. MORRIS: Objection to form of the question.

Q. So, again, let's go back to that. We have accounted for, out of $41 million where the liquidation analysis increases between the two dates, $22 million of it. That leaves

J. SEERY

$18 million. How much of that is publicly traded or ascertainable assets versus operating businesses?

A. I don't know off the top of my head the percentages.

Q. All right. The same question for the plan analysis where you have the differential between the November number and the January number. How much of it is marketable securities versus an operating business?

A. I don't recall off the top of my head.

MR. DRAPER: Let me take a few-minute break. Can we take a ten-minute break here?

THE WITNESS: Sure.

(Recess.)

BY MR. DRAPER:

Q. Mr. Seery, what I am going to show you and what I would ask you to look at is in the note E, in the statement of assumptions for the November 2020 disclosure statement. It discusses fixed

Sale of Assets of Affiliates or Controlled Entities

Asset	Sales Price
Structural Steel Products	$50 million
Life Settlements	$35 million
OmniMax	$50 million
Targa	$37 million

- These assets were sold over the contemporaneous objections of James Dondero, who was the Portfolio Manager and key-man on the funds.
- Mr. Seery admitted[1] that he must comply with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Protocols for the sale of major assets of the estate. We believe that a competitive bid process and court approval should have been required for the sale of each of these assets (as was done for the sale of the building at 2817 Maple Ave. [a $9 million asset] and the sale of the interest in PetroCap [a $3 million asset]).

[1] *See* Mr. Seery's Jan. 29, 2021 deposition testimony, Appendix p. A-20.

20 Largest Unsecured Creditors

Name of Claimant	Allowed Class 8	Allowed Class 9
Redeemer Committee of the Highland Crusader Fund	$136,696,610.00	
UBS AG, London Branch and UBS Securities LLC	$65,000,000.00	$60,000,000
HarbourVest entities	$45,000,000.00	$35,000,000
Acis Capital Management, L.P. and Acis Capital Management GP, LLC	$23,000,000.00	
CLO Holdco Ltd	$11,340,751.26	
Patrick Daugherty	$8,250,000.00	$2,750,000 (+$750,000 cash payment on Effective Date of Plan)
Todd Travers (Claim based on unpaid bonus due for Feb 2009)	$2,618,480.48	
McKool Smith PC	$2,163,976.00	
Davis Deadman (Claim based on unpaid bonus due for Feb 2009)	$1,749,836.44	
Jack Yang (Claim based on unpaid bonus due for Feb 2009)	$1,731,813.00	
Paul Kauffman (Claim based on unpaid bonus due for Feb 2009)	$1,715,369.73	
Kurtis Plumer (Claim based on unpaid bonus due for Feb 2009)	$1,470,219.80	
Foley Gardere	$1,446,136.66	
DLA Piper	$1,318,730.36	
Brad Borud (Claim based on unpaid bonus due for Feb 2009)	$1,252,250.00	
Stinson LLP (successor to Lackey Hershman LLP)	$895,714.90	
Meta-E Discovery LLC	$779,969.87	
Andrews Kurth LLP	$677,075.65	
Markit WSO Corp	$572,874.53	
Duff & Phelps, LLC	$449,285.00	
Lynn Pinker Cox Hurst	$436,538.06	
Joshua and Jennifer Terry	$425,000.00	
Joshua Terry	$355,000.00	
CPCM LLC (bought claims of certain former HCMLP employees)	Several million	
TOTAL:	**$309,345,631.74**	**$95,000,000**

Timeline of Relevant Events

Date	Description
10/29/2019	UCC appointed; members agree to fiduciary duties and not sell claims.
9/23/2020	Acis 9019 filed
9/23/2020	Redeemer 9019 filed
10/28/2020	Redeemer settlement approved
10/28/2020	Acis settlement approved
12/24/2020	HarbourVest 9019 filed
1/14/2021	Motion to appoint examiner filed
1/21/2021	HarbourVest settlement approved; transferred its interest in HCLOF to HCMLP assignee, valued at $22 million per Seery
1/28/2021	Debtor discloses that it has reached an agreement in principle with UBS
2/3/2021	Failure to comply with Rule 2015.3 raised
2/24/2021	Plan confirmed
3/9/2021	Farallon Cap. Mgmt. forms "Muck Holdings LLC" in Delaware
3/15/2021	Debtor files Jan. '21 monthly operating report indicating assets of $364 million, liabilities of $335 million (**inclusive of $267,607,000 in Class 8 claims, but exclusive of any Class 9 claims**), the last publicly filed summary of the Debtor's assets. The MOR states that no Class 9 distributions are anticipated at this time and Class 9 recoveries are not expected.
3/31/2021	UBS files friendly suit against HCMLP under seal
4/8/2021	Stonehill Cap. Mgmt. forms "Jessup Holdings LLC" in Delaware
4/15/2021	UBS 9019 filed
4/16/2021	Notice of Transfer of Claim - Acis to Muck (Farallon Capital)
4/29/2021	Motion to Compel Compliance with Rule 2015.3 Filed
4/30/2021	Notice of Transfer of Claim - Redeemer to Jessup (Stonehill Capital)
4/30/2021	Notice of Transfer of Claim - HarbourVest to Muck (Farallon Capital)
4/30/2021	Sale of Redeemer claim to Jessup (Stonehill Capital) "consummated"
5/27/2021	UBS settlement approved; included $18.5 million in cash from Multi-Strat
6/14/2021	UBS dismisses appeal of Redeemer award
8/9/2021	Notice of Transfer of Claim - UBS to Jessup (Stonehill Capital)
8/9/2021	Notice of Transfer of Claim - UBS to Muck (Farallon Capital)

Critical unknown dates and information:

- The date on which Muck entered into agreements with HarbourVest and Acis to acquire their claims and what negative and affirmative covenants those agreements contained.
- The date on which Jessup entered into an agreement with the Redeemer Committee and the Crusader Fund to acquire their claim and what negative and affirmative covenants the agreement contained.
- The date on which the sales actually closed versus the date on which notice of the transfer was filed (i.e., did UCC members continue to serve on the committee after they had sold their claims).

Debtor's October 15, 2020 Liquidation Analysis [Doc. 1173-1]

	Plan Analysis		**Liquidation Analysis**
Estimated cash on hand at 12/31/2020	$26,496		$26,496
Estimated proceeds from monetization of assets [1][2]	198,662		154,618
Estimated expenses through final distribution [1][3]	(29,864)		(33,804)
Total estimated $ available for distribution	**195,294**		**147,309**
Less: Claims paid in full			
Administrative claims [4]	(10,533)		(10,533)
Priority Tax/Settled Amount [10]	(1,237)		(1,237)
Class 1 – Jefferies Secured Claim	-		-
Class 2 – Frontier Secured Claim [5]	(5,560)		(5,560)
Class 3 – Priority non-tax claims [10]	(16)		(16)
Class 4 – Retained employee claims	-		-
Class 5 – Convenience claims [6][10]	(13,455)		-
Class 6 – Unpaid employee claims [7]	(2,955)		-
Subtotal	(33,756)		(17,346)
Estimated amount remaining for distribution to general unsecured claims	161,538		129,962
Class 5 – Convenience claims [8]	-		17,940
Class 6 – Unpaid employee claims	-		3,940
Class 7 – General unsecured claims [9]	174,609		174,609
Subtotal	174,609		196,489
% Distribution to general unsecured claims	92.51%		66.14%
Estimated amount remaining for distribution	-		-
Class 8 – Subordinated claims	*no distribution*		*no distribution*
Class 9 – Class B/C limited partnership interests	*no distribution*		*no distribution*
Class 10 – Class A limited partnership interests	*no distribution*		*no distribution*

Notable notations/disclosures in the Oct. 15, 2020 liquidation analysis include:

- Note [9]: General unsecured claims estimated using $0 allowed claims for HarbourVest and UBS. Ultimately, those two creditors were awarded $105 million of general unsecured claims and $95 million of subordinated claims.

Updated Liquidation Analysis (Feb. 1, 2021)[2]

	Plan Analysis		Liquidation Analysis
Estimated cash on hand at 1/31/2020 [sic]	$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	**222,658**		**174,178**
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	**(27,793)**		**(17,514)**
Estimated amount remaining for distribution to general unsecured claims	194,865		157,235
% Distribution to Class 7 (Class 7 claims including in Class 8 in Liquidation scenario)	85.00%		0.00%
Class 8 – General unsecured claims [8] [10]	273,219		286,100
Subtotal	273,219		286,100
% Distribution to general unsecured claims	71.32%		54.96%
Estimated amount remaining for distribution	-		-
Class 9 – Subordinated claims	*no distribution*		*no distribution*
Class 10 – Class B/C limited partnership interests	*no distribution*		*no distribution*
Class 11 – Class A limited partnership interests	*no distribution*		*no distribution*

Notable notations/disclosures in the Feb. 1, 2021 liquidation analysis include:

- 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

[2] Doc. 1895.

Summary of Debtor's January 31, 2021 Monthly Operating Report[3]

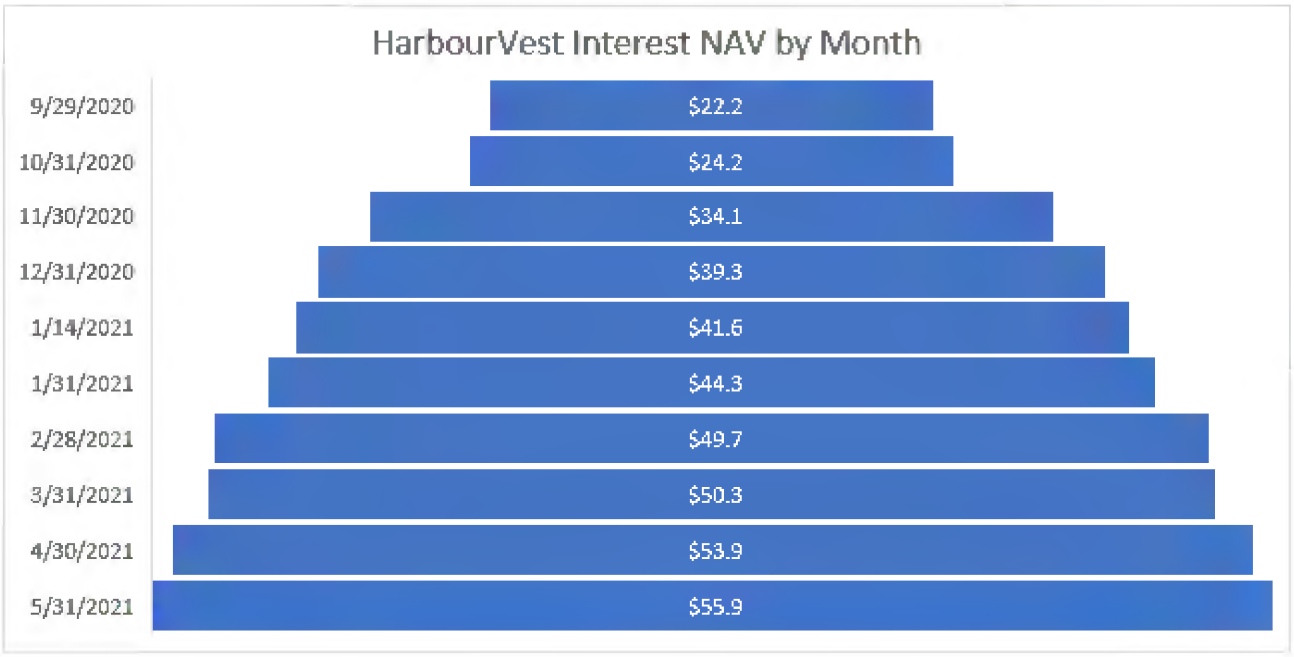
	10/15/2019	12/31/2020	1/31/2021
Assets			
Cash and cash equivalents	$2,529,000	$12,651,000	$10,651,000
Investments, at fair value	$232,620,000	$109,211,000	$142,976,000
Equity method investees	$161,819,000	$103,174,000	$105,293,000
mgmt and incentive fee receivable	$2,579,000	$2,461,000	$2,857,000
fixed assets, net	$3,754,000	$2,594,000	$2,518,000
due from affiliates	$151,901,000	$152,449,000	$152,538,000
reserve against notices receivable		($61,039,000)	($61,167,000)
other assets	$11,311,000	$8,258,000	$8,651,000
Total Assets	**$566,513,000**	**$329,759,000**	**$364,317,000**
Liabilities and Partners' Capital			
pre-petition accounts payable	$1,176,000	$1,077,000	$1,077,000
post-petition accounts payable		$900,000	$3,010,000
Secured debt			
Frontier	$5,195,000	$5,195,000	$5,195,000
Jefferies	$30,328,000	$0	$0
Accrued expenses and other liabilities	$59,203,000	$60,446,000	$49,445,000
Accrued re-organization related fees		$5,795,000	$8,944,000
Class 8 general unsecured claims	$73,997,000	$73,997,000	$267,607,000
Partners' Capital	$396,614,000	$182,347,000	$29,039,000
Total liabilities and partners' capital	**$566,513,000**	**$329,757,000**	**$364,317,000**

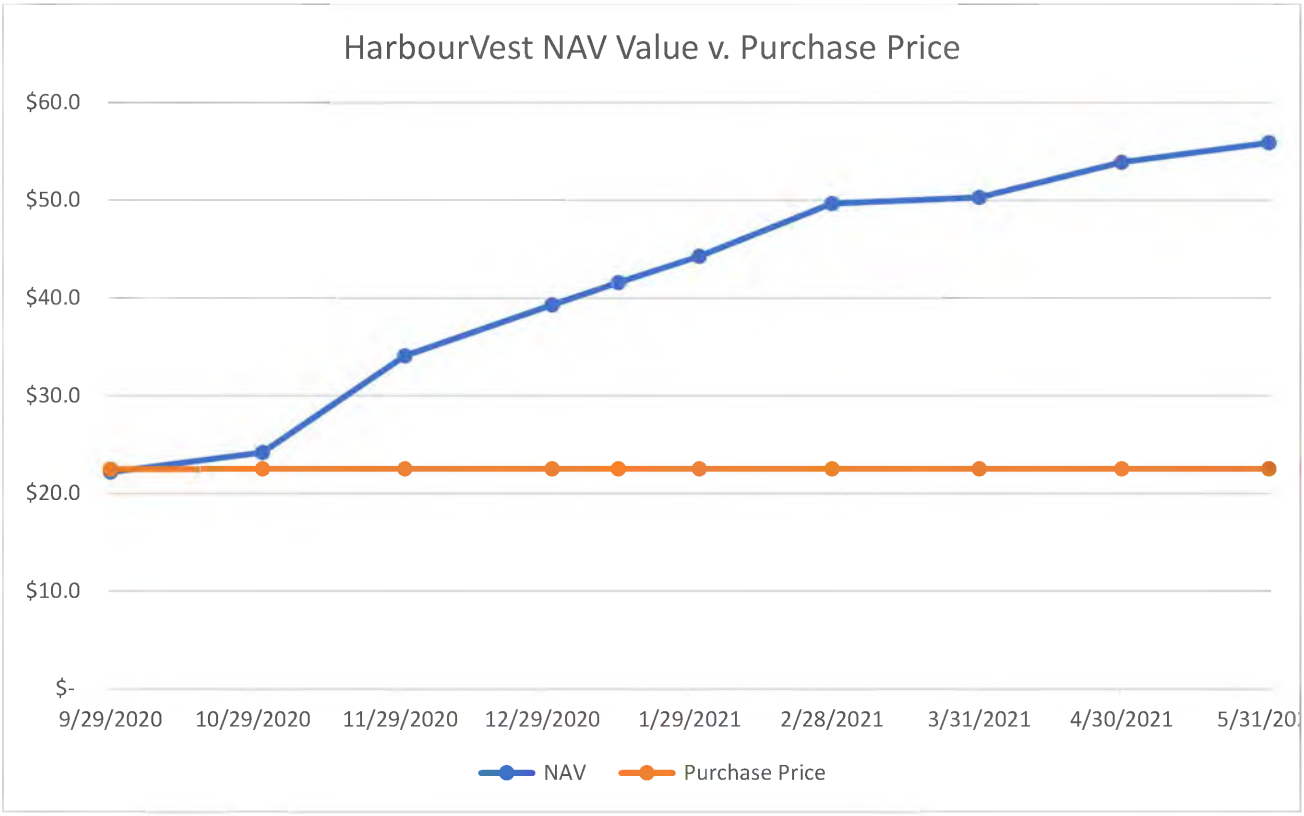
Notable notations/disclosures in the Jan. 31, 2021 MOR include:

- Class 8 claims totaled $267 million, a jump from $74 million in the prior month's MOR
- The MOR stated that no Class 9 recovery was expected, which was based on the then existing $267 million in Class 8 Claims.
- Currently, there are roughly $310 million of Allowed Class 8 Claims.

[3] [Doc. 2030] Filed on March 15, 2021, the last publicly disclosed information regarding the value of assets in the estate.

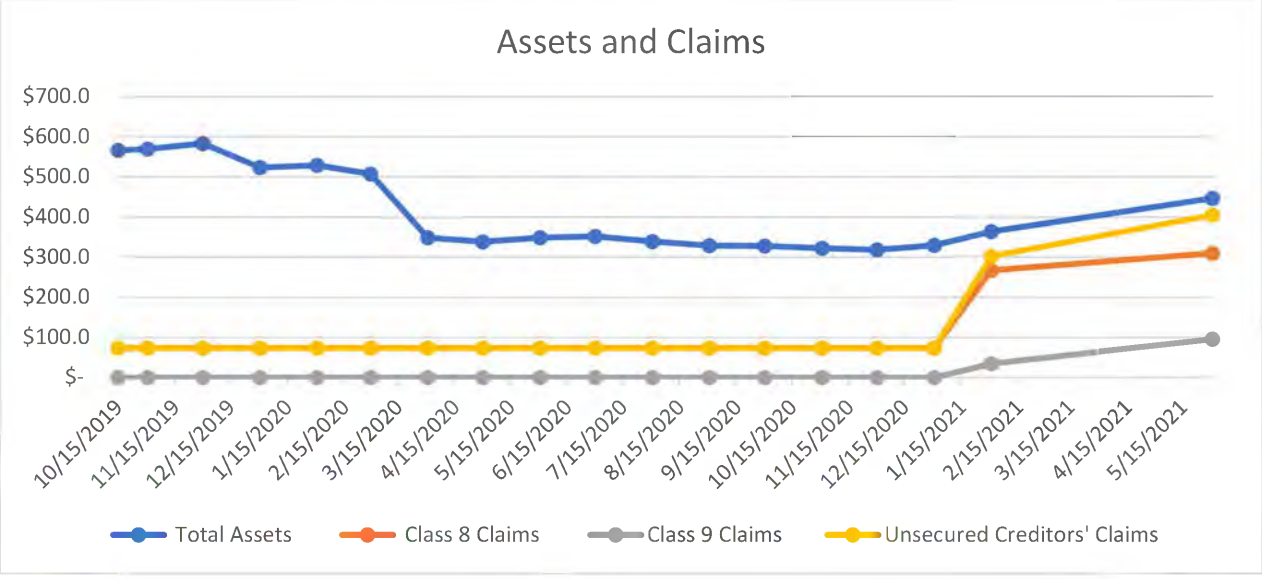
Value of HarbourVest Claim





Estate Value as of August 1, 2021 (in millions)[4]

Asset	Low	High
Cash as of 6/30/2021	$17.9	$17.9
Targa Sale	$37.0	$37.0
8/1 CLO Flows	$10.0	$10.0
Uchi Bldg. Sale	$9.0	$9.0
Siepe Sale	$3.5	$3.5
PetroCap Sale	$3.2	$3.2
HarbourVest trapped cash	$25.0	$25.0
Total Cash	**$105.6**	**$105.6**
Trussway	$180.0	$180.0
Cornerstone (125mm; 16%)	$18.0	$18.0
HarbourVest CLOs	$40.0	$40.0
CCS Medical (in CLOs and Highland Restoration)	$20.0	$20.0
MGM (direct ownership)	$32.0	$32.0
Multi-Strat (45% of 100mm; MGM; CCS)	$45.0	$45.0
Korea Fund	$18.0	$18.0
Celtic (in Credit-Strat)	$12.0	$40.0
SE Multifamily	$0.0	$20.0
Affiliate Notes	$0.0	$70.0
Other	$2.0	$10.0
TOTAL	**$472.6**	**$598.6**



[4] Values are based upon historical knowledge of the Debtor's assets (including cross-holdings) and publicly filed information.

HarbourVest Motion to Approve Settlement [Doc. 1625]

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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.	§	

DEBTOR'S MOTION FOR ENTRY OF AN ORDER APPROVING SETTLEMENT WITH HARBOURVEST (CLAIM NOS. 143, 147, 149, 150, 153, 154) AND AUTHORIZING ACTIONS CONSISTENT THEREWITH

TO THE HONORABLE STACEY G. C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE:

[1] The last four digits of the Debtor's taxpayer identification number are 6725. The headquarters and service address for the Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

Highland Capital Management, L.P., the above-captioned debtor and debtor-in-possession ("Highland" or the "Debtor"), files this motion (the "Motion") for entry of an order, substantially in the form attached hereto as **Exhibit A**, pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), approving a settlement agreement (the "Settlement Agreement"),[2] a copy of which is attached as Exhibit 1 to the *Declaration of John A. Morris in Support of the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* being filed simultaneously with this Motion ("Morris Dec."), that, among other things, fully and finally resolves the proofs of claim filed by HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P. (collectively, "HarbourVest"). In support of this Motion, the Debtor represents as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought herein are sections 105(a) and 363 of title 11 of the United States Code (the "Bankruptcy Code"), and Rule 9019 of the Bankruptcy Rules.

[2] All capitalized terms used but not defined herein shall have the meanings given to them in the Settlement Agreement.

RELEVANT BACKGROUND

A. Procedural Background

3. 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").

4. On October 29, 2019, the official committee of unsecured creditors (the "Committee") was appointed by the U.S. Trustee in the Delaware Court.

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

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

7. In connection with the Settlement Order, an independent board of directors was constituted at the Debtor's general partner, Strand Advisors, Inc., and certain operating protocols were instituted.

8. On July 16, 2020, this Court entered an order appointing James P. Seery, Jr., as the Debtor's chief executive officer and chief restructuring officer [Docket No. 854].

9. 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.

[3] All docket numbers refer to the docket maintained by this Court.

B. Overview of HarbourVest's Claims

10. HarbourVest's claims against the Debtor's estate arise from its $80 million investment in Highland CLO Funding, f/k/a Acis Loan Funding, Ltd. ("HCLOF"), pursuant to which HarbourVest obtained a 49 percent interest in HCLOF (the "Investment").

11. In brief, HarbourVest contends that it was fraudulently induced into entering into the Investment based on the Debtor's misrepresentations and omissions concerning certain material facts, including that the Debtor: (1) failed to disclose that it never intended to pay an arbitration award obtained by a former portfolio manager, (2) failed to disclose that it engaged in a series of fraudulent transfers for the purpose of preventing the former portfolio manager from collecting on his arbitration award and misrepresented the reasons changing the portfolio manager for HCLOF immediately prior to the Investment, (3) indicated that the dispute with the former portfolio manager would not impact investment activities, and (4) expressed confidence in the ability of HCLOF to reset or redeem the collateralized loan obligations ("CLOs") under its control.

12. HarbourVest seeks to rescind its Investment and claims damages in excess of $300 million based on theories of fraud, fraudulent inducement, fraudulent concealment, fraudulent misrepresentation, negligent misrepresentation, and breach of fiduciary duty (under Guernsey law), and on alleged violations of state securities laws and the Racketeer Influenced Corrupt Organization Act ("RICO").

13. HarbourVest's allegations are summarized below.[4]

[4] Solely for purposes of this Motion, and not for any other reason, the facts set forth herein are adopted largely from the *HarbourVest Response to Debtor's First Omnibus Objection to Certain (A) Duplicate Claims; (B) Overstated Claims; (C) Late-Filed Claims; (D) Satisfied Claims; (E) No-Liability Claims; and (F) Insufficient-Documentation Claims* [Docket No. 1057] (the "Response").

C. Summary of HarbourVest's Factual Allegations

14. At the time HarbourVest made its Investment, the Debtor was embroiled in an arbitration against Joshua Terry ("Mr. Terry"), a former employee of the Debtor and limited partner of Acis Capital Management, L.P. ("Acis LP"). Through Acis LP, Mr. Terry managed Highland's CLO business, including CLO-related investments held by Acis Loan Funding, Ltd. ("Acis Funding").

15. The litigation between Mr. Terry and the Debtor began in 2016, after the Debtor terminated Mr. Terry and commenced an action against him in Texas state court. Mr. Terry asserted counterclaims for wrongful termination and for the wrongful taking of his ownership interest in Acis LP and subsequently had certain claims referred to arbitration where he obtained an award of approximately $8 million (the "Arbitration Award") on October 20, 2017.

16. HarbourVest alleges that the Debtor responded to the Arbitration Award by engaging in a series of fraudulent transfers and corporate restructurings, the true purposes of which were fraudulently concealed from HarbourVest.

17. For example, according to HarbourVest, the Debtor changed the name of the target fund from Acis Funding to "Highland CLO Funding, Ltd." ("HCLOF") and "swapped out" Acis LP for Highland HCF Advisor, Ltd. as portfolio manager (the "Structural Changes"). The Debtor allegedly told HarbourVest that it made these changes because of the "reputational harm" to Acis LP resulting from the Arbitration Award. The Debtor further told HarbourVest that in lieu of redemptions, resetting the CLOs was necessary, and that it would be easier to reset them under the "Highland" CLO brand instead of the Acis CLO brand.

18. In addition, HarbourVest also alleges that the Debtor had no intention of allowing Mr. Terry to collect on his Arbitration Award, and orchestrated a scheme to "denude"

Acis of assets by fraudulently transferring virtually all of its assets and attempting to transfer its profitable portfolio management contracts to non-Acis, Debtor-related entities.

19. Unaware of the fraudulent transfers or the true purposes of the Structural Changes, and in reliance on representations made by the Debtor, HarbourVest closed on its Investment in HCLOF on November 15, 2017.

20. After discovering the transfers that occurred between Highland and Acis between October and December 2017 following the Arbitration Award (the "Transfers"), on January 24, 2018, Terry moved for a temporary restraining order (the "TRO") from the Texas state court on the grounds that the Transfers were pursued for the purpose of rendering Acis LP judgment-proof. The state court granted the TRO, enjoining the Debtor from transferring any CLO management contracts or other assets away from Acis LP.

21. On January 30, 2018, Mr. Terry filed involuntary bankruptcy petitions against Acis LP and its general partner, Acis Capital Management GP, LLC. *See In re Acis Capital Management, L.P.*, Case No. 18-30264-sgj11 (Bankr. N.D. Tex. 2018) and *In re Acis Capital Management GP, LLC*, Case No. 18-30265-sgj11 (Bankr. N.D. Tex. 2018) (collectively, the "Acis Bankruptcy Case"). The Bankruptcy Court overruled the Debtor's objection, granted the involuntary petitions, and appointed a chapter 11 trustee (the "Acis Trustee"). A long sequence of events subsequently transpired, all of which relate to HarbourVest's claims, including:

- On May 31, 2018, the Court issued a *sua sponte* TRO preventing any actions in furtherance of the optional redemptions or other liquidation of the Acis CLOs.
- On June 14, 2018, HCLOF withdrew optional redemption notices.
- The TRO expired on June 15, 2018, and HCLOF noticed the Acis Trustee that it was requesting an optional redemption.

- HCLOF's request was withdrawn on July 6, 2018, and on June 21, 2018, the Acis Trustee sought an injunction preventing Highland/HCLOF from seeking further redemptions (the "Preliminary Injunction").

- The Court granted the Preliminary Injunction on July 10, 2018, pending the Acis Trustee's attempts to confirm a plan or resolve the Acis Bankruptcy.

- On August 30, 2018, the Court denied confirmation of the First Amended Joint Plan for Acis, and held that the Preliminary Injunction must stay in place on the ground that the "evidence thus far has been compelling that numerous transfers after the Josh Terry judgment denuded Acis of value."

- After the Debtor made various statements implicating HarbourVest in the Transfers, the Acis Trustee investigated HarbourVest's involvement in such Transfers, including extensive discovery and taking a 30(b)(6) deposition of HarbourVest's managing director, Michael Pugatch, on November 17, 2018.

- On March 20, 2019, HCLOF sent a letter to Acis LP stating that it was not interested in pursuing, or able to pursue, a CLO reset transaction.

D. The Parties' Pleadings and Positions Concerning HarbourVest's Proofs of Claim

22. On April 8, 2020, HarbourVest filed proofs of claim against Highland that were subsequently denoted by the Debtor's claims agents as claim numbers 143, 147, 149, 150, 153, and 154, respectively (collectively, the "Proofs of Claim"). Morris Dec. Exhibits 2-7.

23. The Proofs of Claim assert, among other things, that HarbourVest suffered significant harm due to conduct undertaken by the Debtor and the Debtor's employees, including "financial harm resulting from (i) court orders in the Acis Bankruptcy that prevented certain CLOs in which HCLOF was invested from being refinanced or reset and court orders that otherwise relegated the activity of HCLOF [*i.e.*, the Preliminary Injunction]; and (ii) significant fees and expenses related to the Acis Bankruptcy that were charged to HCLOF." *See, e.g.*, Morris Dec. Exhibit 2 ¶3.

24. HarbourVest also asserted "any and all of its right to payment, remedies, and other claims (including contingent or unliquidated claims) against the Debtor in connection with and relating to the forgoing harm, including for any amounts due or owed under the various

agreements with the Debtor in connection with relating to" the Operative Documents "and any and all legal and equitable claims or causes of action relating to the forgoing harm." *See, e.g.*, Morris Dec. Exhibit 2 ¶4.

25. Highland subsequently objected to HarbourVest's Proofs of Claim on the grounds that they were no-liability claims. [Docket No. 906] (the "Claim Objection").

26. On September 11, 2020, HarbourVest filed its Response. The Response articulated specified claims under U.S. federal and state and Guernsey law, including claims for fraud, fraudulent concealment, fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation (collectively, the "Fraud Claims"), U.S. State and Federal Securities Law Claims (the "Securities Claims"), violations of the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), breach of fiduciary duty and misuse of fund assets, and an unfair prejudice claim under Guernsey law (collectively, with the Proofs of Claim, the "HarbourVest Claims").

27. On October 18, 2020, HarbourVest filed its *Motion of HarbourVest Pursuant to Rule 3018 of the Federal Rules of Bankruptcy Procedure for Temporary Allowance of Claims for Purposes of Voting to Accept or Reject the Plan* [Docket No. 1207] (the "3018 Motion"). In its 3018 Motion, HarbourVest sought for its Claims to be temporarily allowed for voting purposes in the amount of more than $300 million (based largely on a theory of treble damages).

E. Settlement Discussions

28. In October, the parties discussed the possibility of resolving the Rule 3018 Motion.

29. In November, the parties broadened the discussions in an attempt to reach a global resolution of the HarbourVest Claims. In the pursuit thereof, the parties and their

counsel participated in several conference calls where they engaged in a spirited exchange of perspectives concerning the facts and the law.

30. During follow up meetings, the parties' interests became more defined. Specifically, HarbourVest sought to maximize its recovery while fully extracting itself from the Investment, while the Debtor sought to minimize the HarbourVest Claims consistent with its perceptions of the facts and law.

31. After the parties' interests became more defined, the principals engaged in a series of direct, arm's-length, telephonic negotiations that ultimately lead to the settlement, whose terms are summarized below.

F. Summary of Settlement Terms

32. The Settlement Agreement contains the following material terms, among others:

- HarbourVest shall transfer its entire interest in HCLOF to an entity to be designated by the Debtor;[5]
- HarbourVest shall receive an allowed, general unsecured, non-priority claim in the amount of $45 million and shall vote its Class 8 claim in that amount to support the Plan;
- HarbourVest shall receive a subordinated, allowed, general unsecured, non-priority claim in the amount of $35 million and shall vote its Class 9 claim in that amount to support the Plan;
- HarbourVest will support confirmation of the Debtor's Plan, including, but not limited to, voting its claims in support of the Plan;
- The HarbourVest Claims shall be allowed in the aggregate amount of $45 million for voting purposes;
- HarbourVest will support the Debtor's pursuit of its pending Plan of Reorganization; and
- The parties shall exchange mutual releases.

[5] The NAV for HarbourVest's 49.98% interest in HCLOF was estimated to be approximately $22 million as of December 1, 2020.

See generally Morris Dec. Exhibit 1.

BASIS FOR RELIEF REQUESTED

33. Bankruptcy Rule 9019 governs the procedural prerequisites to approval of a settlement, providing that:

> On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

FED. R. BANKR. P. 9019(a).

34. Settlements in bankruptcy are favored as a means of minimizing litigation, expediting the administration of the bankruptcy estate, and providing for the efficient resolution of bankruptcy cases. *See Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996); *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980). Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may approve a compromise or settlement as long as the proposed settlement is fair, reasonable, and in the best interest of the estate. *See In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, "approval of a compromise is within the sound discretion of the bankruptcy court." *See United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Jackson Brewing*, 624 F.2d at 602–03.

35. In making this determination, the United States Court of Appeals for the Fifth Circuit applies a three-part test, "with a focus on comparing 'the terms of the compromise with the rewards of litigation.'" *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop. (In re Cajun Elec. Power Coop.)*, 119 F.3d 349, 356 (5th Cir. 1997) (citing *Jackson Brewing*, 624 F.2d at 602). The Fifth Circuit has instructed courts to consider the following factors: "(1) The probability of success in the litigation, with due consideration for the uncertainty of law and fact, (2) The complexity and likely duration of the litigation and any

attendant expense, inconvenience and delay, and (3) All other factors bearing on the wisdom of the compromise." *Id.* Under the rubric of the third factor referenced above, the Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. First, the court should consider "the paramount interest of creditors with proper deference to their reasonable views." *Id.*; *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortgage Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995). Second, the court should consider the "extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion." *Age Ref. Inc.*, 801 F.3d at 540; *Foster Mortgage Corp.*, 68 F.3d at 918 (citations omitted).

36. There is ample basis to approve the proposed Settlement Agreement based on the Rule 9019 factors set forth by the Fifth Circuit.

37. First, although the Debtor believes that it has valid defenses to the HarbourVest Claims, there is no guarantee that the Debtor would succeed in its litigation with HarbourVest. Indeed, to establish its defenses, the Debtor would be required to rely, at least in part, on the credibility of witnesses whose veracity has already been called into question by this Court. Moreover, it will be difficult to dispute that the Transfers precipitated the Acis Bankruptcy, and, ultimately, the imposition of the Bankruptcy Court's TRO that restricted HCLOF's ability to reset or redeem the CLOs and that is at the core of the HarbourVest Claims.

38. The second factor—the complexity, duration, and costs of litigation—also weighs heavily in favor of approving the Settlement Agreement. As this Court is aware, the events forming the basis of the HarbourVest Claims—including the Terry Litigation and Acis Bankruptcy—proceeded *for years* in this Court and in multiple other forums, and has already cost the Debtor's estate millions of dollars in legal fees. If the Settlement Agreement is not approved, then the parties will expend significant resources litigating a host of fact-intensive

issues including, among other things, the substance and materiality of the Debtor's alleged fraudulent statements and omissions and whether HarbourVest reasonably relied on those statements and omissions.

39. Third, approval of the Settlement Agreement is justified by the paramount interest of creditors. Specifically, the settlement will enable the Debtor to: (a) avoid incurring substantial litigation costs; (b) avoid the litigation risk associated with HarbourVest's $300 million claim; and (c) through the plan support provisions, increase the likelihood that the Debtor's pending plan of reorganization will be confirmed.

40. Finally, the Settlement Agreement was unquestionably negotiated at arm's-length. The terms of the settlement are the result of numerous, ongoing discussions and negotiations between the parties and their counsel and represent neither party's "best case scenario." Indeed, the Settlement Agreement should be approved as a rational exercise of the Debtor's business judgment made after due deliberation of the facts and circumstances concerning HarbourVest's Claims.

NO PRIOR REQUEST

41. No previous request for the relief sought herein has been made to this, or any other, Court.

NOTICE

42. Notice of this Motion shall be given to the following parties or, in lieu thereof, to their counsel, if known: (a) counsel for HarbourVest; (b) the Office of the United States Trustee; (c) the Office of the United States Attorney for the Northern District of Texas; (d) the Debtor's principal secured parties; (e) counsel to the Committee; and (f) parties requesting notice pursuant to Bankruptcy Rule 2002. The Debtor submits that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtor respectfully requests entry of an order, substantially in the form attached hereto as Exhibit A, (a) granting the relief requested herein, and (b) granting such other relief as is just and proper.

Dated: December 23, 2020.

PACHULSKI STANG ZIEHL & JONES LLP

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Counsel for the Debtor and Debtor-in-Possession

Exhibit 1

Settlement Agreement

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into as of March 30, 2021, by and among (i) Highland Capital Management, L.P. ("HCMLP" or the "Debtor"), (ii) Highland Credit Opportunities CDO, L.P. (n/k/a Highland Multi Strategy Credit Fund, L.P.) ("Multi-Strat," and together with its general partner and its direct and indirect wholly-owned subsidiaries, the "MSCF Parties"), (iii) Strand Advisors, Inc. ("Strand"), and (iv) UBS Securities LLC and UBS AG London Branch (collectively, "UBS").

Each of HCMLP, the MSCF Parties, Strand, and UBS are sometimes referred to herein collectively as the "Parties" and individually as a "Party."

RECITALS

WHEREAS, in 2007, UBS entered into certain contracts with HCMLP and two funds managed by HCMLP—Highland CDO Opportunity Master Fund, L.P. ("CDO Fund") and Highland Special Opportunities Holding Company ("SOHC," and together with CDO Fund, the "Funds") related to a securitization transaction (the "Knox Agreement");

WHEREAS, in 2008, the parties to the Knox Agreement restructured the Knox Agreement;

WHEREAS, UBS terminated the Knox Agreement and, on February 24, 2009, UBS filed a complaint in the Supreme Court of the State of New York, County of New York (the "State Court") against HCMLP and the Funds seeking to recover damages related to the Knox Agreement, in an action captioned *UBS Securities LLC, et al. v. Highland Capital Management, L.P., et al.*, Index No. 650097/2009 (N.Y. Sup. Ct.) (the "2009 Action");

WHEREAS, UBS's lone claim against HCMLP in the 2009 Action for indemnification was dismissed in early 2010, and thereafter UBS amended its complaint in the 2009 Action to add five new defendants, Highland Financial Partners, L.P. ("HFP"), Highland Credit Strategies Master Funds, L.P. ("Credit-Strat"), Highland Crusader Offshore Partners, L.P. ("Crusader"), Multi-Strat, and Strand, and to add new claims for fraudulent inducement, fraudulent conveyance, tortious interference with contract, alter ego, and general partner liability;

WHEREAS, UBS filed a new, separate action against HCMLP on June 28, 2010, for, *inter alia*, fraudulent conveyance and breach of the implied covenant of good faith and fair dealing, captioned *UBS Securities LLC, et al. v. Highland Capital Management, L.P.*, Index No. 650752/2010 (N.Y. Sup. Ct.) (the "2010 Action");

WHEREAS, in November 2010, the State Court consolidated the 2009 Action and the 2010 Action (hereafter referred to as the "State Court Action"), and on May 11, 2011, UBS filed a Second Amended Complaint in the 2009 Action;

WHEREAS, in 2015, UBS entered into settlement agreements with Crusader and Credit-Strat, and thereafter UBS filed notices with the State Court in the State Court Action dismissing its claims against Crusader and Credit-Strat;

WHEREAS, the State Court bifurcated claims asserted in the State Court Action for purposes of trial, with the Phase I bench trial deciding UBS's breach of contract claims against the Funds and HCMLP's counterclaims against UBS;

WHEREAS, on August 7, 2017, the Funds, along with Highland CDO Opportunity Fund, Ltd., Highland CDO Holding Company, Highland Financial Corp., and HFP, purportedly sold assets with a purported collective fair market value of $105,647,679 (the "Transferred Assets") and purported face value of over $300,000,000 to Sentinel Reinsurance, Ltd. ("Sentinel") pursuant to a purported asset purchase agreement (the "Purchase Agreement");

WHEREAS, Sentinel treated the Transferred Assets as payment for a $25,000,000 premium on a document entitled "Legal Liability Insurance Policy" (the "Insurance Policy");

WHEREAS, the Insurance Policy purports to provide coverage to the Funds for up to $100,000,000 for any legal liability resulting from the State Court Action (the "Insurance Proceeds");

WHEREAS, one of the Transferred Assets CDO Fund transferred to Sentinel was CDO Fund's limited partnership interests in Multi-Strat (the "CDOF Interests");

WHEREAS, Sentinel had also received from HCMLP limited partnership interests in Multi-Strat for certain cash consideration (together with the CDOF Interests, the "MSCF Interests");

WHEREAS, the existence of the Purchase Agreement and Insurance Policy were unknown to Strand's independent directors and the Debtor's bankruptcy advisors prior to late January 2021;

WHEREAS, in early February 2021, the Debtor disclosed the existence of the Purchase Agreement and Insurance Policy to UBS;

WHEREAS, prior to such disclosure, the Purchase Agreement and Insurance Policy were unknown to UBS;

WHEREAS, on November 14, 2019, following the Phase I trial, the State Court issued its decision determining that the Funds breached the Knox Agreement on December 5, 2008 and dismissing HCMLP's counterclaims;

WHEREAS, Sentinel purportedly redeemed the MSCF Interests in November 2019 and the redeemed MSCF Interests are currently valued at approximately $32,823,423.50 (the "Sentinel Redemption");

WHEREAS, on February 10, 2020, the State Court entered a Phase I trial judgment against the Funds in the amount of $1,039,957,799.44 as of January 22, 2020 (the "Phase I Judgment");

WHEREAS, Phase II of the trial of the State Court Action, includes, *inter alia*, UBS's claim for breach of implied covenant of good faith and fair dealing against HCMLP, UBS's

fraudulent transfer claims against HCMLP, HFP, and Multi-Strat, and UBS's general partner claim against Strand;

WHEREAS, on October 16, 2019, HCMLP filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Case"). The Bankruptcy Case was transferred to the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") on December 4, 2019;

WHEREAS, Phase II of the trial of the State Court Action was automatically stayed as to HCMLP by HCMLP's bankruptcy filing;

WHEREAS, on May 11, 2020, UBS, Multi-Strat, Highland Credit Opportunities CDO, Ltd., and Highland Credit Opportunities CDO Asset Holdings, L.P. (collectively, the "May Settlement Parties"), entered into a Settlement Agreement (the "May Settlement") pursuant to which the May Settlement Parties agreed to the allocation of the proceeds of certain sales of assets held by Multi-Strat, including escrowing a portion of such funds, and restrictions on Multi-Strat's actions;

WHEREAS, on June 26, 2020, UBS timely filed two substantively identical claims in the Bankruptcy Case: (i) Claim No. 190 filed by UBS Securities LLC; and (ii) Claim No. 191 filed by UBS AG London Branch (hereinafter collectively referred to as the "UBS Claim"). The UBS Claim asserts a general unsecured claim against HCMLP for $1,039,957,799.40;

WHEREAS, on August 3, 2020, the Bankruptcy Court entered an *Order Directing Mediation* [Docket No. 912] pursuant to which HCMLP, UBS, and several other parties were directed to mediate their Bankruptcy Case disputes before two experienced third-party mediators, Retired Judge Allan Gropper and Sylvia Mayer (together, the "Mediators"). HCMLP and UBS formally met with the Mediators together and separately on numerous occasions, including on August 27, September 2, 3, and 4, and December 17, 2020, and had numerous other informal discussions outside of the presence of the Mediators, in an attempt to resolve the UBS Claim;

WHEREAS, on August 7, 2020, HCMLP filed an objection to the UBS Claim [Docket No. 928]. Also on August 7, 2020, the Redeemer Committee of the Highland Crusader Fund, and Crusader, Highland Crusader Fund, L.P., Highland Crusader Fund, Ltd., and Highland Crusader Fund II, Ltd. (collectively, the "Redeemer Committee"), objected to the UBS Claim [Docket No. 933]. On September 25, 2020, UBS filed its response to these objections [Docket No. 1105];

WHEREAS, on October 16, 2020, HCMLP and the Redeemer Committee each moved for partial summary judgment on the UBS Claim [Docket Nos. 1180 and 1183, respectively], and on November 6, 2020, UBS opposed these motions [Docket No. 1337];

WHEREAS, by Order dated December 9, 2020, the Bankruptcy Court granted, as set forth therein, the motions for partial summary judgment filed by HCMLP and the Redeemer Committee and denied UBS's request for leave to file an amended proof of claim [Docket No. 1526];

WHEREAS, on November 6, 2020, UBS filed *UBS's Motion for Temporary Allowance of Claims for Voting Purposes Pursuant to Federal Rule of Bankruptcy Procedure 3018* [Docket No. 1338] (the "3018 Motion"), and on November 16, 2020, HCMLP and the Redeemer Committee each opposed the 3018 Motion [Docket Nos. 1404 and 1409, respectively];

WHEREAS, by Order dated December 8, 2020, the Bankruptcy Court granted the 3018 Motion and allowed the UBS Claim, on a temporary basis and for voting purposes only, in the amount of $94,761,076 [Docket No. 1518];

WHEREAS, on January 22, 2021, the Debtor filed the *Fifth Amended Plan of Reorganization for Highland Capital Management, L.P. (As Modified)* [Docket No. 1808] (as amended, and as may be further amended, supplemented, or otherwise modified, the "Plan");

WHEREAS, on March 29, 2021, the Debtor caused CDO Fund to make a claim on the Insurance Policy to collect the Insurance Proceeds pursuant to the Phase I Judgment;

WHEREAS, on March 29, 2021, UBS filed an adversary proceeding seeking injunctive relief and a motion for a temporary restraining order and preliminary injunction to, among other things, enjoin the Debtor from allowing Multi-Strat to distribute the Sentinel Redemption to Sentinel or any transferee of Sentinel (the "Multi-Strat Proceeding"), which relief the Debtor, in its capacity as Multi-Strat's investment manager and general partner, does not oppose;

WHEREAS, the Parties wish to enter into this Agreement to settle all claims and disputes between and among them, to the extent and on the terms and conditions set forth herein, and to exchange the mutual releases set forth herein, without any admission of fault, liability, or wrongdoing on the part of any Party; and

WHEREAS, this Agreement will be presented to the Bankruptcy Court for approval pursuant to Federal Rule of Bankruptcy Procedure 9019 ("Rule 9019") and section 363 of the Bankruptcy Code;

NOW THEREFORE, in consideration of the above recitals, the covenants, conditions, and promises made herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

AGREEMENT

1. Settlement of Claims. In full and complete satisfaction of the UBS Released Claims (as defined below):

(a) The UBS Claim will be allowed as (i) a single, general unsecured claim in the amount of $65,000,000 against HCMLP, which shall be treated as a Class 8 General Unsecured Claim under the Plan;[1] and (ii) a single, subordinated unsecured claim in the amount of $60,000,000 against HCMLP, which shall be treated as a Class 9 Subordinated General Unsecured Claim under the Plan.

[1] Capitalized terms used but not defined herein shall have the meanings attributed to them in the Plan.

(b) Multi-Strat will pay UBS the sum of $18,500,000 (the "Multi-Strat Payment") as follows: (i) within two (2) business days after the Order Date, the May Settlement Parties will submit a Joint Release Instruction (as defined in the May Settlement) for the release of the amounts held in the Escrow Account (as defined in the May Settlement) to be paid to UBS in partial satisfaction of the Multi-Strat Payment on the date that is ten (10) business days following the Order Date; and (ii) Multi-Strat will pay UBS the remainder of the Multi-Strat Payment in immediately available funds on the date that is ten (10) business days following the Order Date, provided that, for the avoidance of doubt, the amounts held in the Escrow Account will not be paid to UBS until and unless the remainder of the Multi-Strat Payment is made.

(c) Subject to applicable law, HCMLP will use reasonable efforts to (i) cause CDO Fund to pay the Insurance Proceeds in full to UBS as soon as practicable, but no later than within 5 business days of CDO Fund actually receiving the Insurance Proceeds from or on behalf of Sentinel; (ii) if Sentinel refuses to pay the Insurance Proceeds, take legal action reasonably designed to recover the Insurance Proceeds or the MSCF Interests or to return the Transferred Assets to the Funds to satisfy the Phase I Judgment and in addition shall provide reasonable assistance to UBS in connection with any legal action UBS takes to recover the Insurance Proceeds or to return the Transferred Assets to the Funds to satisfy the Phase I Judgment or obtain rights to the MSCF interests, including but not limited to the redemption payments in connection with the MSCF Interests; (iii) cooperate with UBS and participate (as applicable) in the investigation or prosecution of claims or requests for injunctive relief against the Funds, Multi-Strat, Sentinel, James Dondero, Isaac Leventon, Scott Ellington, Andrew Dean, Christopher Walter, Jean Paul Sevilla, Matthew DiOrio, Katie Irving, and/or any other current or former employee or director of the Funds or Sentinel and/or any other former employee or former director of any of the HCMLP Parties that is believed to be involved with the Purchase Agreement, Insurance Policy, Transferred Assets, the transfer of the MSCF Interests, or any potentially fraudulent transfer of assets from the Funds to Sentinel, excluding the individuals listed on the schedule provided to UBS on March 25, 2021 (the "HCMLP Excluded Employees"); (iv) as soon as reasonably practicable, provide UBS with all business and trustee contacts at the Funds, HFP, Greenbriar CLO Ltd., Greenbriar CLO Corp., Aberdeen Loan Funding Ltd, Eastland CLO Ltd, Grayson CLO Ltd, Valhalla CLO Ltd, and Governance Re Ltd, if any, that are actually known by the Debtor after reasonable inquiry; (v) as soon as reasonably practicable, provide UBS with a copy of the governing documents, prospectuses, and indenture agreements for the Funds, HFP, Greenbriar CLO Ltd., Greenbriar CLO Corp., Aberdeen Loan Funding Ltd, Eastland CLO Ltd, Grayson CLO Ltd, Valhalla CLO Ltd, and Governance Re Ltd, as applicable, that are in the Debtor's actual possession, custody, or control, (vi) as soon as reasonably practicable, provide, to the extent possible, any CUSIP numbers of the securities of the Funds, HFP, Greenbriar CLO Ltd., Greenbriar CLO Corp., Aberdeen Loan Funding Ltd, Eastland CLO Ltd, Grayson CLO Ltd, Valhalla CLO Ltd, and Governance Re Ltd., as applicable, including information regarding the location and amount of any cash related to those entities' holdings, in each case only to the extent actually known by the Debtor after reasonable inquiry; (vii) cooperate with UBS to assign or convey any such assets described in Section 1(c)(vi) or any other assets owned or controlled by the Funds and/or HFP, including for avoidance of doubt any additional assets currently unknown to the Debtor that the Debtor discovers in the future after the Agreement Effective Date; (viii) respond as promptly as reasonably possible to requests by UBS for access to relevant documents and approve as promptly as reasonably possible requests for access to relevant documents from third parties as needed with respect to the Transferred Assets, the Purchase Agreement, the Insurance Policy, the

MSCF Interests and any other assets currently or formerly held by the Funds or HFP, including without limitation the requests listed in **Appendix A** (provided, however, that the provision of any such documents or access will be subject to the common interest privilege and will not constitute a waiver of any attorney-client or other privilege in favor of HCMLP) that are in the Debtor's actual possession, custody, or control; (ix) preserve all documents in HCMLP's possession, custody, or control regarding or relating to the Purchase Agreement, the Insurance Policy, the MSCF Interests, or any transfer of assets from the Funds to Sentinel, including but not limited to the documents requested in Appendix A, from 2016 to present, and issue a litigation hold to all individuals deemed reasonably necessary regarding the same; and (x) otherwise use reasonable efforts to assist UBS to collect its Phase I Judgment against the Funds and HFP and assets the Funds and/or HFP may own, or have a claim to under applicable law ahead of all other creditors of the Funds and HFP; provided, however, that, from and after the date hereof, HCMLP shall not be required to incur any out-of-pocket fees or expenses, including, but not limited to, those fees and expenses for outside consultants and professionals (the "Reimbursable Expenses"), in connection with any provision of this Section 1(c) in excess of $3,000,000 (the "Expense Cap"), and provided further that, for every dollar UBS recovers from the Funds (other than the assets related to Greenbriar CLO Ltd. or Greenbriar CLO Corp.), Sentinel, Multi-Strat (other than the amounts set forth in Section 1(b) hereof), or any other person or entity described in Section 1(c)(iii) in connection with any claims UBS has that arise out of or relate to the Phase I Judgment, the Purchase Agreement, the Insurance Policy, the Transferred Assets, the MSCF Interests, or the Insurance Proceeds (the "UBS Recovery"), UBS will reimburse HCMLP ten percent of the UBS Recovery for the Reimbursable Expenses incurred by HCMLP, subject to: (1) the occurrence of the Agreement Effective Date and (2) UBS's receipt and review of invoices and time records (which may be redacted as reasonably necessary) for outside consultants and professionals in connection with such efforts described in this Section 1(c), up to but not exceeding the Expense Cap after any disputes regarding the Reimbursable Expenses have been resolved pursuant to procedures to be agreed upon, or absent an agreement, in a manner directed by the Bankruptcy Court; and provided further that in any proceeding over the reasonableness of the Reimbursable Expenses, the losing party shall be obligated to pay the reasonable fees and expenses of the prevailing party; and provided further that any litigation in which HCMLP is a co-plaintiff with UBS or a plaintiff pursuing claims on behalf of or for UBS's benefit pursuant to this Section 1(c) shall be conducted in consultation with UBS, including but not limited to the selection of necessary outside consultants and professionals to assist in such litigation; and provided further that UBS shall have the right to approve HCMLP's selection of outside consultants and professionals to assist in any litigation in which HCMLP is a co-plaintiff with UBS or a plaintiff pursuing claims on behalf of or for UBS's benefit pursuant to this Section 1(c).

(d) Redeemer Appeal.

(i) On the Agreement Effective Date, provided that neither the Redeemer Committee nor any entities acting on its behalf or with any assistance from or coordination with the Redeemer Committee have objected to this Agreement or the 9019 Motion (as defined below), UBS shall withdraw with prejudice its appeal of the *Order Approving Debtor's Settlement with (A) the Redeemer Committee of the Highland Crusader Fund (Claim No. 72) and (B) the Highland Crusader Funds (Claim No. 81), and Authorizing Actions Consistent Therewith* [Docket No. 1273] (the "Redeemer Appeal"); and

(ii) The Parties have stipulated to extend the deadline for the filing of any briefs in the Redeemer Appeal to June 30, 2021 and will agree to such further extensions as necessary to facilitate this Settlement Agreement.

(e) As of the Agreement Effective Date, the restrictions and obligations set forth in the May Settlement, other than those in Section 7 thereof, shall be extinguished in their entirety and be of no further force or effect.

(f) On the Agreement Effective Date, the Debtor shall instruct the claims agent in the Bankruptcy Case to adjust the claims register in accordance with this Agreement.

(g) On the Agreement Effective Date, any claim the Debtor may have against Sentinel or any other party, and any recovery related thereto, with respect to the MSCF Interests shall be automatically transferred to UBS, without any further action required by the Debtor. For the avoidance of doubt, the Debtor shall retain any and all other claims it may have against Sentinel or any other party, and the recovery related thereto, unrelated to the MSCF Interests.

2. Definitions.

(a) "Agreement Effective Date" shall mean the date the full amount of the Multi-Strat Payment defined in Section 1(b) above, including without limitation the amounts held in the Escrow Account (as defined in the May Settlement), is actually paid to UBS.

(b) "HCMLP Parties" shall mean (a) HCMLP, in its individual capacity; (b) HCMLP, as manager of Multi-Strat; and (c) Strand.

(c) "Order Date" shall mean the date of an order entered by the Bankruptcy Court approving this Agreement pursuant to a motion filed under Rule 9019 and section 363 of the Bankruptcy Code.

(d) "UBS Parties" shall mean UBS Securities LLC and UBS AG London Branch.

3. Releases.

(a) UBS Releases. Upon the occurrence of the Agreement Effective Date, and to the maximum extent permitted by law, each of the UBS Parties hereby forever, finally, fully, unconditionally, irrevocably, and completely releases, relieves, acquits, remises, exonerates, forever discharges, and covenants never to sue (A) the HCMLP Parties and each of their current and former advisors, attorneys, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (each in their capacities as such), except as expressly set forth below, and (B) the MSCF Parties and each of their current and former advisors, attorneys, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (each in their capacities as such), except as expressly set forth below, for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorneys' 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, or statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those that have been or could have been alleged or asserted in the State Court Action or the Bankruptcy Case (collectively, the "UBS Released Claims"), provided, however, that notwithstanding anything to the contrary herein, such releases shall not apply to (1) the obligations of the HCMLP Parties and MSCF Parties under this Agreement, including without limitation the allowance of or distributions on account of the UBS Claim or the settlement terms described in Sections 1(a)-(g) above; (2) the Funds or HFP, including for any liability with respect to the prosecution, enforcement, collection, or defense of the Phase I Judgment, Purchase Agreement, and/or Insurance Policy, or such prosecution, enforcement, collection, or defense of the Phase I Judgment, Purchase Agreement, and/or Insurance Policy by UBS; (3) James Dondero or Mark Okada, or any entities, including without limitation Hunter Mountain Investment Trust, Dugaboy Investment Trust, and NexBank, SSB, owned or controlled by either of them, other than the HCMLP Parties and MSCF Parties (but for the avoidance of doubt, such releases of the HCMLP Parties and MSCF Parties shall be solely with respect to such entities and shall not extend in any way to James Dondero or Mark Okada in their individual capacity or in any other capacity, including but not limited to as an investor, officer, trustee, or director in the HCMLP Parties or MSCF Parties); (4) Sentinel or its subsidiaries, parents, affiliates, successors, designees, assigns, employees, or directors, including James Dondero, Isaac Leventon, Scott Ellington, Andrew Dean, Christopher Walter, Jean Paul Sevilla, Matthew DiOrio, Katie Irving, and/or any other current or former employee or director of the Funds or Sentinel and/or any other former employee or former director of any of the HCMLP Parties that is believed to be involved with the Purchase Agreement, Insurance Policy, MSCF Interests, or Transferred Assets, including for any liability with respect to the prosecution, enforcement, collection, or defense of the Phase I Judgment, Purchase Agreement, the MSCF Interests, any potentially fraudulent transfer of assets from the Funds to Sentinel and/or Insurance Policy, excluding the HCMLP Excluded Employees; (5) the economic rights or interests of UBS in its capacity as an investor, directly or indirectly (including in its capacity as an investment manager and/or investment advisor), in any HCMLP-affiliated entity, including without limitation in the Redeemer Committee and Credit Strat, and/or in such entities' past, present or future subsidiaries and feeders funds (the "UBS Unrelated Investments"); and (6) any actions taken by UBS against any person or entity, including any HCMLP Party or MSCF Party, to enjoin a distribution on the Sentinel Redemption or the transfer of any assets currently held by or within the control of CDO Fund to Sentinel or a subsequent transferee or to seek to compel any action that only such person or entity has standing to pursue or authorize in order to permit UBS to recover the Insurance Proceeds, Transferred Assets, the Phase I Judgment or any recovery against HFP; provided, however, that, from and after the date hereof, any out-of-pocket fees or expenses incurred by HCMLP in connection with this Section 3(a)(6) will be considered Reimbursable Expenses and shall be subject to, and applied against, the Expense Cap as if they were incurred by HCMLP pursuant to Section 1(c) subject to the occurrence of the Agreement Effective Date and after any disputes regarding such Reimbursable Expenses have been resolved in the manner described in Section 1(c).

(b) **HCMLP Release.** Upon the occurrence of the Agreement Effective Date, and to the maximum extent permitted by law, each of the HCMLP Parties hereby forever, finally, fully, unconditionally, irrevocably, and completely releases, relieves, acquits, remises, exonerates, forever discharges, and covenants never to sue any of the UBS Parties and each of

their current and former advisors, attorneys, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (each in their capacities as such), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorneys' 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, or statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those that have been or could have been alleged or asserted in the State Court Action or the Bankruptcy Case (collectively, the "HCMLP Released Claims"), provided, however, that notwithstanding anything to the contrary herein, such releases shall not apply to the obligations of the UBS Parties under this Agreement or Section 7 of the May Settlement; and (b) the obligations of the UBS Parties in connection with the UBS Unrelated Investments.

(c) **Multi-Strat Release.** Upon the occurrence of the Agreement Effective Date, and to the maximum extent permitted by law, each of the MSCF Parties hereby forever, finally, fully, unconditionally, irrevocably, and completely releases, relieves, acquits, remises, exonerates, forever discharges, and covenants never to sue any of the UBS Parties and each of their current and former advisors, attorneys, trustees, directors, officers, managers, members, partners, employees, beneficiaries, shareholders, agents, participants, subsidiaries, parents, affiliates, successors, designees, and assigns (each in their capacities as such), for and from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, liens, losses, costs and expenses (including, without limitation, attorneys' 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, or statutory or otherwise, including, without limitation, any claims, defenses, and affirmative defenses, whether known or unknown, including, without limitation, those that have been or could have been alleged or asserted in the State Court Action or the Bankruptcy Case (collectively, the "Multi-Strat Released Claims"), provided, however, that notwithstanding anything to the contrary herein, such releases shall not apply to the obligations of the UBS Parties under this Agreement or Section 7 of the May Settlement.

4. **No Third Party Beneficiaries.** Except for the parties released by this Agreement, no other person or entity shall be deemed a third-party beneficiary of this Agreement.

5. **UBS Covenant Not to Sue.** Subject to the occurrence of the Agreement Effective date, if UBS ever controls any HCMLP-affiliated defendant in the State Court Action by virtue of the prosecution, enforcement, or collection of the Phase I Judgment (collectively, the "Controlled State Court Defendants"), UBS covenants on behalf of itself and the Controlled State Court Defendants, if any, that neither UBS nor the Controlled State Court Defendants will assert or pursue any claims that any Controlled State Court Defendant has or may have against any of the HCMLP Parties; provided, however, that nothing shall prohibit UBS or a Controlled State Court Defendant from taking any of the actions set forth in Section 3(a)(1)-(6); provided further, however, if and to the extent UBS receives any distribution from any Controlled State Court Defendant that is derived from a claim by a Controlled State Court Defendant against the Debtor, subject to the exceptions set forth in Section 3(a), which distribution is directly

attributable to any property the Controlled State Court Defendant receives from the Debtor and separate and distinct from property owned or controlled by CDO Fund, SOHC, or Multi-Strat, then such recovery shall be credited against all amounts due from the Debtor's estate on account of the UBS Claim allowed pursuant to Section 1(a) of this Agreement, or if such claim has been paid in full, shall be promptly turned over to the Debtor or its successors or assigns.

6. Agreement Subject to Bankruptcy Court Approval.

(a) The force and effect of this Agreement and the Parties' obligations hereunder are conditioned in all respects on the approval of this Agreement and the releases herein by the Bankruptcy Court. The Parties agree to use reasonable efforts to have this Agreement expeditiously approved by the Bankruptcy Court by cooperating in the preparation and prosecution of a mutually agreeable motion and proposed order (the "9019 Motion") to be filed by the Debtor no later than five business days after execution of this Agreement by all Parties unless an extension is agreed to by both parties.

7. Representations and Warranties.

(a) Each UBS Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the UBS Released Claims and has not sold, transferred, or assigned any UBS Released Claim to any other person or entity, and (ii) no person or entity other than such UBS Party has been, is, or will be authorized to bring, pursue, or enforce any UBS Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) such UBS Party.

(b) Each HCMLP Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the HCMLP Released Claims and has not sold, transferred, or assigned any HCMLP Released Claim to any other person or entity, and (ii) no person or entity other than such HCMLP Party has been, is, or will be authorized to bring, pursue, or enforce any HCMLP Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) such HCMLP Party.

(c) Each MSCF Party represents and warrants that (i) it has full authority to enter into this Agreement and to release the Multi-Strat Released Claims and has not sold, transferred, or assigned any Multi-Strat Released Claim to any other person or entity, and (ii) no person or entity other than such MSCF Party has been, is, or will be authorized to bring, pursue, or enforce any Multi-Strat Released Claim on behalf of, for the benefit of, or in the name of (whether directly or derivatively) such MSCF Party.

8. **No Admission of Liability**. The Parties acknowledge that there is a bona fide dispute with respect to the UBS Claim. Nothing in this Agreement shall be construed, expressly or by implication, as an admission of liability, fault, or wrongdoing by HCMLP, the MSCF Parties, Strand, UBS, or any other person, and the execution of this Agreement does not constitute an admission of liability, fault, or wrongdoing on the part of HCMLP, the MSCF Parties, Strand, UBS, or any other person.

9. **Successors-in-Interest.** This Agreement shall be binding upon and shall inure to the benefit of each of the Parties and their representatives, successors, and assigns.

10. **Notice**. Each notice and other communication hereunder shall be in writing and will, unless otherwise subsequently directed in writing, be delivered by email and overnight delivery, as set forth below, and will be deemed to have been given on the date following such mailing.

HCMLP Parties or the MSCF Parties

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: General Counsel
Telephone No.: 972-628-4100
E-mail: notices@HighlandCapital.com

with a copy (which shall not constitute notice) to:

Pachulski Stang Ziehl & Jones LLP
Attention: Jeffrey Pomerantz, Esq.
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone No.: 310-277-6910
E-mail: jpomerantz@pszjlaw.com

UBS

UBS Securities LLC
UBS AG London Branch
Attention: Elizabeth Kozlowski, Executive Director and Counsel
1285 Avenue of the Americas
New York, NY 10019
Telephone No.: 212-713-9007
E-mail: elizabeth.kozlowski@ubs.com

UBS Securities LLC
UBS AG London Branch
Attention: John Lantz, Executive Director
1285 Avenue of the Americas
New York, NY 10019

Telephone No.: 212-713-1371
E-mail: john.lantz@ubs.com

with a copy (which shall not constitute notice) to:

Latham & Watkins LLP
Attention: Andrew Clubok
Sarah Tomkowiak
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004-1304
Telephone No.: 202-637-3323
Email: andrew.clubok@lw.com
sarah.tomkowiak@lw.com

11. Advice of Counsel. Each of the Parties represents that such Party has: (a) been adequately represented by independent legal counsel of its own choice, throughout all of the negotiations that preceded the execution of this Agreement; (b) executed this Agreement upon the advice of such counsel; (c) read this Agreement, and understands and assents to all the terms and conditions contained herein without any reservations; and (d) had the opportunity to have this Agreement and all the terms and conditions contained herein explained by independent counsel, who has answered any and all questions asked of such counsel, or which could have been asked of such counsel, including, but not limited to, with regard to the meaning and effect of any of the provisions of this Agreement.

12. Entire Agreement. This Agreement contains the entire agreement and understanding concerning the subject matter of this Agreement, and supersedes and replaces all prior negotiations and agreements, written or oral and executed or unexecuted, concerning such subject matter. Each of the Parties acknowledges that no other Party, nor any agent of or attorney for any such Party, has made any promise, representation, or warranty, express or implied, written or oral, not otherwise contained in this Agreement to induce any Party to execute this Agreement. The Parties further acknowledge that they are not executing this Agreement in reliance on any promise, representation, or warranty not contained in this Agreement, and that any such reliance would be unreasonable. This Agreement will not be waived or modified except by an agreement in writing signed by each Party or duly authorized representative of each Party.

13. No Party Deemed Drafter. The Parties acknowledge that the terms of this Agreement are contractual and are the result of arm's-length negotiations between the Parties and their chosen counsel. Each Party and its counsel cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the Agreement will not be construed against any Party.

14. Future Cooperation. The Parties agree to cooperate and execute such further documentation as is reasonably necessary to effectuate the intent of this Agreement.

15. Counterparts. This Agreement may be executed in counterparts with the same force and effect as if executed in one complete document. Each Party's signature hereto will signify acceptance of, and agreement to, the terms and provisions contained in this Agreement.

Photographic, electronic, and facsimile copies of signed counterparts may be used in lieu of the originals of this Agreement for any purpose.

16. Governing Law; Venue; Attorneys' Fees and Costs. The Parties agree that this Agreement will be governed by and will be construed according to the laws of the State of New York without regard to conflict-of-law principles. Each of the Parties hereby submits to the exclusive jurisdiction of the Bankruptcy Court during the pendency of the Bankruptcy Case and thereafter to the exclusive jurisdiction of the state and federal courts located in the Borough of Manhattan, New York, with respect to any disputes arising from or out of this Agreement. In any action to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees and costs (including experts).

[Remainder of Page Intentionally Blank]

IT IS HEREBY AGREED.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: _____
Name: James P. Seery, Jr.
Its: Authorized Signatory

HIGHLAND MULTI STRATEGY CREDIT FUND, L.P. (f/k/a Highland Credit Opportunities CDO, L.P.)

By: _____
Name: James P. Seery, Jr
Its: Authorized Signatory

HIGHLAND CREDIT OPPORTUNITIES CDO, Ltd.

By: _____
Name: James P. Seery, Jr
Its: Authorized Signatory

HIGHLAND CREDIT OPPORTUNITIES CDO ASSET HOLDINGS, L.P.

By: _____
Name: James P. Seery, Jr
Its: Authorized Signatory

STRAND ADVISORS, INC.

By: _____
Name: James P. Seery, Jr.
Its: Authorized Signatory

EXECUTION VERSION

UBS SECURITIES LLC

By: _____
Name: John Lantz
Its: Authorized Signatory

By: _____
Name: Elizabeth Kozlowski
Its: Authorized Signatory

UBS AG LONDON BRANCH

By: _____
Name: William Chandler
Its: Authorized Signatory

By: _____
Name: Elizabeth Kozlowski
Its: Authorized Signatory

EXECUTION VERSION

APPENDIX A

- The search parameters (custodians, date ranges, search terms) used to locate the documents produced to UBS on February 27, 2021 (and any additional parameters used for the previous requests from UBS);
- Identity of counsel to, and trustees of, CDO Fund or SOHC;
- Current or last effective investment manager agreements for CDO Fund and SOHC, including any management fee schedule, and any documentation regarding the termination of those agreements;
- The tax returns for the CDO Fund and SOHC from 2017-present;
- Communications between any employees of Sentinel (or its affiliates) and any employees of the HCMLP Parties, CDO Fund, SOHC, or any of Dondero, Leventon, or Ellington from 2017-present;
- Documents or communications regarding or relating to the Purchase Agreement, Insurance Policy, or June 30, 2018 Memorandum entitled "Tax Consequences of Sentinel Acquisition of HFP/CDO Opportunity Assets" (the "Tax Memo"), including without limitation (i) amendments to these documents, (ii) transfer of assets pursuant to these documents, (iii) board minutes or resolutions regarding or relating to these documents, (iv) claims made on the Insurance Policy; (v) communications with the IRS regarding the asset transfer pursuant to these documents; and (vi) any similar asset purchase agreements, capital transfer agreements, or similar agreements;
- Documents or communications regarding or relating to the value of any assets transferred pursuant to the Insurance Policy or Purchase Agreement, including without limitation those assets listed in Schedule A to the Purchase Agreement, from 2017 to present, including documentation supporting the $105,647,679 value of those assets as listed in the Tax Memo;
- Documents showing the organizational structure of Sentinel and its affiliated entities, including information on Dondero's relationship to Sentinel;
- Any factual information provided by current or former employees of the HCMLP Parties, CDO Fund, SOHC, or Sentinel regarding or relating to the Purchase Agreement, Insurance Policy, Tax Memo, and/or transfer of assets pursuant to those documents;
- Debtor's settlement agreements with Ellington and Leventon;
- Copies of all prior and future Monthly Reports and Valuation Reports (as defined in the Indenture, dated as of December 20, 2007, among Greenbriar CLO Ltd., Greenbriar CLO Corp., and State Street Bank and Trust Company); and
- Identity of any creditors of CDO Fund, SOHC, or HFP and amount of debts owed to those creditors by CDO Fund, SOHC, or HFP, including without limitation any debts owed to the Debtor.

Hellman & Friedman Seeded Farallon Capital Management

OUR FOUNDER

RETURN TO ABOUT (/ABOUT/)

Warren Hellman: One of the good guys

Warren Hellman was a devoted family man, highly successful businessman, active philanthropist, dedicated musician, arts patron, endurance athlete and all-around good guy. Born in New York City in 1934, he grew up in the Bay Area, graduating from the University of California at Berkeley. After serving in the U.S. Army and attending Harvard Business School, Warren began his finance career at Lehman Brothers, becoming the youngest partner in the firm's history at age 26 and subsequently serving as President. After a distinguished career on Wall Street, Warren moved back west and co-founded Hellman & Friedman, building it into one of the industry's leading private equity firms.

Warren deeply believed in the power of people to accomplish incredible things and used his success to improve and enrich the lives of countless people. Throughout his career, Warren helped found or seed many successful businesses including Matrix Partners, Jordan Management Company, Farallon Capital Management and Hall Capital Partners.

Within the community, Warren and his family were generous supporters of dozens of organizations and causes in the arts, public education, civic life, and public health, including creating and running the San Francisco Free Clinic. Later in life, Warren became an accomplished 5-string banjo player and found great joy in sharing the love of music with others. In true form, he made something larger of this avocation to benefit others by founding the Hardly Strictly Bluegrass Festival, an annual three-day, free music festival that draws hundreds of thousands of people together from around the Bay Area.

An accomplished endurance athlete, Warren regularly completed 100-mile runs, horseback rides and combinations of the two. He also was an avid skier and national caliber master ski racer and served as president of the U.S. Ski Team in the late 1970s, and is credited with helping revitalize the Sugar Bowl ski resort in the California Sierras.

In short, Warren Hellman embodied the ideal of living life to the fullest. He had an active mind and body, and a huge heart. We are lucky to call him our founder. **Read more about Warren. (https://hf.com/wp-content/uploads/2015/09/Warren-Hellman-News-Release.pdf)**

SFChronicle/SFGate/Liz Hafalia

Robert Holmgren

no caption

Hellman & Friedman Owned a Portion of Grosvenor until 2020

GCM GROSVENOR

Grosvenor Capital Management

In 2007, H&F invested in Grosvenor, one of the world's largest and most diversified independent alternative asset management firms. The Company offers comprehensive public and private markets solutions and a broad suite of investment and advisory choices that span hedge funds, private equity, and various credit and specialty strategies. Grosvenor specializes in developing customized investment programs tailored to each client's specific investment goals.

SECTOR

Financial Services

STATUS

Past

www.gcmlp.com (http://www.gcmlp.com)

CORNER OFFICE

GCM Grosvenor to Go Public

Julie Segal

The $57 billion alternatives manager will become a public company after merging with a SPAC backed by Cantor Fitzgerald.

August 03, 2020

Chicago, IL (Tim Boyle/Bloomberg)

In a sign of the times, GCM Grosvenor will become a public company through a SPAC.

The Chicago-based alternative investments firm is planning to go public by merging with a special purpose acquisition company in a deal valued at $2 billion. The 50-year-old firm has $57 billion in assets in private equity, infrastructure, real estate, credit, and absolute return investments.

"We have long valued having external shareholders and we wanted to preserve the accountability and focus that comes with that," Michael Sacks, GCM Grosvenor's chairman and CEO, said in a statement.

GCM Grosvenor will combine with CF Finance Special Acquisition Corp, a SPAC backed by Cantor Fitzgerald, according to an announcement from both companies on Monday. After the company goes public, Sacks will continue to lead GCM Grosvenor, which is owned by management and Hellman & Friedman, a private equity firm. Hellman & Friedman, which has owned a minority stake of the Chicago asset manager since 2007, will sell its equity as

Farallon was a Significant Borrower for Lehman

Case Study – Large Loan Origination

Debt origination for an affiliate of Simon Property Group Inc. and Farallon Capital Management

Date	June 2007
Asset Class	Retail
Asset Size	1,808,506 Sq. Ft.
Sponsor	Simon Property Group Inc. / Farallon Capital Management
Transaction Type	Refinance
Total Debt Amount	Lehman Brothers: $121 million JP Morgan: $200 million

Transaction Overview

- In June 2007, Lehman Brothers co-originated a loan in the aggregate amount of $321 million (Lehman portion: $121 million) with JP Morgan to a special purpose affiliate of a joint venture between Simon Property Group Inc ("Simon") and Farallon Capital Management ("Farallon") secured by the shopping center known as Gurnee Mills Mall (the "Property") located in Gurnee, IL .
- The Property consists of a one-story, 200 store discount mega-mall comprised of 1,808,506 square feet anchored by Burlington Coat Factory, Marshalls, Bed Bath & Beyond and Kohls among other national retailers. Built in 1991, the Property underwent a $5 million interior renovation in addition to a $71 million redevelopment between 2004 and 2005. As of March 2007, the Property had a in-line occupancy of 99.5%.

Lehman Brothers Role

- Simon and Farallon comprised the sponsorship which eventually merged with The Mills Corporation in early 2007 for $25.25 per common share in cash. The total value of the transaction was approximately $1.64 billion for all of the outstanding common stock, and approximately $7.9 billion including assumed debt and preferred equity.
- Lehman and JP Morgan subsequently co-originated $321 million loan at 79.2% LTV based on an appraisal completed in March by Cushman & Wakefield. The Loan was used to refinance the indebtedness secured by the Property.

Sponsorship Overview

- The Mills Corporation, based in Chevy Chase MD is a developer owner and manager of a diversified portfolio of retail destinations including regional shopping malls and entertainment centers. They currently own 38 properties in the United States totaling 47 million square feet.

LEHMAN BROTHERS 32

Mr. Seery Represented Stonehill While at Sidley

James P. Seery, Jr.
John G. Hutchinson
John J. Lavelle
Martin B. Jackson
Sidley Austin LLP
787 Seventh Avenue
New York, New York 10019
(212) 839-5300 (tel)
(212) 839-5599 (fax)

Attorneys for the Steering Group

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

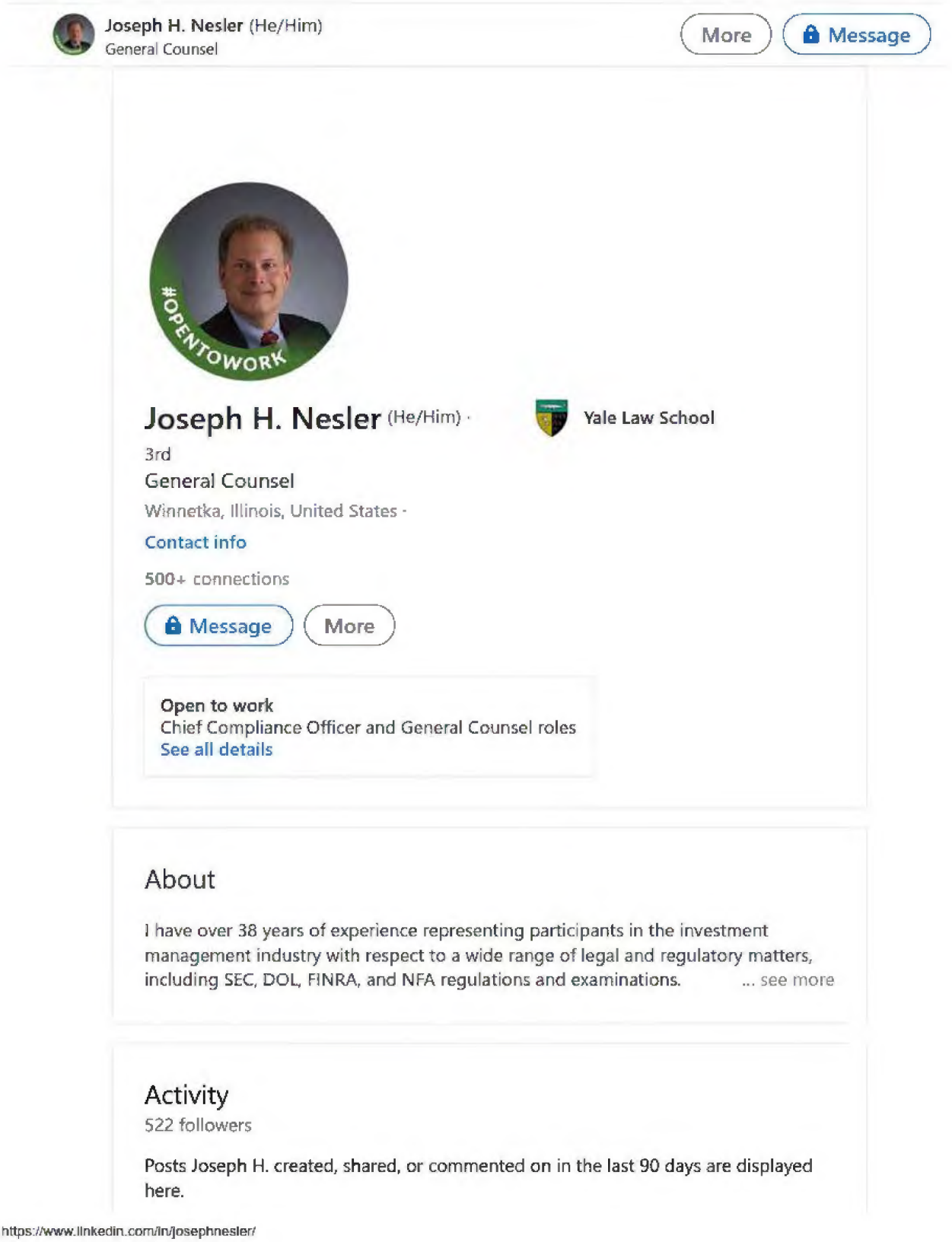
In re:	:	Chapter 11
BLOCKBUSTER INC., *et al.*,	:	Case No. 10-14997 (BRL)
Debtors.	:	(Jointly Administered)

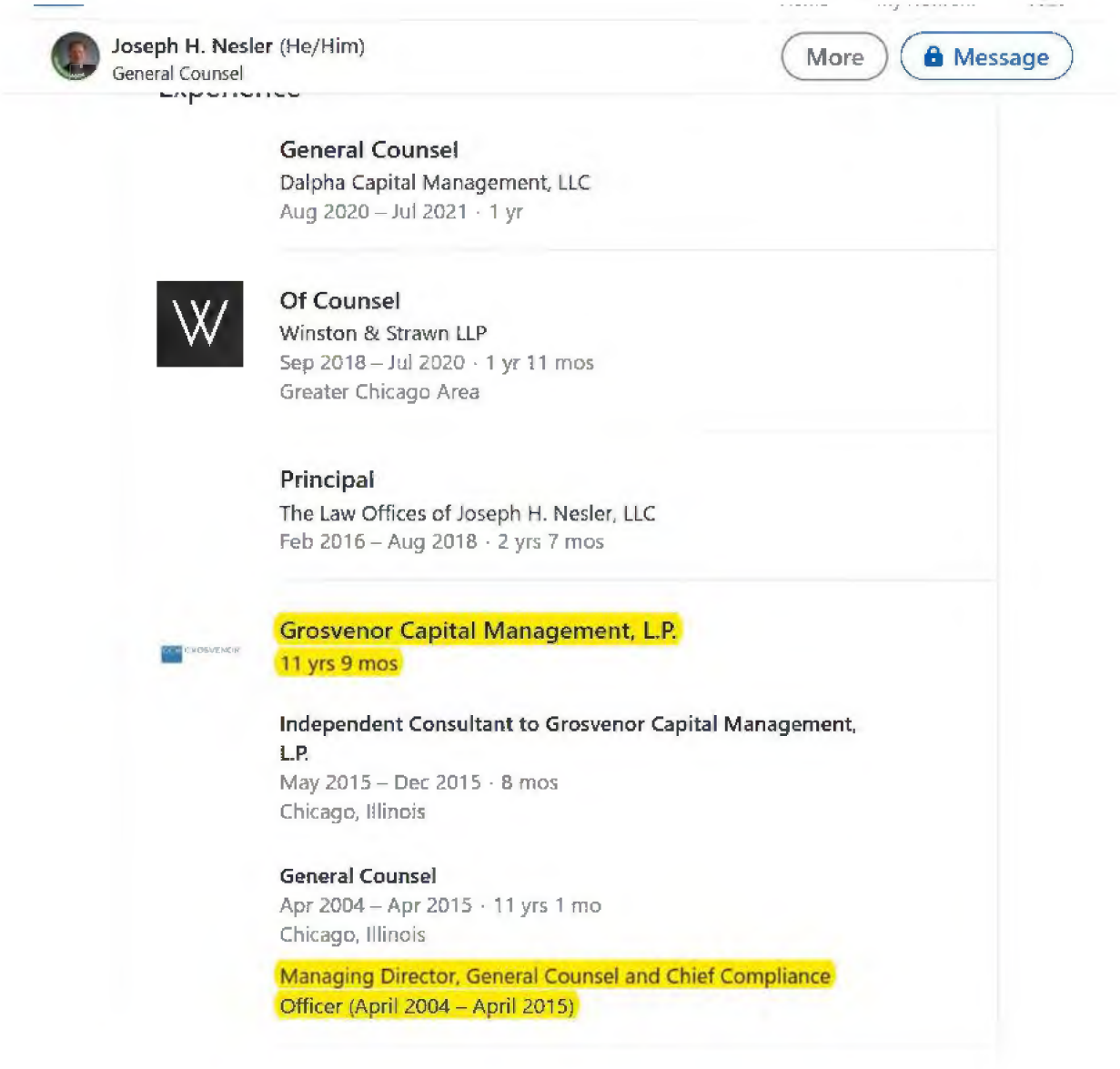
THE BACKSTOP LENDERS' OBJECTION TO THE MOTION OF LYME REGIS TO ABANDON CERTAIN CAUSES OF ACTION OR, IN THE ALTERNATIVE, TO GRANT STANDING TO LYME REGIS TO PURSUE CLAIMS ON BEHALF OF THE ESTATE

1. The Steering Group of Senior Secured Noteholders who are Backstop Lenders -- Icahn Capital LP, Monarch Alternative Capital LP, Owl Creek Asset Management, L.P., Stonehill Capital Management LLC, and Värde Partners, Inc. (collectively, the "Backstop Lenders") -- hereby file this objection (the "Objection") to the Motion of Lyme Regis Partners, LLC ("Lyme Regis") to Abandon Certain Causes of Action or, in the Alternative, to Grant Standing to Lyme Regis to Pursue Claims on Behalf of the Estate (the "Motion") [Docket No. 593].

Stonehill Founder (Motulsky) and Grosvenor's G.C. (Nesler) Were Law School Classmates

Over 25 years earlier, here is a group at a party. From the left, Bob Zinn, Dave Lowenthal, Rory Little, Joe Nesler, Jon Polonsky (in front of Joe), John Motulsky and Mark Windfeld-Hansen (behind bottle!) Motulsky circulated this photo at the reunion. Thanks John!


Joseph H. Nesler (He/Him)
General Counsel
More
Message
#OPENTOWORK
Joseph H. Nesler (He/Him) ·
3rd
General Counsel
Winnetka, Illinois, United States ·
Contact info
500+ connections
Message
More
Yale Law School
Open to work
Chief Compliance Officer and General Counsel roles
See all details
About
I have over 38 years of experience representing participants in the investment management industry with respect to a wide range of legal and regulatory matters, including SEC, DOL, FINRA, and NFA regulations and examinations. ... see more
Activity
522 followers
Posts Joseph H. created, shared, or commented on in the last 90 days are displayed here.
https://www.linkedin.com/in/josephnesler/



Joseph H. Nesler (He/Him)
General Counsel

More | Message

General Counsel
Dalpha Capital Management, LLC
Aug 2020 – Jul 2021 · 1 yr

Of Counsel
Winston & Strawn LLP
Sep 2018 – Jul 2020 · 1 yr 11 mos
Greater Chicago Area

Principal
The Law Offices of Joseph H. Nesler, LLC
Feb 2016 – Aug 2018 · 2 yrs 7 mos

Grosvenor Capital Management, L.P.
11 yrs 9 mos

Independent Consultant to Grosvenor Capital Management, L.P.
May 2015 – Dec 2015 · 8 mos
Chicago, Illinois

General Counsel
Apr 2004 – Apr 2015 · 11 yrs 1 mo
Chicago, Illinois

Managing Director, General Counsel and Chief Compliance Officer (April 2004 – April 2015)

Investor Communication to Highland Crusader Funds Stakeholders

Alvarez & Marsal
Management, LLC 2029 Ce
Park East Suite 2060
Angeles, CA 9

July 6, 2021

Re: Update & Notice of Distribution

Dear Highland Crusader Funds Stakeholder,

As you know, in October 2020, the Bankruptcy Court approved a settlement of the Redeemer Committee's and the Crusader Funds' claims against Highland Capital Management L.P. ("HCM"), as a result of which the Redeemer Committee was allowed a general unsecured claim of $137,696,610 against HCM and the Crusader Funds were allowed a general unsecured claim of $50,000 against HCM (collectively, the "Claims"). In addition, as part of the settlement, various interests in the Crusader Funds held by HCM and certain of its affiliates are to be extinguished (the "Extinguished Interests"), and the Redeemer Committee and the Crusader Funds received a general release from HCM and a waiver by HCM of any claim to distributions or fees that it might otherwise receive from the Crusader Funds (the "Released Claims" and, collectively with the Extinguished Interests, the "Retained Rights").

A timely appeal of the settlement was taken by UBS (the "UBS Appeal) in the United States District Court for the Northern District of Texas, Dallas Division. However, the Bankruptcy Court subsequently approved a settlement between HCM and UBS, resulting in dismissal of the UBS Appeal with prejudice on June 14, 2021.

On April 30, 2021, the Crusader Funds and the Redeemer Committee consummated the sale of the Claims against HCM and the majority of the remaining investments held by the Crusader Funds to Jessup Holdings LLC ("Jessup") for $78 million in cash, which was paid in full to the Crusader Funds at closing. The sale specifically excluded the Crusader Funds' investment in Cornerstone Healthcare Group Holding Inc. and excluded certain specified provisions of the settlement agreement with HCM (the "Settlement Agreement"), including, but not limited to, the Retained Rights. The sale of the Claims and investments was made with no holdbacks or escrows.

The sale to Jessup resulted from a solicitation of offers to purchase the Claims commenced by Alvarez & Marsal CRF Management LLC ("A&M CRF"), as Investment Manager of the Crusader Funds, in consultation with the Redeemer Committee. Ultimately, the Crusader Funds and the Redeemer Committee entered exclusive negotiations with Jessup, culminating in the sale to Jessup.

A&M CRF, pursuant to the Plan and Scheme and with the approval of House Hanover, the Redeemer Committee and the Board of the Master Fund, now intends to distribute the proceeds from the Jessup transaction ($78 million), net of any applicable tax withholdings and with no reserves for the Extinguished Claims or the Released Claims. In addition, the distribution will include approximately $9.4 million in proceeds that have been redistributed due to the cancellation

and extinguishment of the interests and shares in the Crusader Funds held by HCM, Charitable DAF and Eames in connection with the Settlement Agreement, resulting in a total gross distribution of $87.4 million. Distributions will be based on net asset value as of June 30, 2021.

Please note that A&M CRF intends to make the distributions by wire transfer no later than July 31, 2021. Please confirm your wire instructions on or before **July 20, 2021.** If there are any revisions to your wire information, please use the attached template to provide SEI and A&M CRF your updated information on investor letterhead. This information should be sent on or before **July 20, 2021** to Alvarez & Marsal CRF and SEI at CRFInvestor@alvarezandmarsal.com and AIFS-IS_Crusader@seic.com, respectively.

The wire payments will be made to the investor bank account on file with an effective and record date of July 1, 2021. Should you have any questions, please contact SEI or A&M CRF at the e-mail addresses listed above.

Sincerely,

Alvarez & Marsal CRF Management, LLC

By: _____
Steven Varner
Managing Director

Alvarez & Marsal CRF Management, LLC 2029 Century Park East Suite 2060 Los Angeles, CA 90067

July 6, 2021

Re: Update & Notice of Distribution

Dear Highland Crusader Funds Stakeholder,

As you know, in October 2020, the Bankruptcy Court approved a settlement of the Redeemer Committee's and the Crusader Funds' claims against Highland Capital Management L.P. ("HCM"), as a result of which the Redeemer Committee was allowed a general unsecured claim of $137,696,610 against HCM and the Crusader Funds were allowed a general unsecured claim of $50,000 against HCM (collectively, the "Claims"). In addition, as part of the settlement, various interests in the Crusader Funds held by HCM and certain of its affiliates are to be extinguished (the "Extinguished Interests"), and the Redeemer Committee and the Crusader Funds received a general release from HCM and a waiver by HCM of any claim to distributions or fees that it might otherwise receive from the Crusader Funds (the "Released Claims" and, collectively with the Extinguished Interests, the "Retained Rights").

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and extinguishment of the interests and shares in the Crusader Funds held by HCM, Charitable DAF and Eames in connection with the Settlement Agreement, resulting in a total gross distribution of $87.4 million. Distributions will be based on net asset value as of June 30, 2021.

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The wire payments will be made to the investor bank account on file with an effective and record date of July 1, 2021. Should you have any questions, please contact SEI or A&M CRF at the e-mail addresses listed above.

Sincerely,

Alvarez & Marsal CRF Management, LLC

By: _____
Steven Varner
Managing Director

On investor letterhead, please use the template below to provide Alvarez & Marsal CRF Management, LLC and SEI your updated wire information.

Information Needed	Wire Information Input
Investor name (as it reads on monthly statements) Fund(s) Invested Contact Information (Phone No. and Email) Updated Wire Information • Beneficiary Bank • Bank Address • Beneficiary (Account) Name • ABA/Routing # • Account # • SWIFT Code International Wires • Correspondent Bank • ABA/Routing # • SWIFT Code	

Signed By: _____ Date: _____

Appendix Exhibit 133

UNITED STATES BANKRUPTCY COURT

Northern DISTRICT OF Texas

Case number 19-34054 sgj11

In re: Highland Capital Management, LP § Case No. 19-34054
§
§
Debtor(s) §

☐ Jointly Administered

Post-confirmation Report

Chapter 11

Quarter Ending Date: 03/31/2023 Petition Date: 10/16/2019

Plan Confirmed Date: 02/22/2021 Plan Effective Date: 08/11/2021

This Post-confirmation Report relates to: ◉ Reorganized Debtor

○ Other Authorized Party or Entity: _____
Name of Authorized Party or Entity

/s/ Zachery Z. Annable
Signature of Responsible Party

04/21/2023
Date

Zachery Z. Annable, Hayward PLLC
Printed Name of Responsible Party

10501 N. Central Expressway, Suite 106
Dallas TX 75231
Address

STATEMENT: This Periodic Report is associated with an open bankruptcy case; therefore, Paperwork Reduction Act exemption 5 C.F.R. § 1320.4(a)(2) applies.

1934054230421000000000017

Part 1: Summary of Post-confirmation Transfers

	Current Quarter	Total Since Effective Date
a. Total cash disbursements	$15,817,995	$115,423,961
b. Non-cash securities transferred	$0	$0
c. Other non-cash property transferred	$573,888	$5,194,652
d. Total transferred (a+b+c)	$16,391,883	$120,618,613

Part 2: Preconfirmation Professional Fees and Expenses

				Approved Current Quarter	Approved Cumulative	Paid Current Quarter	Paid Cumulative
a.	Professional fees & expenses (bankruptcy) incurred by or on behalf of the debtor		*Aggregate Total*	$0	$33,005,136	$0	$33,005,136
	Itemized Breakdown by Firm						
		Firm Name	Role				
	i	Pachulski Stang Ziehl & Jones	Lead Counsel	$0	$24,312,860	$0	$24,312,860
	ii	Development Specialists, Inc.	Financial Professional	$0	$5,765,448	$0	$5,765,448
	iii	Kurtzman Carson Consultants	Other	$0	$2,054,716	$0	$2,054,716
	iv	Hayward & Associates PLLC	Local Counsel	$0	$872,112	$0	$872,112
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	vi						
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b.				Approved Current Quarter	Approved Cumulative	Paid Current Quarter	Paid Cumulative
	Professional fees & expenses (nonbankruptcy) incurred by or on behalf of the debtor *Aggregate Total*			$0	$7,604,472	$0	$7,604,472
	Itemized Breakdown by Firm						
		Firm Name	Role				
	i	Hunton Andrews Kurth LLP	Other	$0	$1,149,807	$0	$1,149,807
	ii	Foley Gardere, Foley & Lardne	Other	$0	$629,088	$0	$629,088
	iii	Deloitte	Financial Professional	$0	$553,413	$0	$553,413
	iv	Mercer (US) Inc.	Other	$0	$204,767	$0	$204,767
	v	Teneo Capital, LLC	Financial Professional	$0	$1,364,823	$0	$1,364,823
	vi	Wilmer Cutler Pickering Hale	Other	$0	$2,650,937	$0	$2,650,937

	vii	Carey Olsen	Other	$0	$280,264	$0	$280,264
	viii	ASW Law	Other	$0	$4,976	$0	$4,976
	ix	Houlihan Lokey Financial Advi	Other	$0	$766,397	$0	$766,397
	x						
	xi						
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	xiii						
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c.	All professional fees and expenses (debtor & committees)			$0	$60,171,929	$0	$60,171,929

Part 3: Recoveries of the Holders of Claims and Interests under Confirmed Plan

	Total Anticipated Payments Under Plan	Paid Current Quarter	Paid Cumulative	Allowed Claims	% Paid of Allowed Claims
a. Administrative claims	$0	$0	$15,750	$15,750	100%
b. Secured claims	$5,843,261	$0	$5,274,477	$5,274,477	100%
c. Priority claims	$16,498	$0	$1,213,832	$1,213,832	100%
d. General unsecured claims	$205,144,544	$15,044,364	$270,205,592	$397,485,568	68%
e. Equity interests	$0	$0	$0		

Part 4: Questionnaire

a. Is this a final report? Yes ○ No ◉

If yes, give date Final Decree was entered: _____

If no, give date when the application for Final Decree is anticipated: _____

b. Are you current with quarterly U.S. Trustee fees as set forth under 28 U.S.C. § 1930? Yes ◉ No ○

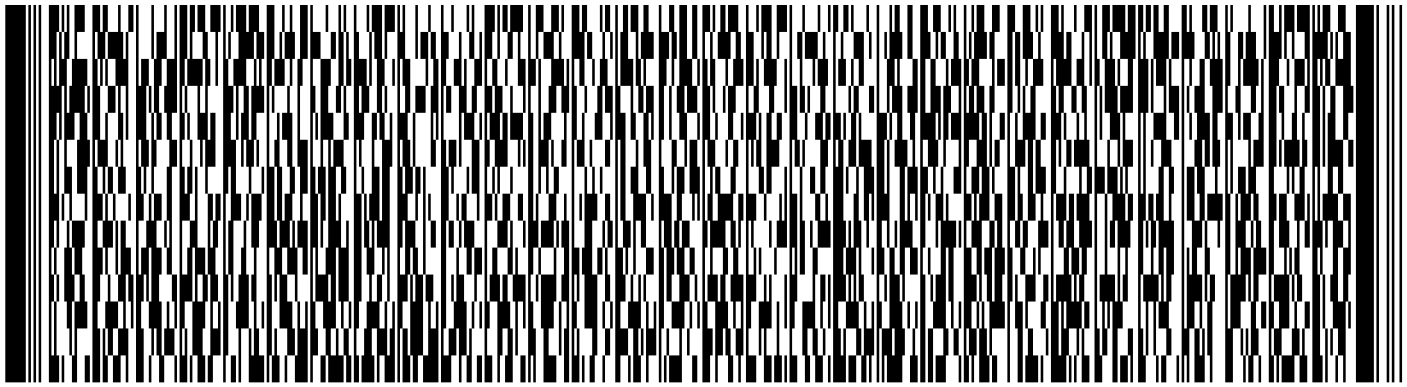
Privacy Act Statement

28 U.S.C. § 589b authorizes the collection of this information and provision of this information is mandatory. The United States Trustee will use this information to calculate statutory fee assessments under 28 U.S.C. § 1930(a)(6) and to otherwise evaluate whether a reorganized chapter 11 debtor is performing as anticipated under a confirmed plan. Disclosure of this information may be to a bankruptcy trustee when the information is needed to perform the trustee's duties, or to the appropriate federal, state, local, regulatory, tribal, or foreign law enforcement agency when the information indicates a violation or potential violation of law. Other disclosures may be made for routine purposes. For a discussion of the types of routine disclosures that may be made, you may consult the Executive Office for United States Trustee's systems of records notice, UST-001, "Bankruptcy Case Files and Associated Records." *See* 71 Fed. Reg. 59,818 et seq. (Oct. 11, 2006). A copy of the notice may be obtained at the following link: http://www.justice.gov/ust/eo/rules_regulations/index.htm. Failure to provide this information could result in the dismissal or conversion of your bankruptcy case, or other action by the United States Trustee. 11 U.S.C. § 1112(b)(4)(F).

I declare under penalty of perjury that the foregoing Post-confirmation Report and its attachments, if any, are true and correct and that I have been authorized to sign this report.

/s/ James Seery	James Seery
Signature of Responsible Party	Printed Name of Responsible Party
CEO	04/21/2023
Title	Date

Debtor's Name Highland Capital Management, LP Case No. 19-34054



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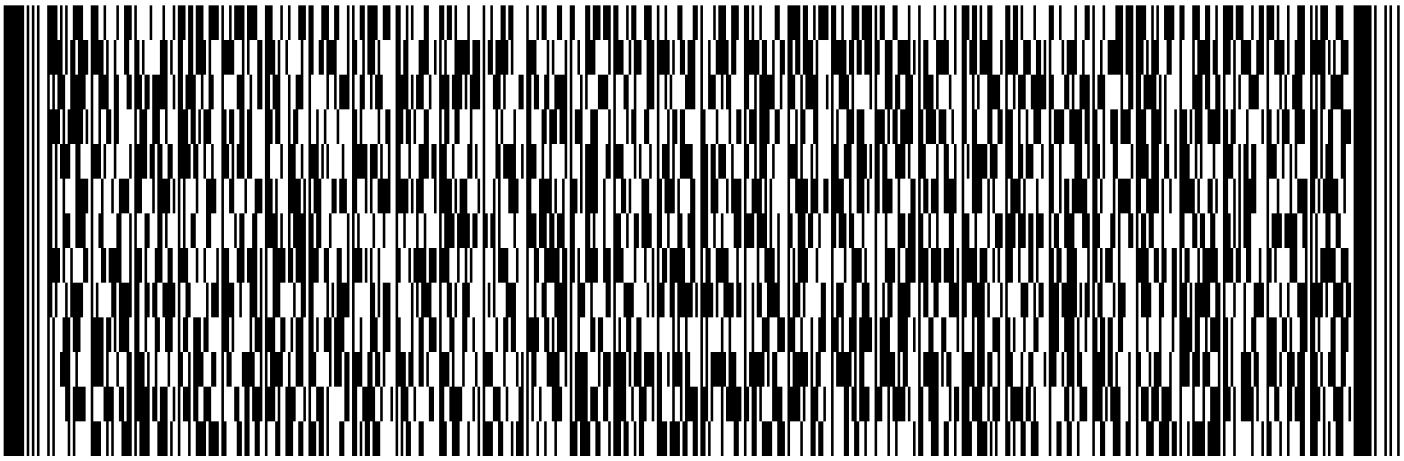
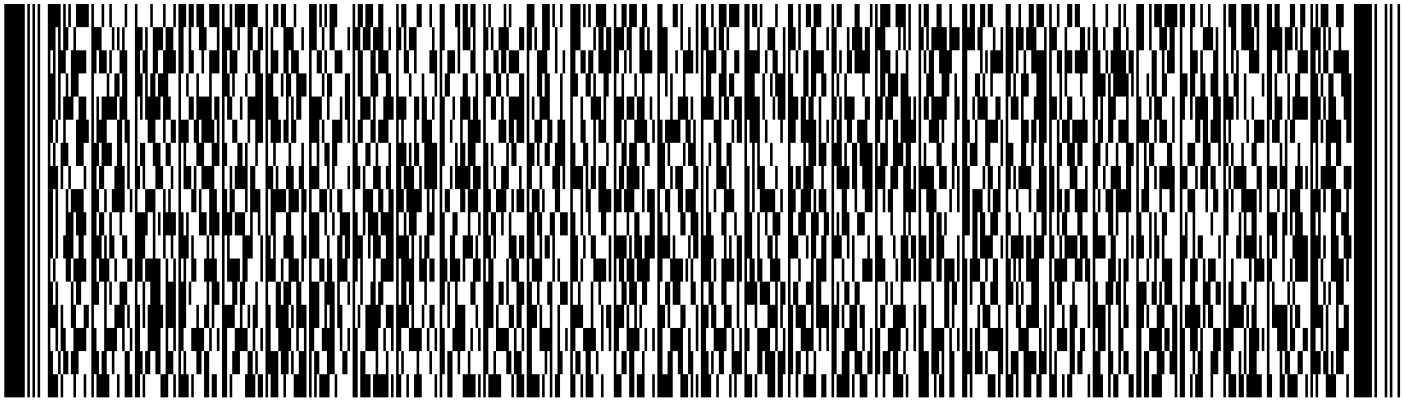


Other Page 1



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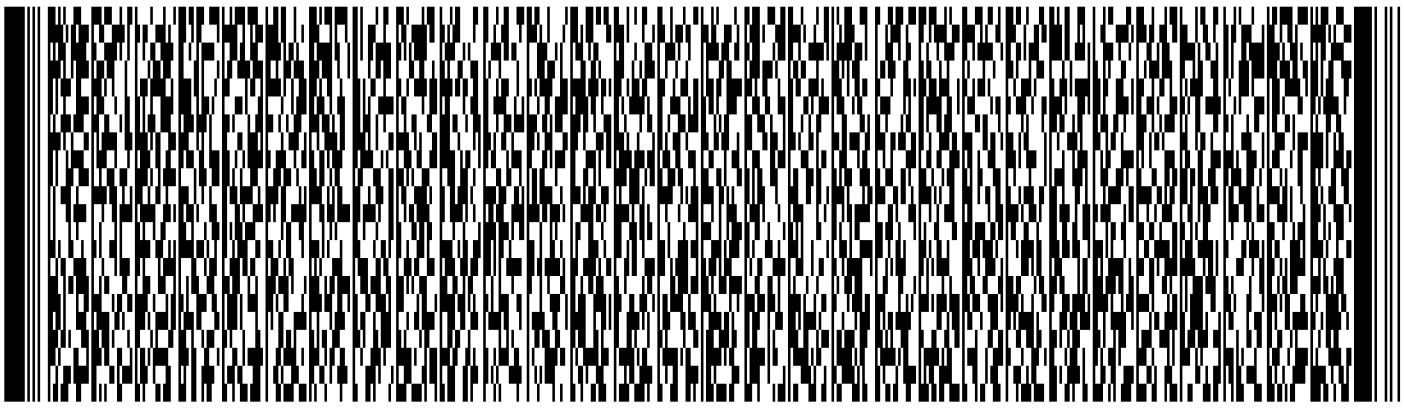
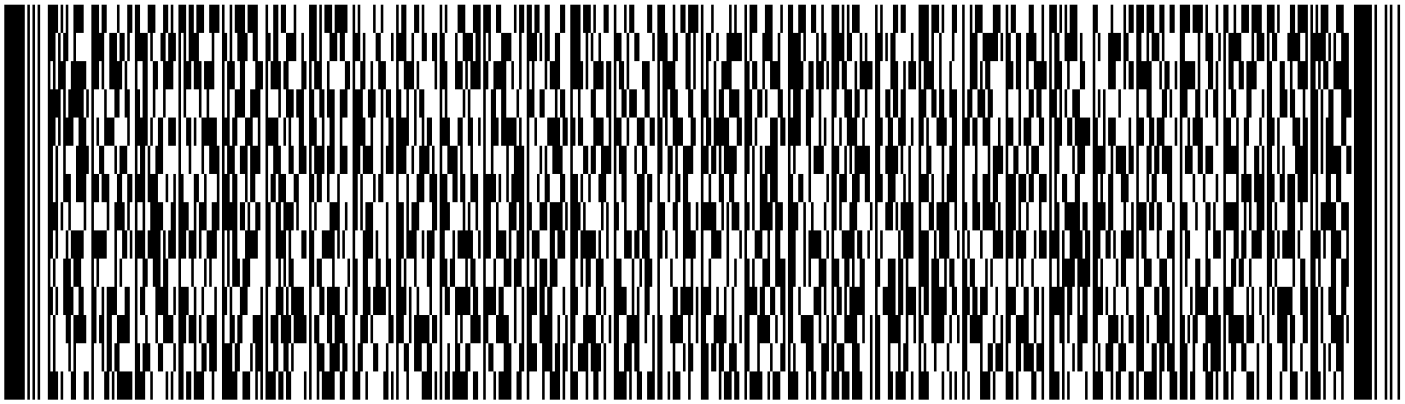
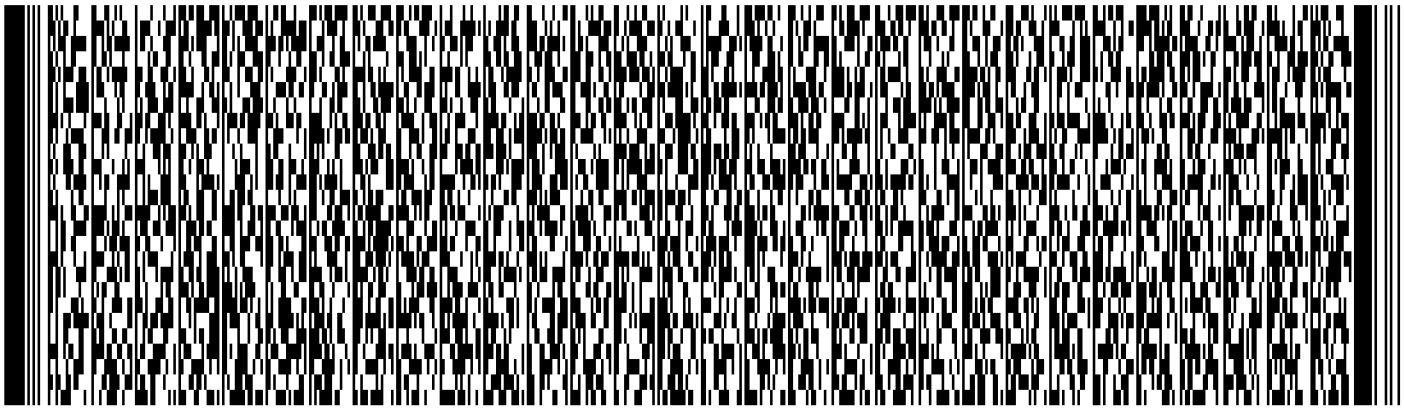


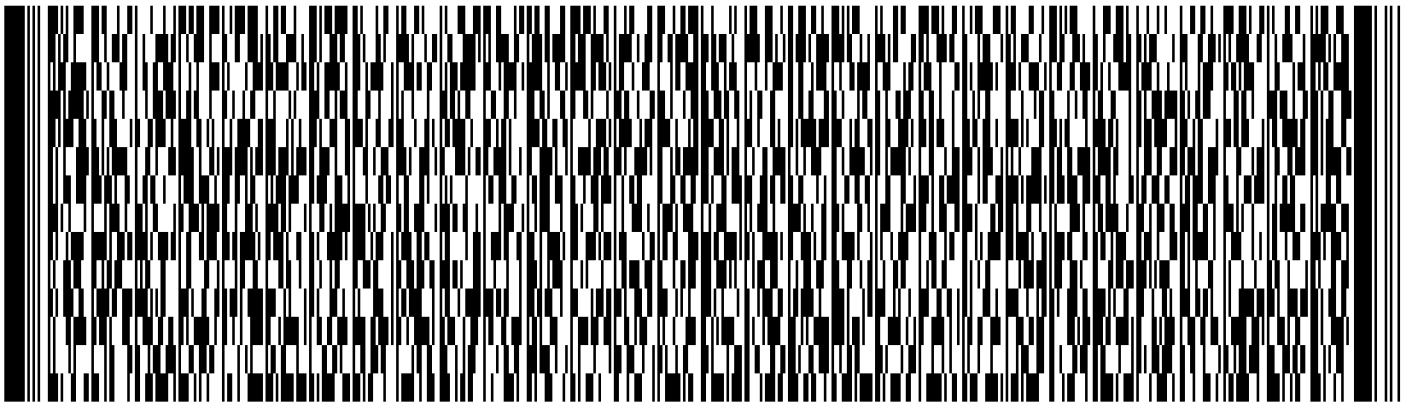
Bankruptcy Table 1-50



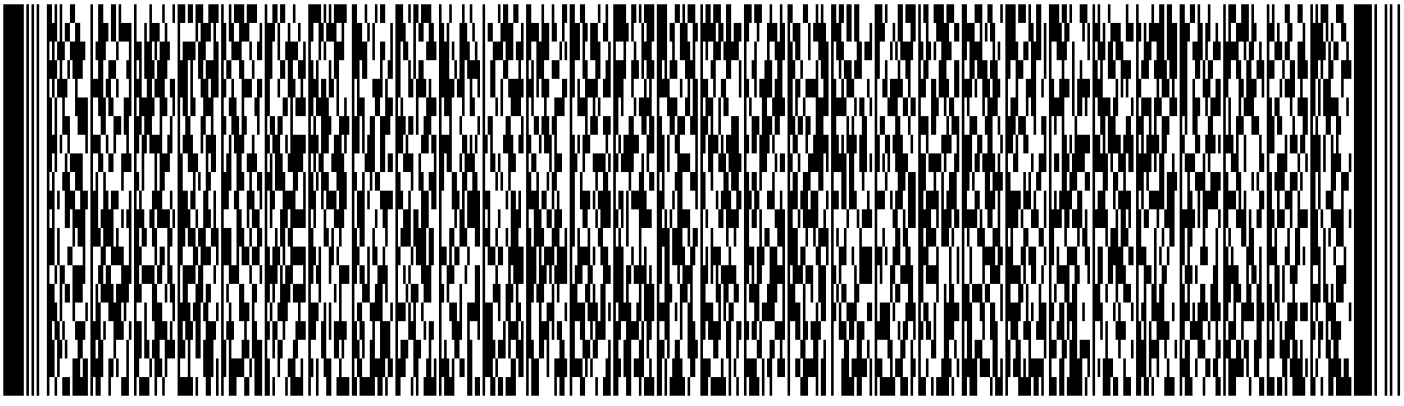
Bankruptcy Table 51-100



Non-Bankruptcy Table 1-50



Non-Bankruptcy Table 51-100



Part 3, Part 4, Last Page

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
Reorganized Debtor.	)	

GLOBAL NOTES TO POST CONFIRMATION REPORT

The Reorganized Debtor has filed the attached post-confirmation report (the "PCR") in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court"), on behalf of debtor Highland Capital Management, L.P., Case No. 19-34054 (SGJ) (the "Bankruptcy Case"). The Reorganized Debtor prepared the PCR with the assistance of the Reorganized Debtor's employees, advisors, and professionals. The PCR was prepared solely for the purpose of complying with the post-confirmation quarterly reporting requirements established by the United States Trustee Program (*see* https://www.justice.gov/ust/chapter-11-operating-reports). The PCR should not be relied upon by any persons for any information in connection with current or future financial conditions or events relating to the Reorganized Debtor or its estate.

The financial information contained in the PCR is preliminary, unaudited, limited in scope, and is not prepared in accordance with accounting principles generally accepted in the United States of America nor in accordance with other applicable non-bankruptcy law. In preparing the PCR, the Reorganized Debtor relied on financial data from the books and records available to it at the time of such preparation, as well as certain filings on the docket in the Bankruptcy Case. Although the Reorganized Debtor made commercially reasonable efforts to ensure the accuracy and completeness of the PCR, inadvertent errors or omissions may exist. The Reorganized Debtor reserves the right to amend and supplement the PCR as may be necessary or appropriate.

Part 2: Preconfirmation Professional Fees and Expenses

In Section A of the PCR, the Reorganized Debtor listed the bankruptcy related professionals employed in connection with the Bankruptcy Case.

In Section B of the PCR, the Reorganized Debtor listed non-bankruptcy professionals, those that would have been retained absent the Bankruptcy Case, and the ordinary course professionals ("OCP"). Hunton Andrews Kurth LLP ("Hunton") and Wilmer Cutler Pickering Hale and Dorr

[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.

LLP ("Wilmer Hale") were originally ordinary course professionals but were later employed professionals. The amounts listed for Hunton and Wilmer Hale include the OCP payments and employed professional payments.

In Section C of the PCR, the Reorganized Debtor totals all payments included in Sections A and B, along with payments made to professional employed by the official committee of unsecured creditors (the "Committee").

The approved current quarter, approved cumulative, and paid cumulative will have the same amount listed due to approval and payment of final fee applications.

Part 3: Recoveries of the Holders of Claims and Interests under Confirmed Plan

The payments made to holders of General Unsecured Claims were disbursed from the Claimant Trust, but for presentation purposes, have been included in Part 3 of the post-confirmation report for the Reorganized Debtor.

The presentation contained in this PCR does not reflect the material and necessary reserves that will be taken in accordance with Reorganized Debtor's governing documents and the Plan.

The Debtor reserves all right to object to any claim in accordance with the terms of the Plan.

Addendum to Global Notes for March 31, 2023 Quarterly Operating Report
Summary of Highland Claimant Trust ("Claimant Trust") & Highland Capital Management, L.P. ("HCMLP"), Effectuation of Plan as of March 31, 2023

Item 1: Quarter-ending cash, Disputed Claims Reserve, and Indemnity Trust summary (in $ millions)

Quarter End Date	Quarter End Cash and Equivalents balances [1][2]	Cumulative Funding – Disputed Claims Reserve	Cumulative Funding – Indemnity Trust [2]
3/31/2021	$27.9	n/a	n/a
6/30/2021	$17.9	n/a	n/a
9/30/2021	$33.6	n/a	$2.5
12/31/2021	$19.8	n/a	$2.5
3/31/2022	$21.1	n/a	$2.5
6/30/2022	$85.2	n/a	$2.5
9/30/2022	$31.8	$11.0	$20.0
12/31/2022	$36.6	$11.0	$20.0
3/31/2023	$25.0	$11.6	$32.0

[1] Bank cash for Claimant Trust, HCMLP (debtor up to August 11, 2021; re-organized from August 11, 2021), Highland Litigation Trust Sub-Trust ("Litigation Trust"), HCMLP GP LLC and including cash at brokerage account(s), cash equivalents as well as cash or equivalent reserves for earned operating obligations, if applicable. All amounts herein EXCLUDE the Highland Indemnity Trust ("Indemnity Trust") and the cash held within the Disputed Claims Reserve, which are described separately, as well as any other segregated agency or shareholder representative account(s) for which cash is held solely for the benefit of others.

[2] Based upon the baseless filed motion seeking to litigate against indemnified parties and threats from vexatious parties, the Claimant Trustee expects to fund significant additional amounts into the Indemnity Trust.

Item 2: Class 8 / Class 9 Summary (in $ millions)

Note that payments described within Part 3 of the quarterly operating report include payments to classes 6, 7, 8, and 9, whereas payments below only include payments to classes 8 and 9, as applicable.

Class 8 / 9 Summary (in $ millions)	Cash Payments through March 31, 2023	Disputed Claims Reserve	Remaining [3]
Class 8	$263.4	$11.6	$28.7
Class 9	$0.0	$0.0	$98.8
Classes 8 + 9	$263.4	$11.6	$127.4

[3] Face amount of allowed class 8/9 claims PLUS face amount of pending class 8/9 claims LESS cumulative payments to classes 8/9 LESS cumulative reserves for classes 8/9. Amounts EXCLUDE accrued interest on claim balances as well as amounts of pending admin priority claims, and unliquidated pending class 8/9 claims. Any future distributions to classes 8 and 9 are subject to satisfaction of Claimant Trust senior obligations.

Item 3: Remaining disputed/expunged or pending claims (in $ millions)

Amounts reserved within the Disputed Claims Reserve are in no way indicative of the value or validity of the claim, but rather are simply established based on the face amount of the claim and the proportionate calculation of amounts already distributed to actual allowed claimholders.

Party	Claim number(s)	Face amount	Reserved in Disputed Claims Reserve	Unreserved
Highland CLO Management, Ltd.	Scheduled/Disputed	$10.1	($9.2)	$1.0
Patrick Daugherty [4]	205	$2.7	($2.4)	$0.3
CLO Holdco, Ltd. [5]	254	Unliquidated	$0.0	See note
HCRE Partners, LLC [6]	146	Unliquidated	$0.0	See note
Hunter Covitz [7]	186	Unliquidated	$0.0	See note
Highland Capital Management Fund Advisors, LP and NexPoint Advisors, LP [8]	239	$6.7	$0.0	$6.7
Total		$19.5	($11.6)	$7.9

[4] Proof of claim has been partially settled, with the exception of the Reserved Claim as described in the settlement agreement with Mr. Daugherty [Docket No. 3298]. Claimant may assert additional amounts may be owed.

[5] CLO Holdco, Ltd., initially filed proof of claim 133 and subsequently amended that claim to $0.00 in open court and then by filing proof of claim 198. HCMLP relied on that agreement and amendment. Subsequently, CLO Holdco, Ltd., sought to amend claim 198 to an estimated amount of $3.8 million by filing proof of claim 254. The Litigation Trust objected to the attempted amended claim, and CLO Holdco, Ltd.'s claim was adjudicated at $0.00. CLO HoldCo, Ltd., has appealed.

[6] HCRE Partners, LLC filed a motion to withdraw proof of claim 146. HCMLP contested that the withdrawal of the claim. The matter is sub judice.

[7] Proof of claim 186 was expunged, but alleged transferee of expunged claim has appealed; appeal pending.

[8] Proof of claim 239, which is an administrative priority claim, was expunged and judgment was granted against alleged creditor, but alleged creditor has appealed.

Item 4: Interest-bearing debt outstanding as of March 31, 2023 (in $ millions)

No interest-bearing debt outstanding. Exit Facility retired in 2022. [9]

[9] Encompasses Claimant Trust, HCMLP (re-organized), Litigation Trust, HCMLP GP LLC, but does not look-through to their respective subsidiaries and/or private funds or companies held by private funds.

Item 5: Remaining investments, notes, and other assets [10]

Asset (alphabetic sorting, except "Other misc.")	**Description**
Breach of contract judgment	Direct asset. Bonded judgment against Highland Capital Management Fund Advisors, LP and NexPoint Advisors, LP, pending appeal.
Contempt civil penalty	Direct asset. Civil penalty owed by Mr. Dondero from the first of two contempt orders against him (his second contempt civil penalty was already received from subsidiary of DAF).
Contingent rights, post-sale	Residual contingent rights tied to milestones from a company that was sold Pre-Petition – direct and indirect interests through managed fund(s).
Highland CLO Funding, Ltd. ("HCLOF")	Majority-owned by HCMLP or Claimant Trust (directly or indirectly) but controlled by two independent Guernsey-based directors – investments of this entity are predominantly subordinated notes of Acis-managed CLOs, whose remaining value is predominantly cash. Remaining distributions are held up due to litigation against Acis-related entities and HCLOF by Mr. Dondero's entities.
NHT.U (TSXV exchange)	Direct asset. Hospitality REIT managed by a subsidiary of NexPoint Advisors, LP.
NHT Holdco LLC	Hospitality REIT managed by a subsidiary of NexPoint Advisors, LP. Indirect interests held through a Delaware LLC created for the sole purpose of holding shares of the hospitality REIT. Mr. Dondero is the manager of the entity. HCMLP has demanded shares as provided in the LLC agreement but has yet to receive delivery of the shares.
Note from Hunter Mountain Investment Trust	Direct asset. Defaulted note. Subject to Litigation Trustee collecting.
Note from The Dugaboy Investment Trust ("Dugaboy")	Direct asset. Term note. Last receipt in December 2022. Next scheduled receipt in December 2023.
Notes from Mr. Dondero + his affiliates (except Dugaboy)	Direct asset. Demand notes and accelerated term notes, plus costs of collection. Subject to Claimant Trust collection litigation.
Post-sale escrows	Residual escrow(s) remaining related to the monetizations of two private companies. Direct and indirect interests through managed fund(s).
Private companies	Direct and indirect interests in two privately held companies.
Private equity fund interests	Direct or indirect interests in two private funds that make Oil & Gas and Healthcare-related investments, respectively.
SE Multifamily Holdings LLC	Direct asset. Membership interests. Subject to Claimant Trust litigation.
Other misc.	Future revenue streams; receivables; misc. investments; cash (unrestricted and reserved); litigation claims of the Litigation Trust; indemnification claims.

[10] Listing is not comprehensive, but rather is intended to capture potentially significant asset categories that have yet to be fully monetized. Listing includes assets of the Claimant Trust, HCMLP (re-organized), Litigation Trust, and HCMLP GP LLC. Descriptions herein indicate whether the asset is directly owned by one or more of these entities and/or whether the asset is indirectly beneficially owned.

Appendix Exhibit 134

CASE NO. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NEXPOINT ADVISORS, L.P. and

HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.,

APPELLANT

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.

APPELLEE

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION
BANKRUPTCY CASE NO. 19-34054 (SGJ11)

APPEAL PENDING AS CIVIL ACTION NO. 3:23-CV-00573 IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

PETITION FOR PERMISSION TO APPEAL
(DIRECT APPEAL FROM BANKRUPTCY COURT, 28 U.S.C. § 158(d))

MUNSCH HARDT KOPF & HARR, P.C.

Davor Rukavina
Texas Bar No. 24030781
500 North Akard Street
Suite 3800
Dallas, Texas 75201-6659
Telephone: (214) 855-7500
Facsimile: (214) 855-7584
Email: drukavina@munsch.com

ATTORNEYS FOR THE APPELLANTS

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1. **Appellants:**

NexPoint Advisors, L.P.
Highland Capital Management Fund Advisors, L.P. n/k/a NexPoint Asset Management, L.P.[1]

Counsel for the Appellant:
MUNSCH HARDT KOPF & HARR, P.C.
Davor Rukavina
500 North Akard Street, Suite 3800
Dallas, Texas 75201-6659
Telephone: (214) 855-7500
Facsimile: (214) 855-7584

2. **Appellee:**

Highland Capital Management, L.P.

Counsel for Appellee:
PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz
John A. Morris
10100 Santa Monica Blvd., 13th Floor
Los Angeles, CA 90067
Telephone: (310) 277-6910

[1] Highland Capital Management Fund Advisors, L.P. recently changed its name to NexPoint Asset Management, L.P., but otherwise remains the same entity. For ease, the Appellants have not changed the style of this Petition from the proceedings and orders below, but advise the Court of this name change in order that the Court can properly direct the Appellants how to proceed in light of the name change.

Facsimile: (310) 201-0760

-- and –

HAYWARD PLLC
Melissa S. Hayward
10501 N. Central Expy, Ste. 106
Dallas, Texas 75231
Tel: (972) 755-7100
Facsimile: (972) 755-7110

/s/ Davor Rukavina
Davor Rukavina, Esq.
Counsel for the Appellants

PETITION FOR PERMISSION TO APPEAL
(DIRECT APPEAL FROM BANKRUPTCY COURT 28 U.S.C. § 158(d))

NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P. n/k/a NexPoint Asset Management, L.P. (the "Petitioners" or the "Appellants"), respectfully request that the Court grant them permission to appeal the Plan Conforming Order (defined below), entered by the Bankruptcy Court upon remand from this Court, directly to this Court pursuant to Federal Rule of Appellate Procedure 5 and 28 U.S.C. § 158(d)(2)(A).

I. PROCEDURAL BACKGROUND

A. THE ORIGINAL CONFIRMATION ORDER

This is an appeal after remand of an order of the Bankruptcy Court confirming a Chapter 11 plan on "cramdown" over the objection of the Appellant and various others.

On February 22, 2021, the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") entered that certain *Order (i) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified); and (ii) Granting Related Relief* (the "Confirmation Order"), by which the Bankruptcy Court confirmed the *Debtor's Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [docket no.

1808], as further modified (the "Plan"), filed by Highland Capital Management, L.P. (the "Debtor").

A true and correct copy of the Confirmation Order, which includes the Plan as an original part thereof, is attached hereto as Exhibit "A."

The Debtor filed its voluntary Chapter 11 bankruptcy case (the "Bankruptcy Case") on October 16, 2019. The Debtor was a multi-billion dollar global investment advisor and manager of various funds, and is a registered investment advisor under the Investment Advisers Act of 1940. *See* Confirmation Order at p. 6. Among other assets that the Debtor manages is more than $1 billion invested by third parties in collateral loan obligation investment vehicles (the "CLOs"). *See id*. The CLOs own the underlying assets, usually securities, and the Debtor manages those assets for the CLOs, including by making decisions as to when to sell CLO assets, pursuant to a series of portfolio management agreements between the Debtor and the CLOs. *See id*.

The Plan is a wind down and liquidation plan. The Plan bifurcates the estate into two entities: (i) a claimant trust is created for the benefit of creditors (and potentially for the benefit of equity interest holders), which trust is vested with most assets of the estate, including causes of action, *see id*. at pp. 5-6; and (ii) the Debtor is reorganized and retains various business assets, including its management rights of the CLOs. *See id*. The claimant trust will own the reorganized Debtor. *See id*.

The reorganized Debtor will liquidate and wind-down its assets in approximately two (2) years after confirmation, during which time it will continue to manage the CLOs and various other investments that it holds or manages. *See id*. at p. 47. This is significant because the Debtor will continue in business postconfirmation, which implicates two aspects of the Plan that are directly relevant to this Petition.

First, the Plan originally (prior to remand) contained a broad exculpation provision exculpating the Debtor, its professionals, its general partner, and that partner's board members, among many others, from any claims for negligence. *See* Exhibit "A" at Plan pp. 47-48. This exculpation extended not only to case administration matters, but also to ordinary business matters and also to post-confirmation matters related to the implementation of the Plan. *See id*. The Appellants objected to the Plan's exculpation provisions because the Appellants themselves are registered advisors who advise many publicly traded funds and other investment vehicles, some of which funds own interests in the CLOs or otherwise have their assets managed by the Debtor. Thus, the Appellants wished to ensure that the Plan did not impermissibly exculpate persons from, among other things, any potential claims related to how they managed the CLOs or other investments.

The Appellants objected to the exculpation provisions of the Plan because those provisions effectuate prohibited third releases (*i.e.* claims by a non-debtor against a non-debtor) in violation of this Court's precedent in *In re Pacific Lumber*

Co., 584 F.3d 229, 253 (5th Cir. 2009). *Pacific Lumber* permitted the exculpation of the members of a creditor's committee for actions taken in the bankruptcy case, but it prohibited the exculpation of other persons or professionals. *See id*. at 253. As discussed below, the Appellants substantially prevailed on this argument in the first appeal of the Confirmation Order to this Court.

Second, the Plan contains a permanent "gatekeeper injunction" directly prohibiting the Appellants by name from commencing or pursuing any claim or cause of action against various protected persons, unless the Bankruptcy Court—purporting to exercise "sole and exclusive" jurisdiction—first determines, after notice and a hearing, that such claim or cause of action is "colorable." *See id*. at pp. 50-51. The Appellants objected to any such injunction for postconfirmation matters because the effect of the gatekeeper injunction was to grant a *de facto* exculpation in violation of the Bankruptcy Code and *Pacific Lumber* and because the Bankruptcy Court would have no postconfirmation jurisdiction to determine whether a claim or cause of action is "colorable." *See In re Craig's Stores of Tex. Inc.*, 266 F.3d 388, 390 (5th Cir. 2001). Should the Appellants wish to pursue an action arising after confirmation, and the Bankruptcy Court finds that the claim is not "colorable," that means that a court without jurisdiction will have forever decided and prohibited the bringing of the claim.

The Bankruptcy Court rejected these arguments, finding that the Debtor and others needed special protections from alleged vexatious litigation in the form of the "gatekeeper" injunction and other Plan injunction provisions, without which the Debtor would not be able to obtain post-confirmation D&O insurance. *See* Confirmation Order at pp. 57-59.

B. THIS COURT'S ORIGINAL OPINION

The Appellants and others appealed the Confirmation Order which, after the Bankruptcy Court certified that appeal for a direct appeal to this Court, and this Court granted a petition for direct appeal, proceeded in this Court as Case No. 21-10449 (the "First Appeal").

On August 19, 2022, in the First Appeal, this Court issued its opinion and judgment affirming in part and reversing in part the Confirmation Order with respect to the scope of the Plan's exculpation provisions. Following a motion for rehearing filed by various of the appellants, this Court withdrew its original opinion and entered a subsequent opinion in the First Appeal on September 7, 2022, remanding to the Bankruptcy Court for further proceedings in accordance with the opinion (the "Original Opinion"). A true and correct copy of the Original Opinion is attached hereto as Exhibit "B."

The Original Opinion replaced only one sentence in the prior opinion: "[t]he injunction and gatekeeper provisions are, on the other hand, perfectly lawful" was

replaced with: "[w]e now turn to the Plan's injunction and gatekeeper provisions." Exhibit H at p. 4. The Appellants believed this change to be very significant, in that this Court deleted the prior reference to the gatekeeper injunction being "perfectly lawful."

On September 12, 2022, this Court issued its *Judgment* in the First Appeal (the "Mandate"), a true and correct copy of which is attached hereto as Exhibit "C." The Mandate has not been recalled or stayed, the Court denying various appellants' motion for the same.[2]

By the Original Opinion, this Court concluded that the Plan and Confirmation Order violated 11 U.S.C. § 524(e) and *Pacific Lumber* because the exculpation provisions exceeded the permissible scope and effectuated non-debtor releases in violation of the Bankruptcy Code. *See* Exhibit B at p. 30. This Court vacated the Plan's exculpation provisions with respect to all exculpated parties except for the Debtor, the Official Committee of Unsecured Creditors appointed in the Bankruptcy Case and its members, and the independent directors of the Debtor's general partner for conduct within the scope of their duties. *See id*. This Court then remanded the

[2] Both the Appellants and the Debtor filed petitions for certiorari with the United States Supreme Court. As of this filing, and while the Supreme Court has requested responsive briefing, the Supreme Court has not decided whether it would grant review.

matter to the Bankruptcy Court for further proceedings consistent with the Original Opinion.

The Appellants additionally read the Original Opinion and Mandate as reversing the Bankruptcy Court's gatekeeper injunction, as discussed below, although whether this Court did so was disputed.[3] That is the primary issue on this Appeal.

C. POST-REMAND PROCEEDINGS

On September 9, 2022, the Debtor filed its *Motion to Conform Plan* (the "Motion to Conform"). A true and correct copy of the Motion to Conform is attached hereto as Exhibit "D." By the Motion to Conform, the Debtor sought an order from the Bankruptcy Court conforming the Confirmation Order to the Original Opinion, arguing that the only change to the Confirmation Order that was necessary was to change the definition of "Exculpated Parties" in the Plan to only the following: "collectively, (i) the Debtor, (ii) the Independent Directors, (iii) the Committee, and (iv) the members of the Committee (in their official capacities)." Exhibit "D" at p. 4.

[3] It was for more clarity on the issue of the gatekeeper injunction that the Appellant sought a rehearing which, as noted above, this Court granted. While the Appellants believed that the Court's opinion on rehearing confirmed that the Court was reversing the Bankruptcy Court on the gatekeeper injunction, this too was disputed and, as discussed below, rejected by the Bankruptcy Court.

Certain parties labeled as the "Funds" (as that term was used in the Original Opinion) filed an objection to the Motion to Conform, a true and correct copy of which is attached as Exhibit "E." This objection argued that the Confirmation Order and Plan should be conformed not only to limit the scope of the persons protected by the exculpation provision but that the persons protected by the gatekeeper injunction must be similarly limited in order to comply with the Original Opinion and Mandate; *i.e.* that the gatekeeper injunction could extend only to the same persons protected by the exculpation provision. Otherwise, the Plan would do through the gatekeeper injunction what this Court had held it could not do through the exculpation provision.

On September 30, 2022, the Appellants filed their *Limited Objection of the Advisors to Motion to Conform Plan* (the "Objection"). A true and correct copy of the Objection is attached as Exhibit "F." By the Objection, the Appellants joined in the aforementioned objection filed by the funds. The Appellants argued that the Original Opinion did more than strike only the offending provisions of the Plan's exculpation provision, but also that it struck similarly offending provisions in the gatekeeper injunction by, among other things, holding that "the Plan violates § 524(e) . . . insofar as it exculpates *and enjoins* certain non-debtors." Exhibit B at p. 30 (emphasis added). The Appellants argued that this Court confirmed their view in

the Original Opinion when it struck, on rehearing, the prior provision regarding the gatekeeper injunction being "perfectly lawful."

The Appellants also argued that a different provision of the Plan must be struck to conform the Plan to the Original Opinion, that being Article IX of the Plan which applied the Plan's injunctive provisions to successors, including the "Litigation Sub-Trust, and the Claimant Trust and their respective property and interests in property." Exhibit F at p. 3. Finally, the Appellants argued that the Plan should have been conformed to also exclude from the gatekeeper injunction those suits expressly authorized by 28 U.S.C. § 959(a), which provides that "[t]rustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property." 28 U.S.C. § 959(a). Thus, the Appellants argued that the gatekeeper injunction could not enjoin the bringing of actions expressly permitted by this federal statute.

On October 14, 2022, the Debtor filed its *Reply in Support of Motion to Conform Plan*, a true and correct copy of which is attached as Exhibit "G," in which the Debtor reasserted its argument in the Motion to Conform that no further changes to the Plan and the Confirmation Order were necessitated by this Court's Original Opinion, other than changing the definition of "Exculpated Parties." The Debtor argued that the relief requested by the Appellants in the Objection was inappropriate

and that the sole relief provided in the Original Opinion was to remove certain persons from the scope of the Plan's exculpation provisions.

On February 27, 2023, the Bankruptcy Court entered its *Memorandum Opinion and Order on Reorganized Debtor's Motion to Conform Plan* (the "Plan Conforming Order"). A true and correct copy of the Plan Conforming Order is attached hereto as Exhibit "H." By the Plan Conforming Order, the Bankruptcy Court rejected the Appellants' arguments and conformed the Plan solely with the Debtor's proposed change to the definition of Exculpated Parties, "[t]he court grants the *Motion* and orders that one change be made to the Plan to conform it to the mandate of the Fifth Circuit: revise the definition of "Exculpated Parties" as proposed in the *Motion* and no more. Exhibit H at p. 19.

D. THE CERTIFICATION ORDER

The Appellants believed that the Bankruptcy Court erred with respect to the Plan Conforming Order by not conforming the Plan's gatekeeper injunction, as it had the Plan's exculpation provisions.

On March 13, 2022, the Appellants timely filed their *Joint Notice of Appeal*, a true and correct copy of which is attached as Exhibit "I," by which the Appellants appealed the Plan Conforming Order to the United States District Court for the Northern District of Texas (the "District Court"), where the Appeal is presently

pending as Civil Action Number: 3:23-cv-00573-E (the "District Court Proceeding").

On March 22, 2023, the Appellants and the Debtor filed their *Joint Motion for Certification of Direct Appeal to the Fifth Circuit of Order on Reorganized Debtor's Motion to Conform Plan*, a true and correct copy of which is attached as Exhibit "J," agreeing that a certification for direct appeal to this Court was proper "because a direct appeal will materially advance the progress of the case or proceeding." Exhibit J at p. 2.

On March 28, 2023, the Bankruptcy Court entered its *Order Certifying Direct Appeal to the Fifth Circuit Court of Appeals of Order on Reorganized Debtor's Motion to Conform Plan* (the "Certification Order"). A true and correct copy of the Certification Order is attached hereto as Exhibit "K." By the Certification Order, the Bankruptcy Court certified the Appeal for a direct appeal to this Court pursuant to 28 U.S.C. § 158(d)(2)(A)(iii) "because the direct appeal may materially advance the progress of the case or proceeding in which the Appeal is taken." Exhibit K at p. 2.

E. THE ISSUES ON APPEAL

The issues that the Appellants have raised in this Appeal are as follows:

1. Whether the Bankruptcy Court erred as a matter of law, and in violation of this Court's Original Opinion and Mandate, when it failed on remand to order

that, in addition to revising the definition of "Exculpated Parties" in the Plan, the definition of "Protected Parties" in the Plan (applicable to the gatekeeper injunction) should also be revised to include only "(i) the Debtor, (ii) the Independent Directors, (iii) the Committee, and (iv) members of the Committee (in their official capacities)" (each as defined in the Plan).

2. Whether the Bankruptcy Court erred as a matter of law, and in violation of this Court's Original Opinion and Mandate, when it failed on remand to order the revision of the Plan to remove the Plan's provision conferring limited qualified immunity on the Debtor's successors (the third paragraph of Article IX.F of the Plan).

3. Whether the Bankruptcy Court erred as a matter of law, and in violation of this Court's Original Opinion and Mandate, when it failed on remand to order the revision of the gatekeeper provisions (the fourth paragraph of Article IX.F of the Plan) to remove from its scope suits and claims expressly permitted by federal statute to be brought against a trustee or debtor-in-possession.

II. RELIEF REQUESTED

The Appellants respectfully petition this Court to grant permission for the Appeal to be heard directly by this Court, bypassing the District Court, as provided for by 28 U.S.C. § 158(d)(2). That section:

> was enacted to provide for direct review of bankruptcy court judgments, orders, or decrees by the applicable court of appeals in cases where the bankruptcy court or the district court certify that there is no controlling decision from the Supreme Court or circuit court, the case involves a matter of public importance, there are conflicting precedents, or an immediate appeal may materially advance the progress of the bankruptcy proceeding.

In re OCA, Inc., 552 F.3d 413, 418 (5th Cir. 2008) (citing 28 U.S.C. § 158(d)(2)(A)(i)-(iii)).

"The two primary goals behind this provision are (i) to provide quicker and less costly means of resolving significant issues that are inevitably bound for the court of appeals, and (ii) to facilitate the development of more binding precedents in bankruptcy law." *In re Qimonda AG*, 470 B.R. 374, 382-83 (E.D.Va. 2012) (citing H.R. Rep. No. 109-31(7) at 148 (2005), as *reprinted in* 2005 U.S.L.L.A.N. 88, 206).

In the event that the Bankruptcy Court or the District Court makes the certification under 28 U.S.C. § 158(d)(2), this Court has jurisdiction if it authorizes the direct appeal. *Id.* As set forth in the Certification Order, the Bankruptcy Court determined that the Appeal meets the requirements for direct appeal because an immediate appeal may materially advance the progress of the case or the proceeding in which the Appeal is taken.

III. DISCUSSION

The ultimate issue in this Appeal is whether the Bankruptcy Court properly conformed the Plan to comply with this Court's Original Opinion and Mandate. It

goes without saying that no court is in a better position than this Court to construe and apply its Original Opinion.

The governing statute provides as follows:

> The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—
>
> > (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
> >
> > (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
> >
> > (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;
>
> and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

28 U.S.C. 158(d)(2)(A). This Petition is timely under Federal Rule of Bankruptcy Procedure 8007(g).

Permission to appeal directly to this Court should be granted because, as agreed to by the Debtor and as certified by the Bankruptcy Court, a direct appeal will materially advance the progress of the case or proceeding in which the Appeal is pending, within the meaning of section 158(d)(2)(A)(iii).

With respect to materially advancing the progress of the case, all parties have stated that they intend to appeal any ruling of the District Court, thus ensuring that this Court will consider this Appeal anyway. The Bankruptcy Court certified the Appeal on this basis. Insofar as this Court will almost certainly be presented with the same Appeal eventually, the Appellants submit that it is in everyone's best interests to proceed with a direct appeal, as the parties will save significant fees and costs, upwards of one year of delay will be avoided, the Bankruptcy Case will move toward finality,[4] and the District Court will be spared being called upon to adjudicate an appeal that will be further appealed to this Court, thus promoting judicial economy.

The Appellants will add that this Appeal also raises an issue of "public importance" and, while there is controlling precedent from this Court in the form of the Original Opinion, the Appellants submits that this Court should clarify and enforce the Original Opinion with respect to the gatekeeper injunction that is involved.

At present, the Appellants are under a final injunction limiting their access to the courts and to seek legal redress to protect themselves and their clients, or to advise their clients to do so, even as the Debtor manages (or managed) billions of

[4] Of importance to all creditors and parties-in-interest affected by the Plan, and especially by its payment and injunction provisions.

dollars of investments that subjected the Debtor to a large number of contractual, statutory, and fiduciary duties and obligations. Limiting one's access to the federal courts to enforce federal law, especially when that limitation is issued by an Article I court with questionable jurisdiction, at best, is a most serious matter that merits this Court's prompt review.

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, the Appellants respectfully request that the Court, pursuant to 28 U.S.C. § 158(d), permit the Appeal to proceed directly in this Court.

RESPECTFULLY SUBMITTED this 26th day of April, 2023.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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ATTORNEYS FOR THE APPELLANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 26th day of April, 2023, he caused true and correct copies of this document, with all exhibits attached hereto, to be served by e-mail on the following parties through their respective counsel of record:

Appellee:
Highland Capital Management, L.P.:

Jeffrey Pomerantz (jpomerantz@pszjlaw.com)
John A. Morris (jmorris@pszjlaw.com)

/s/ Davor Rukavina
Davor Rukavina, Esq.

CERTIFICATION OF WORD COUNT

The undersigned hereby certifies that this Petition complies with Rule 5(c) because it contains 3,519 words, excepting those portions that may be excepted.

/s/ Davor Rukavina
Davor Rukavina, Esq.

Appendix Exhibit 135

Fill in this information to identify your case:

United States Bankruptcy Court for the:

NORTHERN DISTRICT OF TEXAS

Case number *(if known)* _____ Chapter **7**

☐ Check if this an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy 06/22

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals,* is available.

1.	**Debtor's name**	**Highland Select Equity Fund GP, L.P.**
2.	**All other names debtor used in the last 8 years** Include any assumed names, trade names and *doing business as* names	
3.	**Debtor's federal Employer Identification Number** (EIN)	**20-3899917**
4.	**Debtor's address**	**Principal place of business** **100 Crescent Court, Suite 1850** **Dallas, TX 75201** Number, Street, City, State & ZIP Code **Dallas** County **Mailing address, if different from principal place of business** P.O. Box, Number, Street, City, State & ZIP Code **Location of principal assets, if different from principal place of business** Number, Street, City, State & ZIP Code
5.	**Debtor's website** (URL)	
6.	**Type of debtor**	☒ Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP)) ☐ Partnership (excluding LLP) ☐ Other. Specify:

Debtor **Highland Select Equity Fund GP, L.P.** Case number (*if known*)
Name

7. Describe debtor's business

A. *Check one:*

- ☐ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ☐ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ☐ Railroad (as defined in 11 U.S.C. § 101(44))
- ☐ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ☐ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ☐ Clearing Bank (as defined in 11 U.S.C. § 781(3))
- ☒ None of the above

B. *Check all that apply*

- ☐ Tax-exempt entity (as described in 26 U.S.C. §501)
- ☐ Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. §80a-3)
- ☐ Investment advisor (as defined in 15 U.S.C. §80b-2(a)(11))

C. NAICS (North American Industry Classification System) 4-digit code that best describes debtor. See http://www.uscourts.gov/four-digit-national-association-naics-codes.

5259

8. Under which chapter of the Bankruptcy Code is the debtor filing?

A debtor who is a "small business debtor" must check the first sub-box. A debtor as defined in § 1182(1) who elects to proceed under subchapter V of chapter 11 (whether or not the debtor is a "small business debtor") must check the second sub-box.

Check one:

- ☒ Chapter 7
- ☐ Chapter 9
- ☐ Chapter 11. *Check **all** that apply*:
  - ☐ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D), and its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $3,024,725. If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ☐ The debtor is a debtor as defined in 11 U.S.C. § 1182(1), its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $7,500,000, **and it chooses to proceed under Subchapter V of Chapter 11.** If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ☐ A plan is being filed with this petition.
  - ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
  - ☐ The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11* (Official Form 201A) with this form.
  - ☐ The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.
- ☐ Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

If more than 2 cases, attach a separate list.

- ☒ No.
- ☐ Yes.

District _____ When _____ Case number _____
District _____ When _____ Case number _____

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

- ☐ No
- ☒ Yes.

List all cases. If more than 1, attach a separate list

Debtor **See Attachment** Relationship _____
District _____ When _____ Case number, if known _____

Debtor **Highland Select Equity Fund GP, L.P.** Case number (*if known*)
Name

11. Why is the case filed in *this district?*

Check all that apply:

☒ Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.

☐ A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

☒ No

☐ Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (*Check all that apply.*)

☐ It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.
What is the hazard? _____

☐ It needs to be physically secured or protected from the weather.

☐ It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).

☐ Other _____

Where is the property? _____
Number, Street, City, State & ZIP Code

Is the property insured?

☐ No

☐ Yes. Insurance agency _____
Contact name _____
Phone _____

Statistical and administrative information

13. Debtor's estimation of available funds

Check one:

☐ Funds will be available for distribution to unsecured creditors.

☒ After any administrative expenses are paid, no funds will be available to unsecured creditors.

14. Estimated number of creditors

☒ 1-49	☐ 1,000-5,000	☐ 25,001-50,000
☐ 50-99	☐ 5001-10,000	☐ 50,001-100,000
☐ 100-199	☐ 10,001-25,000	☐ More than100,000
☐ 200-999		

15. Estimated Assets

☒ $0 - $50,000	☐ $1,000,001 - $10 million	☐ $500,000,001 - $1 billion
☐ $50,001 - $100,000	☐ $10,000,001 - $50 million	☐ $1,000,000,001 - $10 billion
☐ $100,001 - $500,000	☐ $50,000,001 - $100 million	☐ $10,000,000,001 - $50 billion
☐ $500,001 - $1 million	☐ $100,000,001 - $500 million	☐ More than $50 billion

16. Estimated liabilities

☒ $0 - $50,000	☐ $1,000,001 - $10 million	☐ $500,000,001 - $1 billion
☐ $50,001 - $100,000	☐ $10,000,001 - $50 million	☐ $1,000,000,001 - $10 billion
☐ $100,001 - $500,000	☐ $50,000,001 - $100 million	☐ $10,000,000,001 - $50 billion
☐ $500,001 - $1 million	☐ $100,000,001 - $500 million	☐ More than $50 billion

Debtor **Highland Select Equity Fund GP, L.P.** Case number (*if known*)
Name

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Declaration and signature of authorized representative of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **May 25, 2023**
MM / DD / YYYY

X **/s/ James P. Seery, Jr.**
Signature of authorized representative of debtor

James P. Seery, Jr.
Printed name

Title **Authorized Signatory**

---

18. Signature of attorney

X **/s/ Hudson Jobe**
Signature of attorney for debtor

Date **May 25, 2023**
MM / DD / YYYY

Hudson Jobe
Printed name

Quilling Selandar Lownds Winslett Moser PC
Firm name

2001 Bryan Street Suite 1800
Dallas, TX 75201
Number, Street, City, State & ZIP Code

Contact phone **(214) 514-5656** Email address **hjobe@qslwm.com**

TX
Bar number and State

Debtor **Highland Select Equity Fund GP, L.P.** Case number (*if known*)
Name

Fill in this information to identify your case:

United States Bankruptcy Court for the:

NORTHERN DISTRICT OF TEXAS

Case number *(if known)* Chapter **7**

☐ Check if this an amended filing

FORM 201. VOLUNTARY PETITION

Pending Bankruptcy Cases Attachment

Debtor	**Highland Select Equity Master Fund, L.P.**			Relationship to you	**Affiliate**
District	**Northern Texas**	When	**5/24/23**	Case number, if known	**Unknown**
Debtor	**In re Highland Capital Management, L.P.**			Relationship to you	**Affiliate**
District	**Northern Texas**	When	**12/4/19**	Case number, if known	**19-34054-sgj11**

Fill in this information to identify the case:

Debtor name **Highland Select Equity Fund GP, L.P.**

United States Bankruptcy Court for the: NORTHERN DISTRICT OF TEXAS

Case number (if known) _____

☐ Check if this is an amended filing

Official Form 202

Declaration Under Penalty of Perjury for Non-Individual Debtors

12/15

An individual who is authorized to act on behalf of a non-individual debtor, such as a corporation or partnership, must sign and submit this form for the schedules of assets and liabilities, any other document that requires a declaration that is not included in the document, and any amendments of those documents. This form must state the individual's position or relationship to the debtor, the identity of the document, and the date. Bankruptcy Rules 1008 and 9011.

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Declaration and signature

I am the president, another officer, or an authorized agent of the corporation; a member or an authorized agent of the partnership; or another individual serving as a representative of the debtor in this case.

I have examined the information in the documents checked below and I have a reasonable belief that the information is true and correct:

- ☐ *Schedule A/B: Assets–Real and Personal Property* (Official Form 206A/B)
- ☐ *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D)
- ☐ *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F)
- ☐ *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G)
- ☐ *Schedule H: Codebtors* (Official Form 206H)
- ☐ *Summary of Assets and Liabilities for Non-Individuals* (Official Form 206Sum)
- ☐ Amended *Schedule* _____
- ☐ *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders* (Official Form 204)
- ☐ Other document that requires a declaration _____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **May 25, 2023**

X **/s/ James P. Seery, Jr.**
Signature of individual signing on behalf of debtor

James P. Seery, Jr.
Printed name

Authorized Signatory
Position or relationship to debtor

BTXN 094 (rev. 5/04)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

In Re:	§	
	§	
Highland Select Equity Fund GP, L.P.	§	Case No.:
	§	
	§	
Debtor(s)	§	
	§	

VERIFICATION OF MAILING LIST

The Debtor(s) certifies that the attached mailing list (*only one option may be selected per form*):

- ☒ is the first mail matrix in this case.
- ☐ adds entities not listed on previously filed mailing list(s).
- ☐ changes or corrects name(s) and address(es) on previously filed mailing list(s).
- ☐ deletes name(s) and address(es) on previously filed mailing list(s).

In accordance with N.D. TX L.B.R. 1007.2, the above named Debtor(s) hereby verifies that the attached list of creditors is true and correct.

Date: **May 25, 2023**

/s/ James P. Seery, Jr.
James P. Seery, Jr./Authorized Signatory
Signer/Title

Debtor's Social Security/Tax ID No.

Joint Debtor's Social Security/Tax ID No.

Deborah Deitsch Perez
Stinson LLP 2200 Ross Avenue, Suite 2900
Dallas, TX 75201

Highland Capital Management, LP
100 Crescent Court, Suite 1850
Dallas, TX 75201

Internal Revenue Service
PO Box 7346
Philadelphia, PA 19101-7346

Mazin Sbaiti
Sbaiti & Company PLLC
2200 Ross Avenue, Suite 49900W
Dallas, TX 75201

The Dugaboy Investment Trust
c/o Heller, Draper & Horn, L.L.C
650 Poydras St., Suite 2500
New Orleans, LA 70130

TX Comptroller of Public Accounts
Revenue Accounting Division
Bankruptcy Section PO Box 13528
Austin, TX 78711

U.S. Attorney
Office of the U.S. Attorney
3d Floor, 1100 Commerce St.
Dallas, TX 75242

United States Trustee
1100 Commerce Street Room 976
Dallas, TX 75202

United States Bankruptcy Court
Northern District of Texas

In re **Highland Select Equity Fund GP, L.P.** Debtor(s)

Case No.

Chapter **7**

CORPORATE OWNERSHIP STATEMENT (RULE 7007.1)

Pursuant to Federal Rule of Bankruptcy Procedure 7007.1 and to enable the Judges to evaluate possible disqualification or recusal, the undersigned counsel for **Highland Select Equity Fund GP, L.P.** in the above captioned action, certifies that the following is a (are) corporation(s), other than the debtor or a governmental unit, that directly or indirectly own(s) 10% or more of any class of the corporation's(s') equity interests, or states that there are no entities to report under FRBP 7007.1:

Highland Capital Management, L.P.
100 Crescent Court, Suite 1850
Dallas, TX 75201

☐ None [*Check if applicable*]

May 25, 2023
Date

/s/ Hudson Jobe
Hudson Jobe
Signature of Attorney or Litigant
Counsel for **Highland Select Equity Fund GP, L.P.**

Quilling Selandar Lownds Winslett Moser PC
2001 Bryan Street Suite 1800
Dallas, TX 75201
(214) 514-5656 Fax:(214) 871-2111
hjobe@qslwm.com

United States Bankruptcy Court
Northern District of Texas

In re **Highland Select Equity Fund GP, L.P.** Debtor(s)

Case No.

Chapter **7**

DECLARATION FOR ELECTRONIC FILING OF BANKRUPTCY PETITION, LISTS, STATEMENTS, AND SCHEDULES

PART I: DECLARATION OF PETITIONER:

As an individual debtor in this case, or as the individual authorized to act on behalf of the corporation, partnership, or limited liability company seeking bankruptcy relief in this case, I hereby request relief as, or on behalf of, the debtor in accordance with the chapter of title 11, United States Code, specified in the petition to be filed electronically in this case. I have read the information provided in the petition, lists, statements, and schedules to be filed electronically in this case and ***I hereby declare under penalty of perjury*** that the information provided therein, as well as the social security information disclosed in this document, is true and correct. I understand that this Declaration is to be filed with the Bankruptcy Court within 7 days after the petition, lists, statements, and schedules have been filed electronically. I understand that a failure to file the signed original of this Declaration will result in the dismissal of my case.

☒ I hereby further declare under penalty of perjury that I have been authorized to file the petition, lists, statements, and schedules on behalf of the debtor in this case.

Date: **May 25, 2023**

/s/ James P. Seery, Jr.
James P. Seery, Jr., Authorized Signatory

PART II: DECLARATION OF ATTORNEY:

I declare ***under penalty of perjury*** that: (1) I will give the debtor(s) a copy of all documents referenced by Part I herein which are filed with the United States Bankruptcy Court; and (2) I have informed the debtor(s), if an individual with primarily consumer debts, that he or she may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

Date: **May 25, 2023**

/s/ Hudson Jobe
Hudson Jobe, Attorney for Debtor
2001 Bryan Street Suite 1800
Dallas, TX 75201
(214) 514-5656 Fax:(214) 871-2111

Appendix Exhibit 136

Fill in this information to identify your case:

United States Bankruptcy Court for the:

NORTHERN DISTRICT OF TEXAS

Case number *(if known)* _____ Chapter **7**

☐ Check if this an amended filing

Official Form 201
Voluntary Petition for Non-Individuals Filing for Bankruptcy 06/22

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals,* is available.

1.	**Debtor's name**	**Highland Select Equity Master Fund, L.P.**
2.	**All other names debtor used in the last 8 years** Include any assumed names, trade names and *doing business as* names	
3.	**Debtor's federal Employer Identification Number** (EIN)	**98-0520466**
4.	**Debtor's address**	**Principal place of business** **100 Crescent Court, Suite 1850** **Dallas, TX 75201** Number, Street, City, State & ZIP Code **Dallas** County **Mailing address, if different from principal place of business** P.O. Box, Number, Street, City, State & ZIP Code **Location of principal assets, if different from principal place of business** Number, Street, City, State & ZIP Code
5.	**Debtor's website** (URL)	
6.	**Type of debtor**	☒ Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP)) ☐ Partnership (excluding LLP) ☐ Other. Specify:

Debtor **Highland Select Equity Master Fund, L.P.** Case number (*if known*)
Name

7. Describe debtor's business

A. *Check one:*

- ☐ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ☐ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ☐ Railroad (as defined in 11 U.S.C. § 101(44))
- ☐ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ☐ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ☐ Clearing Bank (as defined in 11 U.S.C. § 781(3))
- ☒ None of the above

B. *Check all that apply*

- ☐ Tax-exempt entity (as described in 26 U.S.C. §501)
- ☒ Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. §80a-3)
- ☐ Investment advisor (as defined in 15 U.S.C. §80b-2(a)(11))

C. NAICS (North American Industry Classification System) 4-digit code that best describes debtor. See http://www.uscourts.gov/four-digit-national-association-naics-codes.

5259

8. Under which chapter of the Bankruptcy Code is the debtor filing?

A debtor who is a "small business debtor" must check the first sub-box. A debtor as defined in § 1182(1) who elects to proceed under subchapter V of chapter 11 (whether or not the debtor is a "small business debtor") must check the second sub-box.

Check one:

- ☒ Chapter 7
- ☐ Chapter 9
- ☐ Chapter 11. *Check **all** that apply*:
  - ☐ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D), and its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $3,024,725. If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ☐ The debtor is a debtor as defined in 11 U.S.C. § 1182(1), its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $7,500,000, **and it chooses to proceed under Subchapter V of Chapter 11.** If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ☐ A plan is being filed with this petition.
  - ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
  - ☐ The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11* (Official Form 201A) with this form.
  - ☐ The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.
- ☐ Chapter 12

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

If more than 2 cases, attach a separate list.

- ☒ No.
- ☐ Yes.

District _____ When _____ Case number _____
District _____ When _____ Case number _____

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

- ☐ No
- ☒ Yes.

List all cases. If more than 1, attach a separate list

Debtor **In re Highland Capital Management, L.P.** Relationship **Affiliate**

Debtor **Highland Select Equity Master Fund, L.P.** Case number (*if known*)
Name

District **Northern Texas** When **12/4/19** Case number, if known **Case No. 19-34054-sgj11**

11. Why is the case filed in *this district?*

Check all that apply:

☒ Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.

☐ A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

☒ No

☐ Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (*Check all that apply.*)

☐ It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.
What is the hazard? _____

☐ It needs to be physically secured or protected from the weather.

☐ It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).

☐ Other _____

Where is the property? _____
Number, Street, City, State & ZIP Code

Is the property insured?

☐ No

☐ Yes. Insurance agency _____
Contact name _____
Phone _____

[redacted] Statistical and administrative information

13. Debtor's estimation of available funds

Check one:

☒ Funds will be available for distribution to unsecured creditors.

☐ After any administrative expenses are paid, no funds will be available to unsecured creditors.

14. Estimated number of creditors

☒ 1-49	☐ 1,000-5,000	☐ 25,001-50,000
☐ 50-99	☐ 5001-10,000	☐ 50,001-100,000
☐ 100-199	☐ 10,001-25,000	☐ More than100,000
☐ 200-999		

15. Estimated Assets

☐ $0 - $50,000	☐ $1,000,001 - $10 million	☐ $500,000,001 - $1 billion
☐ $50,001 - $100,000	☐ $10,000,001 - $50 million	☐ $1,000,000,001 - $10 billion
☐ $100,001 - $500,000	☐ $50,000,001 - $100 million	☐ $10,000,000,001 - $50 billion
☒ $500,001 - $1 million	☐ $100,000,001 - $500 million	☐ More than $50 billion

16. Estimated liabilities

☐ $0 - $50,000	☒ $1,000,001 - $10 million	☐ $500,000,001 - $1 billion
☐ $50,001 - $100,000	☐ $10,000,001 - $50 million	☐ $1,000,000,001 - $10 billion
☐ $100,001 - $500,000	☐ $50,000,001 - $100 million	☐ $10,000,000,001 - $50 billion
☐ $500,001 - $1 million	☐ $100,000,001 - $500 million	☐ More than $50 billion

Debtor **Highland Select Equity Master Fund, L.P.** Case number (*if known*)
Name

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Declaration and signature of authorized representative of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **May 25, 2023**
MM / DD / YYYY

X **/s/ James P. Seery, Jr.**
Signature of authorized representative of debtor

James P. Seery, Jr.
Printed name

Title **Authorized Signatory**

---

18. Signature of attorney

X **/s/ Hudson Jobe**
Signature of attorney for debtor

Date **May 25, 2023**
MM / DD / YYYY

Hudson Jobe
Printed name

Quilling Selandar Lownds Winslett Moser PC
Firm name

2001 Bryan Street Suite 1800
Dallas, TX 75201
Number, Street, City, State & ZIP Code

Contact phone **(214) 514-5656** Email address **hjobe@qslwm.com**

TX
Bar number and State

Fill in this information to identify the case:

Debtor name **Highland Select Equity Master Fund, L.P.**

United States Bankruptcy Court for the: NORTHERN DISTRICT OF TEXAS

Case number (if known) _____

☐ Check if this is an amended filing

Official Form 202

Declaration Under Penalty of Perjury for Non-Individual Debtors

12/15

An individual who is authorized to act on behalf of a non-individual debtor, such as a corporation or partnership, must sign and submit this form for the schedules of assets and liabilities, any other document that requires a declaration that is not included in the document, and any amendments of those documents. This form must state the individual's position or relationship to the debtor, the identity of the document, and the date. Bankruptcy Rules 1008 and 9011.

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Declaration and signature

I am the president, another officer, or an authorized agent of the corporation; a member or an authorized agent of the partnership; or another individual serving as a representative of the debtor in this case.

I have examined the information in the documents checked below and I have a reasonable belief that the information is true and correct:

- ☐ *Schedule A/B: Assets–Real and Personal Property* (Official Form 206A/B)
- ☐ *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D)
- ☐ *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F)
- ☐ *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G)
- ☐ *Schedule H: Codebtors* (Official Form 206H)
- ☐ *Summary of Assets and Liabilities for Non-Individuals* (Official Form 206Sum)
- ☐ Amended *Schedule* _____
- ☐ *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders* (Official Form 204)
- ☐ Other document that requires a declaration _____

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **May 25, 2023**

X **/s/ James P. Seery, Jr.**
Signature of individual signing on behalf of debtor

James P. Seery, Jr.
Printed name

Authorized Signatory
Position or relationship to debtor

BTXN 094 (rev. 5/04)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

In Re:	§	
	§	
Highland Select Equity Master Fund, L.P.	§	Case No.:
	§	
	§	
Debtor(s)	§	
	§	

VERIFICATION OF MAILING LIST

The Debtor(s) certifies that the attached mailing list (*only one option may be selected per form*):

- ☒ is the first mail matrix in this case.
- ☐ adds entities not listed on previously filed mailing list(s).
- ☐ changes or corrects name(s) and address(es) on previously filed mailing list(s).
- ☐ deletes name(s) and address(es) on previously filed mailing list(s).

In accordance with N.D. TX L.B.R. 1007.2, the above named Debtor(s) hereby verifies that the attached list of creditors is true and correct.

Date: **May 25, 2023**

/s/ James P. Seery, Jr.
James P. Seery, Jr./Authorized Signatory
Signer/Title

Debtor's Social Security/Tax ID No.

Joint Debtor's Social Security/Tax ID No.

Deborah Deitsch Perez
Stinson LLP
2200 Ross Avenue, Suite 2900
Dallas, TX 75201

Highland Capital Management, LP
100 Crescent Court, Suite 1850
Dallas, TX 75201

Internal Revenue Service
PO Box 7346
Philadelphia, PA 19101-7346

Mazin Sbaiti, Sbaiti & Company PLLC
Sbaiti & Company PLLC
2200 Ross Avenue, Suite 49900W
Dallas, TX 75201

Pachulski, Stang Ziehl & Jones LLP
10100 Santa Monica Blvd, 13th Floor
Los Angeles, CA 90067

The Dugaboy Investment Trust
c/o Heller, Draper & Horn, L.L.C.
650 Poydras St., Suite 2500
New Orleans, LA 70130

TX Comptroller of Public Accounts
Revenue Accounting Division
Bankruptcy Section PO Box 13528
Austin, TX 78711

U.S. Attorney
Office of the U.S. Attorney
3d Floor, 1100 Commerce St.
Dallas, TX 75242

United States Trustee
1100 Commerce Street Room 976
Dallas, TX 75202

United States Bankruptcy Court
Northern District of Texas

In re **Highland Select Equity Master Fund, L.P.** Debtor(s)

Case No.

Chapter **7**

CORPORATE OWNERSHIP STATEMENT (RULE 7007.1)

Pursuant to Federal Rule of Bankruptcy Procedure 7007.1 and to enable the Judges to evaluate possible disqualification or recusal, the undersigned counsel for **Highland Select Equity Master Fund, L.P.** in the above captioned action, certifies that the following is a (are) corporation(s), other than the debtor or a governmental unit, that directly or indirectly own(s) 10% or more of any class of the corporation's(s') equity interests, or states that there are no entities to report under FRBP 7007.1:

Highland Select Equity Fund, L.P.
100 Crescent Court, Suite 1850
Dallas, TX 75201

☐ None [*Check if applicable*]

May 25, 2023
Date

/s/ Hudson Jobe
Hudson Jobe
Signature of Attorney or Litigant
Counsel for **Highland Select Equity Master Fund, L.P.**

Quilling Selandar Lownds Winslett Moser PC
2001 Bryan Street Suite 1800
Dallas, TX 75201
(214) 514-5656 Fax:(214) 871-2111
hjobe@qslwm.com

United States Bankruptcy Court
Northern District of Texas

In re **Highland Select Equity Master Fund, L.P.** Debtor(s)

Case No.

Chapter **7**

DECLARATION FOR ELECTRONIC FILING OF BANKRUPTCY PETITION, LISTS, STATEMENTS, AND SCHEDULES

PART I: DECLARATION OF PETITIONER:

As an individual debtor in this case, or as the individual authorized to act on behalf of the corporation, partnership, or limited liability company seeking bankruptcy relief in this case, I hereby request relief as, or on behalf of, the debtor in accordance with the chapter of title 11, United States Code, specified in the petition to be filed electronically in this case. I have read the information provided in the petition, lists, statements, and schedules to be filed electronically in this case and ***I hereby declare under penalty of perjury*** that the information provided therein, as well as the social security information disclosed in this document, is true and correct. I understand that this Declaration is to be filed with the Bankruptcy Court within 7 days after the petition, lists, statements, and schedules have been filed electronically. I understand that a failure to file the signed original of this Declaration will result in the dismissal of my case.

☒ I hereby further declare under penalty of perjury that I have been authorized to file the petition, lists, statements, and schedules on behalf of the debtor in this case.

Date: **May 25, 2023**

/s/ James P. Seery, Jr.
James P. Seery, Jr., Authorized Signatory

PART II: DECLARATION OF ATTORNEY:

I declare ***under penalty of perjury*** that: (1) I will give the debtor(s) a copy of all documents referenced by Part I herein which are filed with the United States Bankruptcy Court; and (2) I have informed the debtor(s), if an individual with primarily consumer debts, that he or she may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

Date: **May 25, 2023**

/s/ Hudson Jobe
Hudson Jobe, Attorney for Debtor
2001 Bryan Street Suite 1800
Dallas, TX 75201
(214) 514-5656 Fax:(214) 871-2111

Appendix Exhibit 137

Deborah Deitsch-Perez
Michael P. Aigen
STINSON LLP
2200 Ross Avenue, Suite 2900
Dallas, Texas 75201
Telephone: (214) 560-2201
Facsimile: (214) 560-2203
Email: deborah.deitschperez@stinson.com
Email: michael.aigen@stinson.com

Counsel for The Dugaboy Investment Trust

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 (SGJ)
Debtor.	THE DUGABOY INVESTMENT TRUST'S MOTION TO PRESERVE EVIDENCE AND COMPEL FORENSIC IMAGING OF JAMES P. SEERY, JR.'S IPHONE

THE DUGABOY INVESTMENT TRUST'S MOTION TO PRESERVE EVIDENCE AND COMPEL FORENSIC IMAGING OF JAMES P. SEERY, JR.'S IPHONE

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I. INTRODUCTION[1]

The Dugaboy Investment Trust ("Movant") files this Motion to Preserve Evidence and Compel the Forensic Imaging of James P. Seery, Jr.'s iPhone (and any other of his Apple devices sharing the same Apple ID) to preserve the ESI contained on that iPhone and to permit the recovery of text messages Mr. Seery admits to deleting.

On February 16, 2023, Mr. Morris of Pachulski Stang Ziehl & Jones wrote in his capacity as Mr. Seery's personal counsel in responding to a subpoena in another matter. With respect to Mr. Seery's iPhone, Mr. Morris stated the following:

> 1. Mr. Seery's iPhone is personal in nature. While it is backed up to iCloud, that back-up does not contain deleted items, whether deleted manually or as part of an automatic setting.
>
> 2. The automatic text deletion setting is currently set at one year; texts that are manually or automatically deleted are not retrievable.[2]

This shocking disclosure of Mr. Seery's automatic text deletion setting – made now for the first time despite years of litigation in this bankruptcy case and related adversary proceedings – triggered all that follows below.

Mr. Seery joined the board of Highland Capital Management, L.P. ("HCMLP" or the "Reorganized Debtor") on January 9, 2020, he was appointed Chief Executive Officer and Chief Restructuring Officer in July 2020, and he is a significant witness in this proceeding and various related adversary proceedings. He is in possession of, and is continuing to use, an iPhone that he asserts is "personal in nature," but which he also has testified he uses regularly for HCMLP

[1] Concurrently herewith, Movant is filing its *Appendix in Support of The Dugaboy Investment Trust's Motion to Preserve Evidence and Compel Forensic Imaging of James P. Seery, Jr.'s iPhone* (the "Appendix"). Citations to the Appendix are annotated as follows: Ex. #, App. #.

[2] Hartmann Decl., Ex. A, Email from J. Morris to M. Naudin, dated Feb. 16, 2023.

business purposes.[3] Despite having a duty to preserve evidence in this proceeding from the moment he joined the HCMLP board, despite also later becoming materially involved in other related litigation in which he also had a duty to preserve evidence, and despite specifically receiving a December 30, 2020, letter reminding him and HCMLP of their duty to preserve evidence, specifically including text messages and cellular phone voice mails, Mr. Seery deliberately, and in violation of his and HCMLP's duty to preserve evidence, activated a one-year auto-delete setting on his iPhone so text messages more than one year old were automatically deleted on a rolling basis, thus willfully destroying potentially relevant evidence.

This is not (at this time) a motion to compel Movant's *access* to the forensic image. Rather, in light of Mr. Seery's admission that he has been continuously deleting potentially relevant ESI for years, Movant seeks to prevent his further destruction of evidence and to create an image from which HCMLP's or Mr. Seery's counsel can review and produce responsive ESI, and from which the parties may attempt to recover relevant ESI Mr. Seery has already deleted, which his ongoing use of the iPhone is potentially overwriting and rendering unrecoverable.

Movant conferred with counsel for Mr. Seery, but despite the admitted destruction of ESI, Mr. Seery refused to permit the preservation of evidence on Mr. Seery's iPhone by creating a forensic image without sound justification. Thus, for the reasons set forth below, Movant respectfully requests that the Court enter an order compelling HCMLP and/or Mr. Seery to promptly submit Mr. Seery's iPhone to a neutral forensic data expert to create a forensic image of his iPhone, pursuant to the protocol set forth below. This is necessary to ensure the preservation

[3] *See, e.g.*, **Ex. 1**, App. 000001-3 text messages between Mr. Seery (via his iPhone) and HCMLP's former CEO Jim Dondero, regarding HCMLP business and litigation (attached to Mr. Seery's December 7, 2020 sworn declaration in adversary proceeding 20-03190-SGJ as a "true and correct copy" of the text messages); **Ex. 2**, App. 000004-6 text messages between Mr. Seery (via his iPhone) and HCMLP's former employee Patrick Daugherty regarding HCMLP business and litigation) (produced by Mr. Seery in litigation between Mr. Daugherty and another former HCMLP employee).

of evidence on Mr. Seery's iPhone reasonably believed to be relevant to this and various other proceedings, to assist efforts to recover already-deleted text messages before his continued use renders such efforts impossible, and to prevent Mr. Seery's further spoliation of evidence.

II. ARGUMENT AND AUTHORITIES

A. HCMLP and Mr. Seery Had a Continuing Duty to Preserve ESI on Mr. Seery's iPhone from the Time He Joined HCMLP's Board in January 2020, when HCMLP Was Already in Bankruptcy Litigation

"As a general matter, it is beyond question that a party to civil litigation has a duty to preserve relevant information, including ESI, when that party "has notice that the evidence is relevant to litigation or . . . should have known that the evidence may be relevant to future litigation.""[4] Thus, "[t]he Federal Rules of Civil Procedure require that parties take reasonable steps to preserve ESI that is relevant to litigation."[5] "Generally, the duty to preserve extends to documents or tangible things (defined by Federal Rule of Civil Procedure 34) by or to individuals 'likely to have discoverable information that the disclosing party may use to support its claims or defenses.'"[6] The "duty to preserve evidence extends to those persons likely to have relevant

[4] *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008) (cleaned up); *see also Guzman v. Jones*, 804 F.3d 707, 713 (5th Cir. 2015) ("A party's duty to preserve evidence comes into being when the party has notice that the evidence is relevant to the litigation or should have known that the evidence may be relevant."); *Paisley Park Enters., Inc. v. Boxill*, 330 F.R.D. 226, 232 (D. Minn. 2019) ("A party is obligated to preserve evidence once the party knows or should know that the evidence is relevant to future or current litigation."); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d 598, 612 (S.D. Tex. 2010) ("Generally, the duty to preserve arises when a party 'has notice that the evidence is relevant to litigation or . . . should have known that the evidence may be relevant to future litigation.'"); *In re Correra*, 589 B.R. 76, 133 (N.D. Tex. Bankr. 2018) (Jernigan, J.) ("A duty to preserve arises when a party knows or should know that certain evidence is relevant to pending or future litigation.").

[5] *Paisley Park Enters.*, 330 F.R.D. at 232 (citing Fed. R. Civ. P. 37(e)); Fed. R. Civ. P. 37(e) ("If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may: (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.").

[6] *Rimkus Consulting Group*, 688 F.Supp.2d at 612 (*quoting Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 217-218 (S.D.N.Y. 2003)).

information – the key players in the case, and applies to unique, relevant evidence that might be useful to the adversary."[7] Companies with a duty to preserve evidence are also required "to effectively communicate to employees who [are] likely to have possession of relevant documents and electronically stored information that they should preserve that information for purposes of ongoing and anticipated litigation."[8] The preservation duty extends to communications on employees' personal devices also used (even if infrequently) for business purposes.[9]

Specifically regarding text messages, "[i]t is well established that text messages "fit comfortably within the scope of materials that a party may request under Rule 34.""[10] Thus, the failure to suspend routine document destruction policies, resulting in the deletion of text messages, is a failure of reasonable document preservation steps.[11] Thus, courts have found the failure to turn off, or suspend, a mobile phone's text message "auto-erase" function violates the requirement

[7] *Paisley Park Enters.*, 330 F.R.D. at 233 (cleaned up); *see also Schnatter v. 247 Grp., LLC*, No. 3:20-cv-00003-BJB-CHL, 2022 WL 2402658, at *9 (W.D. Ky. Mar. 14, 2022) ("As Schnatter is the plaintiff in this case and a key witness, his personal cellphones were well within the normal scope of discovery").

[8] *Gaddy v. Blitz U.S.A., Inc.*, No. 2:09-CV-52-DF, No. 6:09–CV–283-MHS, 2010 WL 11527376, at *9 (E.D. Tex. Sept. 13, 2010), *opinion modified on denial of reconsideration on other grounds*, No. 2:09-CV-52-DF, 2011 WL 13196167 (E.D. Tex. Feb. 1, 2011).

[9] *Moore v. CITGO Refining & Chem Co., L.P.*, 735 F.3d 309, 317 (5th Cir. 2013); *Paisley Park Enters.*, 330 F.R.D. at 234-35 (rejecting as "without merit" the argument that "given the personal nature of their phones, it is unreasonable for the Court to expect them to know they should preserve information contained on those devices," when "based on text messages that other parties produced in this litigation, that Staley and Wilson used their personal cell phones to conduct the business of RMA and Deliverance."); *Schnatter*, 2022 WL 2402658, at *9 ("First, it would be unreasonable for Schnatter to have believed that his cellphones were exempt from discovery merely because they are not the primary means for his business communications. Even taking Schnatter at his word regarding his limited use of his personal cellphones for business purposes, by his own admission, Schnatter used text messaging for business at least on a limited basis. … As Schnatter is the plaintiff in this case and a key witness, his personal cellphones were well within the normal scope of discovery.").

[10] *Paisley Park Enters.*, 330 F.R.D. at 234 (cleaned up).

[11] *See, e.g., In re Skanska USA Civ. Se. Inc.*, 340 F.R.D. 180, 186-87 (N.D. Fla. 2021) ("the Court finds that Skanska did not take reasonable steps to preserve the cell phone data for these custodians," including because "Skanska also failed [to] suspend its routine document destruction policies, which allowed employees to delete text messages, and did not require cell phone data to be backed up."); *Paisley Park Enters.*, 330 F.R.D. at 233 (D. Minn. 2019) ("The principles of the 'standard reasonableness framework' require a party to suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.") (cleaned up).

to take reasonable steps to preserve evidence.[12] Failing to back up an iPhone also violates the duty to preserve ESI.[13] At least one federal court noted that "[i]t takes, at most, only a few minutes to disengage the auto-delete function on a cell phone."[14] Indeed, this Court has cited with approval to such cases,[15] including in an opinion based in part on a January 8, 2021 hearing concerning Mr. Dondero's cell phone, which Mr. Seery personally attended.

Mr. Seery's testimony confirms he knew of his retention obligation. Mr. Seery testified about how to maintain text messages on Apple phones in the context of Mr. Dondero's alleged obligations to maintain such messages on his personal phone.[16] He also testified that even a personal mobile device may have Highland information on it.[17] Most notably, he engaged in the following exchange: "Q: Do you have a Highland cell phone? A: No. Q: So do you use your personal phone for Highland business? A: Yes. Q: Do you preserve all of your text messages?

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[12] *See, e.g.*, *Paisley Park Enters.*, 330 F.R.D. at 233 ("Defendants were required to take reasonable steps to preserve Staley and Wilson's text messages. The RMA Defendants did not do so. First, Staley and Wilson did not suspend the auto-erase function on their phones."); *Youngevity Int'l v. Smith*, No. 3:16-CV-704-BTM-JLB, 2020 WL 7048687, at *2 (S.D. Cal. July 28, 2020) ("The Relevant Defendants' failure to prevent destruction by backing up their phones' contents or disabling automatic deletion functions was not reasonable because they had control over their text messages and should have taken affirmative steps to prevent their destruction when they became aware of their potential relevance."); *see also In re Skanska*, 340 F.R.D. at 189; *NuVasive, Inc. v. Kormanis*, No. 1:18CV282, 2019 WL 1171486, at *8-9 (M.D.N.C. Mar. 13, 2019), *report and recommendation adopted*, No. 1:18-CV-282, 2019 WL 1418145 (M.D.N.C. Mar. 29, 2019).

[13] *Fast v. GoDaddy.com LLC*, 340 F.R.D. 326, 344 (D. Ariz. 2022) ("By failing to back up her iPhone, Plaintiff failed to take reasonable steps to preserve the ESI contained on the phone.") (citing *Youngevity Int'l*, 2020 WL 7048687, at *2; *Laub v. Horbaczewski*, No. CV 17-6210-JAK (KS), 2020 WL 9066078, at *4 (C.D. Cal. July 22, 2020); *Paisley Park Enters.*, 330 F.R.D. at 233; *Brewer v. Leprino Foods Co., Inc.*, No. CV-1:16-1091-SMM, 2019 WL 356657, at *10 (E.D. Cal. Jan. 29, 2019); *Gaina v. Northridge Hosp. Med. Ctr.*, No. CV 18-00177, 2018 WL 6258895, at *5 (C.D. Cal. Nov. 21, 2018)).

[14] *Paisley Park Enters.*, 330 F.R.D. at 233.

[15] *In re Highland Cap. Mgmt., L.P.*, No. 19-34054-SGJ11, 2021 WL 2326350, at *22 n.165 (Bankr. N.D. Tex. June 7, 2021).

[16] **Ex. 7**, App. 000221 3/22/2021 Hearing Transcript (Adversary Proceeding No. 20-3190-sgj) at 229:19 – 21: "The phone company doesn't maintain text messages for those who use Apple products. Apple maintains them." (Seery, J.).

[17] *Id.* at 228:23 – 229:7 (testifying, in the context of Mr. Okada's phone, that a mobile phone may have Highland information even if it is a personal device).

A: I don't delete them. I believe that they're accessible, yes."[18] All of this testimony was given in the context of Mr. Seery's experience and training as "a licensed attorney [who] was formerly a partner and co-Head of the Sidley Austin LLP New York Corporate Reorganization and Bankruptcy Group."[19] It is therefore beyond doubt that Mr. Seery was acutely aware of his continuing duty to preserve text messages.

HCMLP had a duty to preserve ESI when it entered Chapter 11 Bankruptcy on October 16, 2019.[20] Mr. Seery had a duty to preserve ESI on his devices when he was appointed to HCMLP's board approximately three months later, on January 9, 2020.[21] That duty was continuing when Mr. Seery was also appointed as HCMLP's Chief Executive Officer and Chief Restructuring Officer, which became effective as of March 15, 2020.[22] Moreover, on December 30, 2020, HCMLP (through counsel) and Mr. Seery (directly) received a letter from counsel for then-current, and now-former, HCMLP employees, reminding HCMLP and Mr. Seery of their duty to preserve evidence, including text messages:

> we remind you that you must comply with the law to preserve all evidence that could be relevant to this matter, including all documents, ***text messages, voice mails***, and emails, including but not limited to all communications with our clients, including ***text messages and cellular phone voice mails*** concerning the subject matter of this letter; including ***text messages and cellular phone voice mails*** by and between ***the Independent Board*** and the Creditor's Committee; any and all documents reflecting fees paid by affiliated entities to the Debtor for work performed by and bonuses (cash, retention, and deferred) to be paid to our clients; and any and

[18] *Id.* at 233:2 – 9.

[19] **Ex. 3**, App. 000007-107 HCMLP Bankr. Dkt. 281-2.

[20] *See* Dkt. 2.

[21] *See* Dkt. 339.

[22] **Ex. 4**, App. 000108-120 *See* Dkt. 854.

> all documents reflecting ***the Independent Board***'s decision on what constitutes an "insider."[23]

In fact, in connection with these proceedings, HCMLP expressly acknowledged its duty to preserve evidence as well as its corresponding duty to notify its employees of their duty to preserve evidence, stating in the Document Production Protocol made part of its Settlement Term Sheet: "Debtor [HCMLP] acknowledges that they should take reasonable and proportional steps to preserve discoverable information in the party's possession, custody or control. This includes notifying employees possessing relevant information of their obligation to preserve such data."[24] In adversary proceeding 19-34054-sgj11, this Court emphasized HCMLP's acknowledgment of those duties, stating:

> the January 2020 Corporate Governance Settlement set forth a "Document Production Protocol," which stated that ESI was included within the documents being sought and stated that "***Debtor acknowledges that they should take reasonable and proportional steps to preserve discoverable information in the party's possession, custody or control. This includes notifying employees possessing relevant information of their obligation to preserve such data***."[25]

The Court thus concluded that "whether Mr. Dondero and inhouse counsel paid attention or not, ***they were on notice very early in this case that they had a duty to preserve ESI***."[26] This very early notice applies equally to HCMLP's new CEO, Mr. Seery.

Moreover, it is no excuse that HCMLP characterizes Mr. Seery's iPhone as "personal in nature,"[27] because the truth is that Mr. Seery has testified that he used his iPhone for business

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[23] Smith Decl., Ex. A, December 30, 2020 Letter (emphasis added).

[24] **Ex. 5**, App. 000128 and App. 000165 Dkt. 281-1, Settlement Term Sheet Ex. C, Document Production Protocol, pp. 7, 44.

[25] *In re Highland Cap. Mgmt., L.P.*, 2021 WL 2326350, at *12 (emphasis in original).

[26] *Id.* (emphasis added).

[27] Hartmann Decl., Ex. A, Email from J. Morris to M. Naudin, dated Feb. 16, 2023.

purposes,[28] including using the phone to exchange text messages with then-current, and now-former, HCMLP employees, including HCMLP's former CEO Jim Dondero, regarding HCMLP business.[29] HCMLP and Mr. Seery unquestionably had a duty to preserve the ESI, including text messages, on Mr. Seery's iPhone beginning on January 9, 2020.

Based on his position, Mr. Seery would certainly have communicated with others about (1) purchases and/or sales of HCM assets (2) costs of HCM operations, (3) claims of creditors, (4) settlement of claims of creditors, (5) claims trading, (6) duty to prepare reports, (7) provision of (or refusals to provide) information to equity and numerous other matters potentially relevant to (A) claims brought pursuant to the Motion for Leave at Dkt 3662, (B) the Valuation Adversary Proceeding at Dkt 1 in Cause No. 23-03038, (C) the so-called Vexatious Litigant Motion evidenced at Dkt 102-1 in Cause No. 3:21-cv-00881-X, (D) the Kirschner litigation, Dkt 158 in Cause no. 21-03076. and (E) Charitable DAF Fund, LP and CLO Holdco, Ltd. v. Highland Capital Management, LP, et al, at Cause No. 21-03067, among many other matters. It is beyond dispute that Mr. Seery has been the Debtor's principal witness in nearly every instance in which the Debtor has been required to give testimony.[30]

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[28] Ex. 7, App. 000225 at 233:2 – 9.

[29] *See, e.g.*, Ex. 1, App. 000001-3 text messages between Mr. Seery (via his iPhone) and HCMLP's former CEO Jim Dondero, regarding HCMLP business and litigation (attached to Mr. Seery's December 7, 2020 sworn declaration in adversary proceeding 20-03190-SGJ as a "true and correct copy" of the text messages); Ex. 2, App. 000004-6 text messages between Mr. Seery (via his iPhone) and HCMLP's former employee Patrick Daugherty regarding HCMLP business and litigation) (produced by Mr. Seery in litigation between Mr. Daugherty and another former HCMLP employee); *see also* Hartmann Decl., Ex. B, Letter from M. Hartmann to J. Morris, dated Mar. 4, 2023, p.2.

[30] For example: **Ex. 8**, App. 000263-318 3/4/2020 Hearing Transcript (Cause No. 19-34054); **Ex. 9**, App. 000319-384 7/14/2020 Hearing Transcript (Cause No. 19-34054); **Ex. 10**, App. 000385-409 9/10/2020 Hearing Transcript (Cause No. 19-34054); **Ex. 11**, App. 000410- 414 10/17/2020 Deposition Transcript (Cause No. 19-34054); **Ex. 12**, App. 000415-532 10/20/2020 Hearing Transcript (Cause No. 19-34054); **Ex. 13**, App. 000533-537 12/14/2020 Deposition Transcript (Cause No. 19-34054); **Ex. 14**, App. 000538-610 1/14/2021 Hearing Transcript (Cause No. 19-34054); **Ex. 15**, App. 000611-615 1/20/2021 Deposition Transcript (Adversary Proceeding No. 21-03000-sgj); **Ex. 16**, App. 000616-672 1/26/2021 Hearing Transcript (Cause No. 19-34054 and Adversary Proceeding No. 21-03000-sgj); **Ex. 17**, App. 000673-677 1/29/2021 Deposition Transcript (Cause No. 19-34054); **Ex. 18**, App. 000678-885 2/2/2021 Hearing Transcript (Cause No. 19-34054); **Ex. 19**, App. 000886-896 2/3/2021 Hearing Transcript (Cause No. 19-34054); **Ex. 20**, App. 000897-946 2/23/2021 Hearing Transcript (Adversary Proceeding Nos. 20-03190-sgj

B. Mr. Seery's Years-Long Use of Auto-Delete Violated His and HCMLP's Duty to Preserve ESI

Despite his ongoing duty to preserve the text messages on his iPhone, Mr. Seery deliberately set his iPhone to automatically delete ***all*** text messages more than a year old, regardless of their relevance to existing or future litigation.[31] Notably, the default text message preservation setting on an iPhone is to retain text messages forever, so to automatically delete text messages after a year (or 30 days), a user must manually change the default retention setting.[32] Thus, at some point after obtaining his iPhone, Mr. Seery actively changed (or caused to be changed) his default iPhone text message retention setting from permanent retention to a one-year auto-delete setting.[33] Mr. Seery maintained that one-year auto-delete setting until shortly before March 10, 2023, on which date he represented that the setting had been "recently suspended."[34] Mr. Seery deactivated his auto-delete setting only after use of the setting was discovered in another lawsuit and he received multiple requests to cease deleting messages from counsel for certain

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and 21-03010-sgj); Ex. 7, App. 000201-262; **Ex. 21**, App. 000947-951 5/14/2021 Deposition Transcript (Adversary Proceeding No. 21-03000-sgj); **Ex. 22**, App. 000952-1066 5/21/2021 Hearing Transcript (Cause No. 19-34054); **Ex. 23**, App. 001067-1071 5/24/2021 30(b)6 Deposition Transcript (Adversary Proceeding No. 21-03003-sgj); **Ex. 24**, App. 001072-1110 6/25/2021 Hearing Transcript (Cause No. 19-34054); **Ex. 25**, App. 001111-1129 7/19/2021 Hearing Transcript (Cause No. 19-34054); **Ex. 26**, App. 001130-1172 8/4/2021 Hearing Transcript (Cause No. 19-34054); **Ex. 27**, App. 001173-1177 10/21/2021 Deposition Transcript (Adversary Proceeding No. 21-03005-sgj); **Ex. 28**, App. 001178-1227 3/1/2022 Hearing Transcript (Adversary Proceeding No. 22-03003-sgj); **Ex. 29**, App. 001228-1231 3/11/2022 30(b)6 Deposition Transcript (Adversary Proceeding No. 21-03010-sgj); **Ex. 30**, App. 001232-1235 5/3/2022 30(b)6 Deposition Transcript (Adversary Proceeding No. 21-03082-sgj); **Ex. 31**, App. 001236-1278 8/8/2022 Hearing Transcript (Adversary Proceeding No. 21-03020-sgj).

[31] Hartmann Decl., Ex. A, Email from J. Morris to M. Naudin, dated Feb. 16, 2023.

[32] *NuVasive*, 2019 WL 1171486, at *5, n.7 (recognizing offending user's acknowledgment that an "iPhone's default setting [is] for permanent text message retention."); *see also* Dave Johnson, John Lynch, ed., *How to delete messages and conversations on your iPhone, and set them to auto-delete*, Business Insider, April 22, 2019 ("By default, the iPhone keeps all messages forever (or until you manually delete them). If you prefer, tap "30 Days" or '1 Year." If you do, the iPhone will automatically discard your messages after the selected time period.") (attached for reference, and available at https://www.businessinsider.com/guides/tech/how-to-delete-messages-on-iphone); Declaration of Erik Laykin, ¶ 6.

[33] Hartmann Decl., Ex. A, Email from J. Morris to M. Naudin, dated Feb. 16, 2023.

[34] Hartmann Decl., Ex. D, Email from J. Morris to M. Hartmann, dated Mar. 10, 2023. The one-year auto-delete setting was in place at least as long as February 16, 2023. Hartmann Decl., Ex. A, Email from J. Morris to M. Naudin, dated Feb. 16, 2023.

adversary proceeding defendants.[35] Notably, Mr. Seery, though his counsel, was queried as to when he enabled the setting, but refused to answer.[36] While Mr. Seery maintained the one-year auto-delete setting, any iCloud backup did not back up the deleted messages.[37] Thus, Mr. Seery represents that the deleted text messages "are not retrievable," and he is unable to produce any of the deleted text messages.[38] However, to the extent Mr. Seery uses other Apple devices (*e.g.*, iPad, MacBook, Apple Watch) sharing the same Apple ID as the iPhone, it is possible that the deleted text messages were replicated on the other Apple devices.

C. The Court Should Require Forensic Imaging to Preserve the Remaining ESI on Mr. Seery's iPhone and to Prevent Further Evidence Spoliation

Despite "recently suspend[ing]" his iPhone's auto-delete setting, Mr. Seery continues to use his iPhone, thereby continuing to store new data on his device, which makes the recovery of deleted texts more difficult or, eventually, potentially impossible. "When you delete a piece of data from your device — a photo, video, text or document — it doesn't vanish. Instead, your device labels that space as available to be overwritten by new information.… Once the memory on that device fills up entirely, new information is saved on top of those deleted items."[39] So, the longer one uses a device with deleted data, the bigger the risk that the deleted data will be overwritten so that it is no longer recoverable.[40]

Consequently, to mitigate Mr. Seery's destruction of evidence, and to provide the best

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[35] Hartmann Decl., Ex. B, Letter from M. Hartmann to J. Morris, dated Mar. 4, 2023; Hartmann Decl., Ex. C, Letter from M. Hartmann to R. Loigman and J. Morris, dated Mar. 7, 2023.

[36] *Id.*

[37] Hartmann Decl., Ex. A, Email from J. Morris to M. Naudin, dated Feb. 16, 2023.

[38] *Id.*

[39] Dustin Jones, *When it comes to data on your phone, deleting a text isn't the end of the story*, NPR, July 15, 2022 (attached for convenience at **Ex. 32**, App. 001279-1283 and available at https://www.npr.org/2022/07/15/1111778878); *see also* Declaration of Erik Laykin, ¶ 7.

[40] Declaration of Erik Laykin, ¶ 10.

chance for a digital forensics expert to recover Mr. Seery's deleted texts, it is essential to create a forensic image of Mr. Seery's iPhone as soon as possible.[41] Although it is likely that many of the deleted texts are currently recoverable, each day Mr. Seery uses his iPhone, he increases the risk that the deleted texts will be overwritten, and thereby rendered unrecoverable.[42] For that reason, it is also important to preserve an image of any other Apple devices Mr. Seery uses or used (*e.g.*, iPad, MacBook, Apple Watch) that share the same Apple ID as the iPhone because it is possible that the deleted text messages were replicated on the other Apple devices.

Importantly, the pressing need to create a forensic image of Mr. Seery's iPhone exists only because of Mr. Seery's deliberate destruction of ESI through activating a one-year auto-delete setting on his iPhone.

This Court has the power and discretion to order HCMLP and Mr. Seery to create a forensic (or mirror) image of his iPhone (and other connected Apple devices).[43] Indeed, this Court has already ordered forensic imaging of "cellular phones tablets, laptops, computers, or any other electronic devices that can store data," in this very case.[44] "To be sure, forensic imaging is not uncommon in the course of civil discovery,"[45] though "'courts must consider the significant interests implicated by forensic imaging before ordering such procedures,' including that they must 'account properly for the significant privacy and confidentiality concerns` of the parties."[46]

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[41] Declaration of Erik Laykin, ¶ 11.

[42] Declaration of Erik Laykin, ¶¶ 10-12.

[43] *See In re Correra*, 589 B.R. at 124 (the Court "has inherent powers and authority under section 105 of the Bankruptcy Code to address abuses of judicial process and bad faith conduct."); *see also Hamilton v. First Am. Title Ins. Co.*, No. 3:07-CV-1442-G, 2010 WL 791421, at *4 (N.D. Tex. Mar. 8, 2010) (courts have "broad discretion in discovery matters") (quoting *Winfun v. Daimler Chrysler Corp.*, 255 F. Appx 772, 773 (5th Cir. 2007) (per curiam)).

[44] **Ex. 33**, App. 001284-001286 Dkt. 2177, Order, ¶ 3.

[45] *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008).

[46] *Areizaga v. ADW Corp.*, No. 3:14-cv-2899-B, 2016 WL 9526396, at *3 (N.D. Tex. Aug. 1, 2016) (quoting *John B.*, 53 F.3d at 460).

However, with these considerations in mind, "courts have permitted restrained and orderly computer forensic examinations where the moving party has demonstrated that its opponent has defaulted in its discovery obligations by unwillingness or failure to produce relevant information by more conventional means."[47]

Those circumstances are present here, where HCMLP and Mr. Seery have admitted they failed to preserve ESI on Mr. Seery's iPhone and consider the deleted texts to be "not retrievable,"[48] and therefore not available for production. In other words, the only way a party will ever obtain relevant evidence from one of Mr. Seery's deleted texts will be through a forensic data recovery process.

Courts have also ordered forensic imaging specifically to facilitate the recovery of deleted ESI. For instance, in *Talon Transaction Technologies*, the court ordered forensic imaging when, like here, a party admitted it did not preserve all potentially relevant ESI, and that ESI was subject to being overwritten.[49]

Similarly, like here, in *Antioch Co. v. Scrapbook Boarders, Inc.*, the plaintiff sought forensic imaging "to ensure the recovery, and preservation, of [deleted] information," when "data from a computer which has been deleted remains on the hard drive, but is constantly being

[47] *Id.*; *see also Talon Trans. Tech., Inc., v. Stoneeagle Servs., Inc.*, No. 3:13-CV-902-P, 2013 WL 12172924, at *3-5 (N.D. Tex. May 1, 2013) (establishing an imaging protocol for creation and review of a forensic image); *Genworth Fin. Wealth Mgmt. v. McMullan*, 267 F.R.D. 443, 446-49 (D. Conn. 2010) (same); *Ameriwood Indus., Inc. v. Liberman*, No. 4:06-CV-524-DJS, 2006 WL 3825291, at *5-7 (E.D. Mo. Dec. 27, 2006) (same); *Antioch Co. v. Scrapbook Boarders, Inc.*, 210 F.R.D. 645, 653-54 (D. Minn. 2002) (same); *Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000) (same).

[48] Hartmann Decl., Ex. A, Email from J. Morris to M. Naudin, dated Feb. 16, 2023.

[49] *Talon Trans. Tech.*, 2013 WL 12172924, at *2 ("And, as Defendants have apparently represented to Plaintiffs, Defendants have not preserved all potentially relevant hard drives but rather have only 'backed up' one hard drive. Moreover, it appears that certain portions of Defendants' systems that Plaintiffs insist are relevant may be overwritten on a regular basis. The undersigned concludes that a forensic imaging of Defendants' relevant computer equipment is permissible and appropriate under the circumstances.") (internal citations omitted).

overwritten, irretrievably, by the Defendants' continued use of that equipment."[50] And also like Movant here, Antioch provided the affidavit of a forensic data expert attesting that "data which is deleted from a computer is retained on the hard drive, but is constantly being overwritten by new data, through the normal use of the computer equipment."[51] The court concluded that "the Defendants may have relevant information, on their computer equipment, which is being lost through normal use of the computer, and which might be relevant to the Plaintiff's claims, or the Defendants' defenses."[52] The court granted the motion to compel the forensic imaging because "Antioch should be able to attempt to resurrect data which has been deleted from the Defendants' computer equipment."[53]

Courts that have compelled forensic imaging of computer equipment and phones have utilized a similar protocol to balance the need to preserve or recover potentially relevant ESI with privacy and confidentiality considerations.[54] This Court should draw from those protocols and apply a similar protocol in this case, as follows:

1. The parties shall agree on a neutral expert to conduct the forensic imaging of Mr. Seery's iPhone and any other Apple devices sharing the same Apple ID as Mr. Seery's iPhone (the "Devices") within one week from the date of the order granting this Motion.[55] If the parties are unable to agree on a neutral expert, the Court will appoint one.

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[50] *Antioch*, 210 F.R.D. at 650-51.

[51] *Id.* at 651.

[52] *Id.* at 652.

[53] *Id.* at 652.

[54] *See Talon Trans. Tech*, 2013 WL 12172924, at *3-5 (N.D. Tex. May 1, 2013); *Genworth Fin. Wealth Mgmt*, 267 F.R.D. at 449; *Ameriwood Indus.*, 2006 WL 3825291, at *5-7; *Antioch*, 210 F.R.D. at 653-54; *Simon Prop. Group*, 194 F.R.D. at 640.

[55] HCMLP and Mr. Seery's culpability for the deleted text messages warrants a significant shifting of costs in their direction. *Genworth Fin. Wealth Mgmt. v*, 267 F.R.D. at 448 ("In light of the Defendants' culpability in

2. The expert will maintain all information regarding the imaging of the Devices in the strictest confidence. Within one week from the date of the order granting this Motion, the parties will agree on a confidentiality agreement to govern the expert's handling of the imaged information. The expert's inspection of Mr. Seery's Devices will not waive any applicable privilege or other doctrine, rule, or protection assuring the confidentiality of the information and data on the Devices.

3. HCMLP and Mr. Seery will make Mr. Seery's Devices available for imaging at a mutually agreeable time aimed to minimize disruption, but in any event no later than one week after expert is designated. HCMLP and Mr. Seery are to provide a detailed report and notice of all Devices produced for inspection by the same date.

4. After the expert has completed making the forensic image(s), Mr. Seery's Devices may be returned to normal use, provided that the auto-delete setting remains deactivated.

5. The expert shall use the forensic image to attempt to recover the deleted text messages in a reasonable searchable form.

6. The expert shall provide the image and the recovered data to HCMLP's and Mr. Seery's counsel and shall also provide a contemporaneous report identifying and detailing, for each Device, any recovered data to counsel for HCMLP, Mr. Seery, and Movant, by no later than 3 weeks after the Devices are imaged.

---

necessitating the expense of a neutral expert, the cost for the appointment of a neutral forensic expert is to be borne 80% by the Defendants and 20% by the Plaintiff."). Cost shifting further is warranted by Mr. Seery's misleading, if not outright false, testimony about his text messages that "I don't delete them. I believe they're accessible, yes." Ex. 7, App. 000225 at 233:2 – 9.

7. HCMLP's and/or Mr. Seery's counsel will maintain the image and the recovered data for future review and production of responsive documents in accordance with the Federal Rules of Civil Procedure.

8. The expert shall also maintain the image and recovered data until 60 days after the conclusion of this bankruptcy proceeding and all related adversary proceedings, or until such other later time as agreed by the parties.

The foregoing protocols adequately address any privacy or confidentiality concerns associated with the imaging of Mr. Seery's Devices, while permitting Movant to attempt to resurrect data Mr. Seery deleted from his iPhone in violation of his duty to preserve evidence.

III. CONCLUSION

Movant respectfully requests that the Court grant the Motion and enter an order compelling HCMLP and/or Mr. Seery to submit Mr. Seery's Devices for forensic imaging according to the foregoing protocol.

Dated: May 31, 2023

Respectfully submitted,

/s/Michael P. Aigen

Deborah Deitsch-Perez
State Bar No. 24036072
Michael P. Aigen
State Bar No. 24012196
STINSON LLP
2200 Ross Avenue, Suite 2900
Dallas, Texas 75201
(214) 560-2201 telephone
(214) 560-2203 facsimile
Email: deborah.deitschperez@stinson.com
Email: michael.aigen@stinson.com

Counsel for The Dugaboy Investment Trust

CERTIFICATE OF CONFERENCE

I certify that on May 30, 2023, counsel for Mr. Seery, Joshua Levy of Willkie Farr & Gallagher, and counsel for The Dugaboy Investment Trust, Michael P. Aigen, held a conference to discuss the foregoing motion and requested relief. Counsel for Mr. Seery contended that, contrary to the prior written representations from Debtor's counsel, Mr. Seery was able to recover deleted texts so that an image of Mr. Seery's devices was unnecessary. Counsel did not know, however, whether this recovered all texts that were previously deleted and would not agree to a forensic imaging of Mr. Seery's iPhone in order to determine if all deleted texts were recovered. Thus the parties could not reach an agreement regarding Movant's requested relief.

/s/ Michael P. Aigen
Michael P. Aigen

CERTIFICATE OF SERVICE

I certify that on May 31, 2023, 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 proceeding.

/s/Michael P. Aigen
Michael P. Aigen

Appendix Exhibit 138

Deborah Deitsch-Perez
Michael P. Aigen
STINSON LLP
2200 Ross Avenue, Suite 2900
Dallas, Texas 75201
Telephone: (214) 560-2201
Facsimile: (214) 560-2203
Email: deborah.deitschperez@stinson.com
Email: michael.aigen@stinson.com

Counsel for The Dugaboy Investment Trust

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 (SGJ)
Debtor.	DECLARATION OF MICHELLE HARTMANN IN SUPPORT OF THE DUGABOY INVESTMENT TRUST'S MOTION TO COMPEL FORENSIC IMAGING OF JAMES P. SEERY, JR.'S IPHONE

Declaration of Michelle Hartmann

1. I, Michelle Hartmann, under penalty of perjury pursuant to 28 U.S.C. § 1746, declare as follows:

2. I am attorney and partner with the firm of Baker & McKenzie LLP, and counsel in this matter for various former Highland Capital Management LP employees, including Scott Ellington.

3. I submit this declaration in support of The Dugaboy Investment Trust's Motion to Compel Forensic Imaging of James P. Seery Jr.'s iPhone (the "Motion").

4. This declaration is based on my personal knowledge.

5. Attached hereto as **Exhibit A** is a true and correct copy of a February 16, 2023

email from John A. Morris, counsel for James P. Seery, Jr. in his capacity as Chief Executive Officer of HCMLP, to Michele Naudin, counsel for Scott Ellington in *Ellington v. Daugherty*, Cause No. DC 22-00304 pending in the 101st Judicial District of Dallas, County, Texas. The top email in the chain was redacted for privilege. I also am counsel for Mr. Ellington in the separate proceeding of *Kirschner v. Dondero et al*., Adv. Pro. No. 21-03076 pending in the United States Bankruptcy Court for the Northern District of Texas, and obtained Ms. Naudin's communication with respect to our mutual client Mr. Ellington.

6. Attached hereto as **Exhibit B** is a true and correct copy of a March 4, 2023 Letter from me to Mr. Morris.

7. Attached hereto as **Exhibit C** is a true and correct copy of a March 7, 2023 letter from me to Mr. Morris and Robert Loigman, counsel for the Litigation Trustee for the Highland Litigation Sub-Trust in *Kirschner v. Dondero et al.*, Adv. Proc. No. 21-03076-sgj (Bankr. N.D. Tex.).

8. Attached hereto as **Exhibit D** is a true and correct copy of a March 10, 2023 email from Mr. Morris to me.

9. I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 19, 2023.

Michelle Hartmann

Exhibit A

From: Michele Naudin
To: [redacted]
Cc: [redacted]
Subject: FW: Follow up from Friday"s call
Date: Thursday, February 16, 2023 1:57:42 PM
Attachments: image001.jpg

[redacted]

[redacted]

[redacted]

MICHELE NAUDIN | Attorney
LynnPinkerHurstSchwegmann
Direct 214 292 3648
Mobile 469 705 2825
mnaudin@lynnllp.com

2100 Ross Avenue, Suite 2700
Dallas, Texas 75201
lynnllp.com

From: John A. Morris <jmorris@pszjlaw.com>
Sent: Thursday, February 16, 2023 1:54 PM
To: Michele Naudin <mnaudin@lynnllp.com>
Cc: Hayley R. Winograd <hwinograd@pszjlaw.com>; Michael K. Hurst <MHurst@lynnllp.com>; Laura M. Garcia <lgarcia@weinsteinklein.com>
Subject: RE: Follow up from Friday's call

Michele:

The answers to your questions as follows:

1. Mr. Seery's iPhone is personal in nature. While it is backed up to iCloud, that back-up does not contain deleted items, whether deleted manually or as part of an automatic setting.
2. The automatic text deletion setting is currently set at one year; texts that are manually or automatically deleted are not retrievable; and
3. We have provided all texts and screenshots that we could locate based on a reasonable search. As I mentioned, we're glad that you had the screenshot of Goldsmith bringing documents to a storage facility because we both recalled that Jim sent that to me and I could

not locate it (and you can see from Jim's response that he told Daugherty to "knock it off"). As you know, our ability to locate documents is based on search terms. If Jim forwarded a screen shot (or anything else) without comment (which is possible), I would only be able to find it by reviewing every email received from Jim – which, after three years of daily communications, we don't believe we are required to do. To be as helpful as we can, I recall Jim sending several screenshots to me over the years including: (a) the one of Goldsmith, (b) one of Scott speaking with someone in front of a house (which I think you sent), (c) one of Thomas Surgent's car (obviously sent in 2020). Jim does currently not have any of those pictures on his iPhone. And obviously, as verified by the information produced, Jim never requested these unsolicited pictures or did anything with them (other than forward them to me).

To summarize what we also discussed:

1. Jim and I accepted service of the subpoenas despite the fact that service was improper;
2. We produced all responsive emails, pictures, and texts we located after conducting a reasonable search;
3. We immediately withdrew the objection that you challenged to make clear we were not hiding anything;
4. We've acknowledged receiving (or sharing) certain texts that you obtained elsewhere;
5. One of those texts clearly shows Jim's discomfort with the photo of Ms. Goldsmith;
6. My text with Dandeneau (Scott's lawyer for that purpose) during the remand hearing shows I was ready to "pounce" on Daugherty if he even suggested that he was working on behalf or at that direction of Jim or the Trust.

Please confirm that Jim and I have done all we need to do to comply the subpoena. Otherwise, please let me know what questions remain.

Regards,

John

John A. Morris
Pachulski Stang Ziehl & Jones LLP
Direct Dial: 212.561.7760
Tel: 212.561.7700 | Fax: 212.561.7777
jmorris@pszjlaw.com
vCard | Bio | LinkedIn

pszjlogo

From: Michele Naudin [mailto:mnaudin@lynnllp.com]
Sent: Monday, February 13, 2023 11:07 AM
To: John A. Morris <jmorris@pszjlaw.com>
Cc: Hayley R. Winograd <hwinograd@pszjlaw.com>; Michael K. Hurst <MHurst@lynnllp.com>; Laura M. Garcia <lgarcia@weinsteinklein.com>
Subject: Follow up from Friday's call

Mr. Morris,

As a follow up from Friday's call, we look forward to hearing from you this week as to (1) whether Seery's data backed up to the Cloud, (2) Seery's automatic deletion settings, if any and what the setting is, and (3) confirm that you could not locate another email for any other contemporaneous screenshots of Daugherty's texts sent to Seery, which you stated that Seery screenshotted and sent to you from time to time.

Thank you,

MICHELE NAUDIN | Attorney
LynnPinkerHurstSchwegmann
Direct 214 292 3648
Mobile 469 705 2825
mnaudin@lynnllp.com

2100 Ross Avenue, Suite 2700
Dallas, Texas 75201
lynnllp.com

Exhibit B

Baker McKenzie.

Baker & McKenzie LLP

900 North Pearl Street, Suite 1500
Dallas, Texas 75201
United States

Tel: +1 214 978 3000
Fax: +1 214 978 3099
www.bakermckenzie.com

March 04, 2023

John Morris, Esq.
Pachulski Stang Ziehl & Jones LLP
780 Third Avenue
34th Floor
New York, NY 10017-2024

By email
jmorris@pszjlaw.com

Re: *Kirschner v. Dondero, et al.*, Adv. Pro. No. 21-03076-sgj

Dear John:

I write on behalf of Scott Ellington and Isaac Leventon (collectively "***Defendants***") in the above-referenced matter. It recently has come to my attention that Highland Capital Management, L.P.'s ("***HCMLP***") President, Mr. James P. Seery, Jr., has been deleting text messages on his personal iPhone (the "***Phone***"). Via email communication in another matter, attached herein for reference, you stated:

1. Mr. Seery's iPhone is personal in nature. While it is backed up to iCloud, that back-up does not contain deleted items, whether deleted manually or as part of an automatic setting.

2. The automatic text deletion setting is currently set at one year; texts that are manually or automatically deleted are not retrievable.

From your statements, it appears that Mr. Seery has been deleting text messages on his Phone via a rolling, automatic deletion setting (the "***Deletion Setting***").

With respect to an iPhone, "you can choose to automatically delete your iMessages from your device after 30 days or a year, or to keep them on your device forever. For your convenience, iMessages are backed up in iCloud and encrypted if you have enabled either iCloud Backup or Messages in iCloud."[1] Accordingly, it appears that Mr. Seery would have had to manually change the settings on his Phone to set text messages to delete automatically after a year.

[1] https://www.apple.com/legal/privacy/data/en/messages/#:~:text=You%20can%20choose%20to%20automatically,Backup%20or%20Messages%20in%20iCloud.

Defendants know that Mr. Seery used his text messages for HCMLP's business purposes because Defendants themselves have seen such messages. Accordingly, Defendants hereby request that you: (1) take action to suspend the Deletion Setting, and (2) instruct Mr. Seery to take all steps necessary to preserve all physical and electronic documents and ESI in his possession, custody, or control that relate to the above-referenced matter, including without limitation, ensuring that potentially relevant documents are preserved intact and are not destroyed, altered, modified, or deleted. In particular, Mr. Seery must immediately suspend any document retention or destruction policies.

In addition, Defendants demand the following information regarding the Deletion Setting:

1. Is the Deletion Setting still enabled on the Phone as of your receipt of this correspondence? If not, when was it disabled?

2. When did Mr. Seery enable the Deletion Setting?

3. When did HCMLP's counsel first become aware of the Deletion Setting on the Phone?

4. What instructions, if any, were given by counsel to Mr. Seery to preserve documents that might be relevant to on-going or anticipated litigation? When were such instructions issued? Which counsel issued such instructions?

5. Prior to the date of this correspondence, was counsel to the Litigation Trustee informed of the Deletion Setting?

6. Has Mr. Seery replaced his Phone since he joined HCMLP's board on or about January 9, 2020? If so, what happened to the old phone and/or the data on the old phone?

7. Has counsel for HCMLP or for the Litigation Trustee taken any steps to ensure that other identified witnesses under their control do not have a similar Deletion Setting on their personal mobile devices? If so, please inform us of what steps were taken, when those steps were taken, by which counsel, and with respect to which potential witnesses.

Upon receipt of this correspondence, please immediately confirm the suspension of the Deletion Setting on Mr. Seery's Phone. Please respond to the remaining inquiries promptly so that we may take the appropriate next steps with respect to this matter.

Finally, we understand that the parties are discussing a potential standstill of various proceedings, including of the above-referenced matter. However, given the spoliation issues presented above, we found it necessary to promptly send this letter. We do not anticipate that this issue will or should hinder any standstill agreement being reached amongst the parties.

Best regards,

Michelle Hartmann
Partner
michelle.hartmann@bakermckenzie.com

From: Michele Naudin
To: [redacted]
Cc: [redacted]
Subject: FW: Follow up from Friday"s call
Date: Thursday, February 16, 2023 1:57:42 PM
Attachments: image001.jpg

[redacted]

[redacted]

[redacted]

MICHELE NAUDIN | Attorney
LynnPinkerHurstSchwegmann
Direct 214 292 3648
Mobile 469 705 2825
mnaudin@lynnllp.com

2100 Ross Avenue, Suite 2700
Dallas, Texas 75201
lynnllp.com

From: John A. Morris <jmorris@pszjlaw.com>
Sent: Thursday, February 16, 2023 1:54 PM
To: Michele Naudin <mnaudin@lynnllp.com>
Cc: Hayley R. Winograd <hwinograd@pszjlaw.com>; Michael K. Hurst <MHurst@lynnllp.com>; Laura M. Garcia <lgarcia@weinsteinklein.com>
Subject: RE: Follow up from Friday's call

Michele:

The answers to your questions as follows:

1. Mr. Seery's iPhone is personal in nature. While it is backed up to iCloud, that back-up does not contain deleted items, whether deleted manually or as part of an automatic setting.
2. The automatic text deletion setting is currently set at one year; texts that are manually or automatically deleted are not retrievable; and
3. We have provided all texts and screenshots that we could locate based on a reasonable search. As I mentioned, we're glad that you had the screenshot of Goldsmith bringing documents to a storage facility because we both recalled that Jim sent that to me and I could

not locate it (and you can see from Jim's response that he told Daugherty to "knock it off"). As you know, our ability to locate documents is based on search terms. If Jim forwarded a screen shot (or anything else) without comment (which is possible), I would only be able to find it by reviewing every email received from Jim – which, after three years of daily communications, we don't believe we are required to do. To be as helpful as we can, I recall Jim sending several screenshots to me over the years including: (a) the one of Goldsmith, (b) one of Scott speaking with someone in front of a house (which I think you sent), (c) one of Thomas Surgent's car (obviously sent in 2020). Jim does currently not have any of those pictures on his iPhone. And obviously, as verified by the information produced, Jim never requested these unsolicited pictures or did anything with them (other than forward them to me).

To summarize what we also discussed:

1. Jim and I accepted service of the subpoenas despite the fact that service was improper;
2. We produced all responsive emails, pictures, and texts we located after conducting a reasonable search;
3. We immediately withdrew the objection that you challenged to make clear we were not hiding anything;
4. We've acknowledged receiving (or sharing) certain texts that you obtained elsewhere;
5. One of those texts clearly shows Jim's discomfort with the photo of Ms. Goldsmith;
6. My text with Dandeneau (Scott's lawyer for that purpose) during the remand hearing shows I was ready to "pounce" on Daugherty if he even suggested that he was working on behalf or at that direction of Jim or the Trust.

Please confirm that Jim and I have done all we need to do to comply the subpoena. Otherwise, please let me know what questions remain.

Regards,

John

John A. Morris
Pachulski Stang Ziehl & Jones LLP
Direct Dial: 212.561.7760
Tel: 212.561.7700 | Fax: 212.561.7777
jmorris@pszjlaw.com
vCard | Bio | LinkedIn

pszjlogo

From: Michele Naudin [mailto:mnaudin@lynnllp.com]
Sent: Monday, February 13, 2023 11:07 AM
To: John A. Morris <jmorris@pszjlaw.com>
Cc: Hayley R. Winograd <hwinograd@pszjlaw.com>; Michael K. Hurst <MHurst@lynnllp.com>; Laura M. Garcia <lgarcia@weinsteinklein.com>
Subject: Follow up from Friday's call

Mr. Morris,

As a follow up from Friday's call, we look forward to hearing from you this week as to (1) whether Seery's data backed up to the Cloud, (2) Seery's automatic deletion settings, if any and what the setting is, and (3) confirm that you could not locate another email for any other contemporaneous screenshots of Daugherty's texts sent to Seery, which you stated that Seery screenshotted and sent to you from time to time.

Thank you,

MICHELE NAUDIN | Attorney
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2100 Ross Avenue, Suite 2700
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Exhibit C

Baker McKenzie.

Baker & McKenzie LLP

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Dallas, Texas 75201
United States

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March 07, 2023

Robert S. Loigman
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010

By email
robertloigman@quinnemanuel.com

John Morris, Esq.
Pachulski Stang Ziehl & Jones LLP
780 Third Avenue
34th Floor
New York, NY 10017-2024

By email
jmorris@pszjlaw.com

Re: *Kirschner v. Dondero, et al.*, Adv. Pro. No. 21-03076-sgj

Dear Robert:

I am writing in response to your correspondence of March 7, 2023 ("***Trustee Correspondence***") regarding my March 4, 2023 letter to John Morris of Pachsulski, Stang, Ziehl, & Jones, Debtor's counsel and counsel for Mr. Seery, regarding Mr. Seery's apparent on-going destruction of potentially relevant documents ("***Defendants' Correspondence***"). While I would appreciate clarification of the respective responsibility being assumed by Pachulski and Quinn Emanuel regarding the Deletion Setting, I will nonetheless include both firms in all future correspondence regarding this matter.

As a preliminary matter, I find it disturbing that John Morris had time to consult with you on this matter and you had the time to write me, but neither of you have taken the time to confirm that the on-going destruction of potentially responsive evidence is stopped.[1] Therefore, please confirm that Mr. Seery has suspended the Deletion Setting and has been instructed to otherwise preserve potentially relevant documents in his possession, custody, or control. If you are refusing to put a stop to the apparent on-going destruction of documents, please let me know as soon as possible so that we may determine the next appropriate steps.

With respect to Defendants' Correspondence, that the Highland Litigation Sub-Trust (the "***Trustee***") has taken interest in Mr. Seery's Deletion Setting answers the question of whether the Trustee is aware of the Deletion Setting, however, please clarify when the Trustee became

[1] There is no reasonable dispute that Mr. Seery's text messages should have been preserved as electronically stored information potentially relevant to the on-going matters. In his correspondence dated March 31, 2021 to my clients, John Morris specifically identifies that the parties must preserve all documents, including "text messages" and that my clients should "immediately suspend any document retention/destruction policies…that could result in the destruction or deletion of any potentially relevant documents in its possession, custody, or control." *See* the letters attached.

aware of the Deletion Setting. Additionally, please provide substantive answers to the remaining inquiries from Defendants' Correspondence.

With respect to the balance of your letter, you raise several points, including that (a) neither side has committed yet to production of text messages, (b) certain defendants allegedly rendered collection of their text messages impossible, and (c) the Trustee has produced millions of pages of documents and the Defendants very few. I am not aware of any case law that would consider any of these facts as justifications for, much less relevant to, a party principal's *currently on-going deletion of potentially relevant documents*. We can continue discussions regarding what should be produced in this matter, but regardless, Mr. Seery cannot continue to destroy potentially relevant evidence.

I am copying John on this correspondence as he is Mr. Seery's counsel and still has not responded to the Defendants' Correspondence. While it is unclear to me which of the various firms advising Mr. Seery have assumed responsibility for his on-going Deletion Setting, you all collectively are responsible for stopping the deletion pending a final determination of what should and will be produced in the various on-going matters. I expect that you will comply with this duty to prevent further destruction of evidence.

Best regards,

Michelle Hartmann
Partner
michelle.hartmann@bakermckenzie.com

PACHULSKI STANG ZIEHL & JONES

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LIMITED LIABILITY PARTNERSHIP

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FACSIMILE: 302/652 4400

WEB: www.pszjlaw.com

John A. Morris

212.561.7700
jmorris@pszjlaw.com

March 31, 2021

Via Federal Express

Scott Ellington
3100 Independence Parkway
Suite 311
Plano, Texas 75075

The Ritz-Carlton, Dallas
2525 N. Pearl St.
Unit 1201
Dallas, TX 75201

Re: *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj11 (Bankr. N.D. Tex.)

Dear Mr. Ellington:

We are counsel to Highland Capital Management, L.P. ("HCMLP"), the debtor in the above captioned Chapter 11 case (the "Bankruptcy Case"). The purpose of this document preservation notice (this "Notice") is to notify you of your obligation to preserve documents and information relating in any way to the matters referenced herein.

UBS Securities LLC and UBS AG London Branch (together, "UBS") has recently commenced an adversary proceeding against HCMLP (the "Adversary Case") in connection with the Bankruptcy Case. In the Adversary Case, UBS has alleged that HCMLP, acting through and at the direction of James Dondero and other former employees of HCMLP, fraudulently transferred hundreds of millions of dollars of assets (the "Transferred Assets") away from Highland CDO Opportunity Master Fund, L.P. ("CDO Fund") and Highland Special Opportunities Holding Company ("SOHC," and together with CDO Fund, the "Funds") and affiliated entities—in anticipation of a judgment that UBS obtained against the Funds in the UBS

PACHULSKI STANG ZIEHL & JONES
LAW OFFICES

Litigation[1]—to Sentinel Reinsurance, Ltd. ("Sentinel," and together with its affiliates, the "Sentinel Entities"), a Cayman Islands entity that Mr. Dondero and Scott Ellington owned and controlled.

UBS further alleges that certain of these assets were fraudulently transferred to Sentinel pursuant to a purported purchase agreement (the "Purchase Agreement"), dated as of August 7, 2017, purportedly to satisfy the premium on a legal liability insurance policy issued by Sentinel (the "Insurance Policy"), which policy was supposedly intended to insure the Funds against an adverse judgment in the UBS Litigation. Among the assets that were purportedly transferred to Sentinel are (i) an interest in Multi-Strat that was ostensibly redeemed in November 2019 (the "Sentinel Redemption") and (ii) assets held by CDO Fund related to Greenbriar CLO Ltd., Greenbriar CLO Corp., Aberdeen Loan Funding Ltd., Eastland CLO Ltd., Grayson CLO Ltd., Valhalla CLO Ltd., and Governance Re, Ltd., including cash payments related to those assets.

HCMLP will seek discovery from various parties and third parties in connection with the Adversary Case and any other legal actions that may be commenced relating to the subject matter of this Notice, potentially including from you. You are receiving this preservation demand because we believe that you have documents or other materials related to the matters referenced herein. Applicable law and the rules of discovery require the immediate preservation of all documents and electronically stored information in your possession, custody, or control that relate in any way to these matters.

Pursuant to the Notice, HCMLP demands that you retain all documents, communications (including e-mails and text messages), and other materials in its possession, custody, or control (including such documents and materials in the possession or custody of your representatives, agents, employees, subsidiaries, or affiliates) that relate, directly or indirectly, to the subject matter of this Notice, including, *but not limited to*, any of the following:

[1] "UBS Litigation" refers to the action commenced by UBS in the Supreme Court of the State of New York against HCMLP, the Funds, and Highland Credit Opportunities CDO, L.P. (n/k/a Highland Multi Strategy Credit Fund, L.P.) ("Multi-Strat"), among other defendants, and which has been consolidated in the action captioned *UBS Securities LLC et al. v. Highland Capital Management, L.P. et al.*, No. 650097/2009 (N.Y. Sup. Ct.).

PACHULSKI STANG ZIEHL & JONES
LAW OFFICES

- The Bankruptcy Case;
- The Adversary Case and any future claims or actions that may be brought relating to the subject matter of this Notice;
- UBS or the UBS Litigation, including without limitation any actual or potential judgments entered therein;
- The Sentinel Entities, including without limitation Sentinel Reinsurance, Ltd., Sentinel Holdings, Ltd., and SS Holdings, Ltd., and all predecessors, successors, directors, officers, employees, representatives, and agents of the Sentinel Entities;
- The Insurance Policy, including without limitation any claims made on the Insurance Policy, and all related documents and agreements;
- The Purchase Agreement and all related documents and agreements;
- All assets actually or potentially transferred from HCMLP, the Funds, or any affiliated entities to the Sentinel Entities, including without limitation the value of all such assets;
- All documents and agreements relating to any accounts in which such assets are or have been transferred, deposited, or held;
- All documents and agreements reflecting any actual or potential transfer of assets from HCMLP, the Funds, or any affiliated entities to the Sentinel Entities;
- All actual or potential interests that any Sentinel Entities have had or purport to have in Multi-Strat, including without limitation any redemption interests, partnership interests, or other economic interests; and

PACHULSKI STANG ZIEHL & JONES
LAW OFFICES

- All documents and agreements relating to any subsequent transfers by the Sentinel Entities of any assets received from HCMLP, the Funds, or any affiliated entities.

For the avoidance of doubt, the foregoing topics are not intended to be exhaustive; you must retain all documents and other materials that relate in any way to the subject matter of this Notice. The terms "related to" or "relating to" should be construed as broadly as possible, and any doubts concerning the potential relevance of a document should be resolved in favor of preservation.

For purposes of this Notice, the term "documents" should be construed broadly to encompass all manner of communication and information, whether or not in physical or electronic form, and shall have the broadest meaning allowable under the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure. "Documents" expressly include, without limitation, all of the following:

- Hard copy documents, including without limitation writings (whether typed or printed, or in final or draft form), printouts, calendars, handwritten notes, notebooks, sketches, photographs, drawings, photographs, and other tangible objects; and

- Electronic files and electronically stored information ("ESI"), including without limitation emails and attachments, text messages, chat messages, instant messages, electronic calendars, schedules, social media content and communications, video or sound recordings, pictures, presentations (e.g., PowerPoint), spreadsheets, PDFs, word processing documents, presentations, voicemails, diagrams, images, databases, servers, metadata, and other electronic information, whether stored or maintained on a laptop, desktop computer, hard drive, server, network, legacy system, flash drive, internal or external hard drive, shared drive, CD, CD-ROM, DVD, PDA, tablet, iPad, iPhone, smartphone, Blackberry, computer log, or other removable media or storage device. This also includes potentially relevant documents and information stored on products HCMLP does not own,

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such as the personal laptops or home computers of its employees, subsidiaries, or affiliates.

You must take all steps necessary to preserve all physical and electronic documents and ESI in its possession, custody, or control that relate to the subject matter of this Notice, including without limitation ensuring that potentially relevant documents are preserved intact and are not destroyed, altered, modified, or deleted. In particular, you must immediately suspend any document retention/destruction policies, including any backup tape recycling policies, that could result in the destruction or deletion of any potentially relevant documents in its possession, custody, or control, and must retain all software, hardware, or other information required to access or view potentially relevant ESI. Failure to take such actions may subject you to sanctions.

This preservation demand is continuing in nature and requires your preservation of potentially relevant documents and materials that come into its possession, custody, or control after the date of this Notice.

Please acknowledge receipt of this Notice and promptly confirm that you will comply with this preservation demand.

Very truly yours,

/s/ John A. Morris

John A. Morris

cc: Debra Dandeneau
Michelle Hartman
James P. Seery, Jr.

PACHULSKI STANG ZIEHL & JONES
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John A. Morris
212.561.7700
jmorris@pszjlaw.com

March 31, 2021

Via Federal Express

Isaac Leventon
409 Pleasant Valley Lane
Richardson, TX 75080

Re: *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj11 (Bankr. N.D. Tex.)

Dear Mr. Leventon:

We are counsel to Highland Capital Management, L.P. ("HCMLP"), the debtor in the above captioned Chapter 11 case (the "Bankruptcy Case"). The purpose of this document preservation notice (this "Notice") is to notify you of your obligation to preserve documents and information relating in any way to the matters referenced herein.

UBS Securities LLC and UBS AG London Branch (together, "UBS") has recently commenced an adversary proceeding against HCMLP (the "Adversary Case") in connection with the Bankruptcy Case. In the Adversary Case, UBS has alleged that HCMLP, acting through and at the direction of James Dondero and other former employees of HCMLP, fraudulently transferred hundreds of millions of dollars of assets (the "Transferred Assets") away from Highland CDO Opportunity Master Fund, L.P. ("CDO Fund") and Highland Special Opportunities Holding Company ("SOHC," and together with CDO Fund, the "Funds") and affiliated entities—in anticipation of a judgment that UBS obtained against the Funds in the UBS Litigation[1]—to Sentinel Reinsurance, Ltd. ("Sentinel," and together

[1] "UBS Litigation" refers to the action commenced by UBS in the Supreme Court of the State of New York against HCMLP, the Funds, and Highland Credit Opportunities CDO, L.P. (n/k/a Highland Multi Strategy Credit Fund, L.P.) ("Multi-Strat"), among other defendants, and which has been consolidated in the action captioned *UBS Securities LLC et al. v. Highland Capital Management, L.P. et al.*, No. 650097/2009 (N.Y. Sup. Ct.).

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with its affiliates, the "Sentinel Entities"), a Cayman Islands entity that Mr. Dondero and Scott Ellington owned and controlled.

UBS further alleges that certain of these assets were fraudulently transferred to Sentinel pursuant to a purported purchase agreement (the "Purchase Agreement"), dated as of August 7, 2017, purportedly to satisfy the premium on a legal liability insurance policy issued by Sentinel (the "Insurance Policy"), which policy was supposedly intended to insure the Funds against an adverse judgment in the UBS Litigation. Among the assets that were purportedly transferred to Sentinel are (i) an interest in Multi-Strat that was ostensibly redeemed in November 2019 (the "Sentinel Redemption") and (ii) assets held by CDO Fund related to Greenbriar CLO Ltd., Greenbriar CLO Corp., Aberdeen Loan Funding Ltd., Eastland CLO Ltd., Grayson CLO Ltd., Valhalla CLO Ltd., and Governance Re, Ltd., including cash payments related to those assets.

HCMLP will seek discovery from various parties and third parties in connection with the Adversary Case and any other legal actions that may be commenced relating to the subject matter of this Notice, potentially including from you. You are receiving this preservation demand because we believe that you have documents or other materials related to the matters referenced herein. Applicable law and the rules of discovery require the immediate preservation of all documents and electronically stored information in your possession, custody, or control that relate in any way to these matters.

Pursuant to the Notice, HCMLP demands that you retain all documents, communications (including e-mails and text messages), and other materials in its possession, custody, or control (including such documents and materials in the possession or custody of your representatives, agents, employees, subsidiaries, or affiliates) that relate, directly or indirectly, to the subject matter of this Notice, including, *but not limited to*, any of the following:

- The Bankruptcy Case;
- The Adversary Case and any future claims or actions that may be brought relating to the subject matter of this Notice;

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- UBS or the UBS Litigation, including without limitation any actual or potential judgments entered therein;
- The Sentinel Entities, including without limitation Sentinel Reinsurance, Ltd., Sentinel Holdings, Ltd., and SS Holdings, Ltd., and all predecessors, successors, directors, officers, employees, representatives, and agents of the Sentinel Entities;
- The Insurance Policy, including without limitation any claims made on the Insurance Policy, and all related documents and agreements;
- The Purchase Agreement and all related documents and agreements;
- All assets actually or potentially transferred from HCMLP, the Funds, or any affiliated entities to the Sentinel Entities, including without limitation the value of all such assets;
- All documents and agreements relating to any accounts in which such assets are or have been transferred, deposited, or held;
- All documents and agreements reflecting any actual or potential transfer of assets from HCMLP, the Funds, or any affiliated entities to the Sentinel Entities;
- All actual or potential interests that any Sentinel Entities have had or purport to have in Multi-Strat, including without limitation any redemption interests, partnership interests, or other economic interests; and
- All documents and agreements relating to any subsequent transfers by the Sentinel Entities of any assets received from HCMLP, the Funds, or any affiliated entities.

For the avoidance of doubt, the foregoing topics are not intended to be exhaustive; you must retain all documents and other materials that

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relate in any way to the subject matter of this Notice. The terms "related to" or "relating to" should be construed as broadly as possible, and any doubts concerning the potential relevance of a document should be resolved in favor of preservation.

For purposes of this Notice, the term "documents" should be construed broadly to encompass all manner of communication and information, whether or not in physical or electronic form, and shall have the broadest meaning allowable under the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure. "Documents" expressly include, without limitation, all of the following:

- Hard copy documents, including without limitation writings (whether typed or printed, or in final or draft form), printouts, calendars, handwritten notes, notebooks, sketches, photographs, drawings, photographs, and other tangible objects; and

- Electronic files and electronically stored information ("ESI"), including without limitation emails and attachments, text messages, chat messages, instant messages, electronic calendars, schedules, social media content and communications, video or sound recordings, pictures, presentations (e.g., PowerPoint), spreadsheets, PDFs, word processing documents, presentations, voicemails, diagrams, images, databases, servers, metadata, and other electronic information, whether stored or maintained on a laptop, desktop computer, hard drive, server, network, legacy system, flash drive, internal or external hard drive, shared drive, CD, CD-ROM, DVD, PDA, tablet, iPad, iPhone, smartphone, Blackberry, computer log, or other removable media or storage device. This also includes potentially relevant documents and information stored on products HCMLP does not own, such as the personal laptops or home computers of its employees, subsidiaries, or affiliates.

You must take all steps necessary to preserve all physical and electronic documents and ESI in its possession, custody, or control that relate to the subject matter of this Notice, including without limitation ensuring that potentially relevant documents are preserved

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intact and are not destroyed, altered, modified, or deleted. In particular, you must immediately suspend any document retention/destruction policies, including any backup tape recycling policies, that could result in the destruction or deletion of any potentially relevant documents in its possession, custody, or control, and must retain all software, hardware, or other information required to access or view potentially relevant ESI. Failure to take such actions may subject you to sanctions.

This preservation demand is continuing in nature and requires your preservation of potentially relevant documents and materials that come into its possession, custody, or control after the date of this Notice.

Please acknowledge receipt of this Notice and promptly confirm that you will comply with this preservation demand.

Sincerely,

/s/ John A. Morris

John A. Morris

cc: Debra Dandeneau
Michelle Hartman
James P. Seery, Jr.

Exhibit D

From: Giles, Courtney
[redacted]
Cc: Hartmann, Michelle; Cahn, Blaire; Zimmerman, Laura
Subject: FW: Kirschner v. Dondero et al.: Letter re text messages
Date: Friday, March 10, 2023 3:26:41 PM
Attachments: image001.png

[redacted]

[redacted]

Thanks,

Courtney Giles
Associate, Litigation
Baker & McKenzie LLP
700 Louisiana, Suite 3000
Houston, TX 77002
United States
Tel: +1 713 427 5000
Direct: +1 713 427 5086
Fax: +1 713 427 5099
courtney.giles@bakermckenzie.com

Baker McKenzie.

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From: John A. Morris <jmorris@pszjlaw.com>
Sent: Friday, March 10, 2023 3:20 PM
To: Hartmann, Michelle <Michelle.Hartmann@bakermckenzie.com>
Cc: Jeff Pomerantz <jpomerantz@pszjlaw.com>; Gregory V. Demo <GDemo@pszjlaw.com>; Hayley R. Winograd <hwinograd@pszjlaw.com>; 'Robert Loigman' <robertloigman@quinnemanuel.com>; 'Aaron Lawrence' <aaronlawrence@quinnemanuel.com>; Giles, Courtney <Courtney.Giles@bakermckenzie.com>
Subject: [EXTERNAL] Kirschner v. Dondero et al.: Letter re text messages

Michelle:

As you know, Mr. Seery is (among other things) the CEO of our client, Highland Capital Management, L.P., and we represent him in that capacity, not in his personal, individual capacity.

In response to the communication, please be advised that Mr. Seery recently suspended his deletion setting; separately, all potentially relevant documents in his possession, custody, and control have been preserved.

Regards,

John
John A. Morris

Pachulski Stang Ziehl & Jones LLP
Direct Dial: 212.561.7760
Tel: 212.561.7700 | Fax: 212.561.7777
jmorris@pszjlaw.com
vCard | Bio | LinkedIn

Los Angeles | San Francisco | Wilmington, DE | New York | Houston

---

From: Giles, Courtney [mailto:Courtney.Giles@bakermckenzie.com]
Sent: Tuesday, March 7, 2023 10:05 PM
To: robertloigman@quinnemanuel.com; Aaron Lawrence <aaronlawrence@quinnemanuel.com>; Hartmann, Michelle <Michelle.Hartmann@bakermckenzie.com>
Cc: Dandeneau, Debra A. <Debra.Dandeneau@bakermckenzie.com>; qe-highland <qe-highland@quinnemanuel.com>; Jeff Pomerantz <jpomerantz@pszjlaw.com>; John A. Morris <jmorris@pszjlaw.com>; Gregory V. Demo <GDemo@pszjlaw.com>; Hayley R. Winograd <hwinograd@pszjlaw.com>
Subject: RE: Kirschner v. Dondero et al.: Letter re text messages

Counsel,

Please see the attached correspondence.

Best regards,

Courtney Giles
Associate, Litigation
Baker & McKenzie LLP
700 Louisiana, Suite 3000
Houston, TX 77002
United States
Tel: +1 713 427 5000
Direct: +1 713 427 5086
Fax: +1 713 427 5099
courtney.giles@bakermckenzie.com

From: Aaron Lawrence <aaronlawrence@quinnemanuel.com>

Sent: Tuesday, March 7, 2023 2:08 PM
To: Hartmann, Michelle <Michelle.Hartmann@bakermckenzie.com>
Cc: Giles, Courtney <Courtney.Giles@bakermckenzie.com>; Dandeneau, Debra A. <Debra.Dandeneau@bakermckenzie.com>; qe-highland <qe-highland@quinnemanuel.com>; 'jpomerantz@pszjlaw.com' <jpomerantz@pszjlaw.com>; John A. Morris <jmorris@pszjlaw.com>; Gregory V. Demo <GDemo@pszjlaw.com>; Hayley R. Winograd <hwinograd@pszjlaw.com>
Subject: [EXTERNAL] Kirschner v. Dondero et al.: Letter re text messages

Michelle,

Please see the attached correspondence.

Best,

Aaron Lawrence
Associate
Quinn Emanuel Urquhart & Sullivan, LLP

51 Madison Avenue, 22nd Floor
New York, NY 10010
Direct
212-849-7000 Main Office Number
212-849-7100 FAX
aaronlawrence@quinnemanuel.com
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Appendix Exhibit 139

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Facsimile: (713) 960-7347
Attorneys for Hunter Mountain Investment Trust

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.	§	

HUNTER MOUNTAIN INVESTMENT TRUST'S EMERGENCY MOTION FOR LEAVE TO FILE VERIFIED ADVERARY PROCEEDING

Hunter Mountain Investment Trust ("HMIT"), Movant, files this Emergency Motion for Leave to File Verified Adversary Proceeding ("Motion"), both in its individual capacity and as a derivative action on behalf of the Reorganized Debtor, Highland Capital Management, L.P. ("HCM" or "Reorganized Debtor") and the Highland Claimant Trust against Muck Holdings, LLC ("Muck"), Jessup Holdings, LLC ("Jessup"), Farallon

Capital Management, LLC ("Farallon"), Stonehill Capital Management, LLC ("Stonehill"), James P. Seery, Jr. ("Seery") and John Doe Defendant Nos. 1-10 (Muck, Jessup, Stonehill, Farallon, Seery and the John Doe Defendant Nos. 11-10 are collectively "Respondents" or "Proposed Defendants").

I. Good Cause for Expedited Relief

1. HMIT seeks leave to file an Adversary Proceeding pursuant to the Court's "gatekeeping" orders, as well as the injunction and exculpation provisions in the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (Doc. 1943), as modified (the "Plan").[1] A copy of HMIT's proposed Verified Adversary Proceeding ("Adversary Proceeding") is attached as Exhibit 1 to this Motion. This Motion is separately supported by objective evidence derived from historical filings in the bankruptcy proceedings.[2] WITHDRAWN

WITHDRAWN

WITHDRAWN .

[1] The exculpation provisions were recently modified by a decision of the Fifth Circuit. Such provisions apply to James P. Seery, Jr. only and are limited to his capacity as an Independent Director. *Matter of Highland Cap. Mgmt., L.P.*, 48 F.4th 419, 438 (5th Cir. 2022).

[2] Unless otherwise referenced, all references to evidence involving documents filed in the Debtor's bankruptcy proceedings (Case No. 19-34054-sgj11 (Bankr. N.D. Tex.)) are cited by "Doc." reference. HMIT asks the Court to take judicial notice of the documents identified by such entries.

WITHDRAWN

WITHDRAWN

2. The expedited nature of this Motion is permitted under Fed. R. Bank P. 9006 (c)(1), which authorizes a shortened time for a response and hearing for good cause. For the reasons set forth herein, HMIT has shown good cause and requests that the Court schedule a hearing on this Motion on three (3) days' notice, and that any responses be filed no later than twenty-four hours before the scheduled hearing.[4]

3. HMIT brings this Motion on behalf of itself and derivatively on behalf of the Reorganized Debtor and the Highland Claimant Trust ("Claimant Trust"), as defined in the Claimant Trust Agreement (Doc. 3521-5) ("CTA").[5] Upon the Plan's Effective Date, Highland Capital Management, LP, as the original Debtor ("Original Debtor"), transferred its assets, including its causes of action, to the Claimant Trust, including the causes of action set forth in the attached Adversary Proceeding. The attached Adversary Proceeding alleges claims which are substantially more than "colorable" based upon plausible allegations that the Proposed Defendants, acting in concert, perpetrated a fraud,[6] including a fraud upon innocent stakeholders, as well as breaches of fiduciary

[4] Expedited action on this Motion is also warranted to hasten Movants' opportunity to file suit, pursue prompt relevant discovery, and reduce the threat of loss of potentially key evidence. Upon information and belief, Seery has been deleting text messages on his personal iPhone via a rolling, automatic deletion setting.

[5] Solely in the alternative, and in the unlikely event HMIT's proposed causes of actions against Seery, Stonehill, Farallon, Muck, and/or Jessup are considered to be "Estate Claims" as those terms are used and defined within the CTA and Exhibit A to the Notice of Final Term Sheet [Docket No. 354] in HCM's bankruptcy (and without admitting the same), HMIT alternatively seeks standing to bring this action as a derivative action on behalf of the Litigation Sub-Trust as appropriate.

[6] Neither this Motion nor the proposed Adversary Complaint seeks to challenge the Court's Orders or the Plan. In addition, neither this Motion nor the proposed Adversary Complaint seeks to redistribute the assets of the Claimant Trust in a manner that would adversely impact innocent creditors. Rather, the

duties and knowing participation in (or aiding and abetting) breaches of fiduciary duty. The Adversary Proceeding also alleges that the Proposed Defendants did so collectively by falsely representing the value of the Debtor's Estate, failing to timely disclose accurate values of the Debtor's Estate, and trading on material non-public information regarding such values. HMIT also alleges that the Proposed Defendants colluded to manipulate the Debtor's Estate—providing Seery the opportunity to plant close business allies into positions of control to approve Seery's compensation demands following the Effective Date.

4. Emergency relief is needed because of a fast-approaching date (April 16, 2023) that one or more of the Proposed Defendants *may* argue, depending upon choice of law, constitutes the expiration of the statute of limitations concerning some of the common law claims available to the Claimant Trust, as well as to HMIT.[7] Although HMIT offered to enter tolling agreements from each of the Proposed Defendants, they either rejected HMIT's requests or have not confirmed their willingness to do so, thereby necessitating the expedited nature of this Motion.[8] Because this Motion is subject to the

proposed Adversary Proceeding seeks to benefit all innocent stakeholders while working within the terms and provisions of the Plan, as well as the Claimant Trust Agreement.

[7] The first insider trade at issue involved the sale and transfer of Claim 23 in the amount of $23 million held by ACMLD Claim, LLC to Muck on April 16, 2021 (Doc. 2215).

[8] HMIT has been diligent in its efforts to investigate the claims described in this Motion, including the filing of a Tex. R. Civ. P. Rule 202 proceeding in January 2023, which was not adjudicated until recently in March 2023. Those proceeding were conducted in the 191st Judicial District Court in Dallas County, Texas, under Cause DC-23-01004. [redacted] Farallon and Stonehill defended those proceedings by aggressively arguing, in significant part, that the discovery issues were better undertaken in this Court.[8] The Rule 202 Petition was recently dismissed (**necessarily without prejudice**)

Court's "gatekeeping" orders and the injunction provisions of the Plan, emergency leave is required.

5. This Motion will come as no surprise to the Proposed Defendants. Farallon and Stonehill were involved in recent pre-suit discovery proceedings under Rule 202 of the Texas Rules of Civil Procedure relating to the same insider trading allegations described in this Motion. Muck and Jessup, special purpose entities created and ostensibly controlled by Farallon and Stonehill, respectively, also were provided notice of these Rule 202 Proceedings in February 2023. Like this Motion, the Rule 202 Proceedings focused on Muck, Jessup, Farallon, and Stonehill and their wrongful purchase of large, allowed claims in the Original Debtor's bankruptcy based upon material non-public information. Seery is also aware of these insider trading allegations because of a prior written demand.

6. In light of the Proposed Defendants' apparent refusal to enter tolling agreements, or their failure to fully affirm their willingness to do so, HMIT is forced to seek emergency relief from this Court to proceed timely with the proposed Adversary Proceeding before the expiration of any *arguable* limitations period.[10]

---

on March 8, 2023, ostensibly based on such arguments. However, it is telling that Stonehill and Farallon admitted during the Rule 202 Proceedings to their "affiliation" with Muck and Jessup and that they bought the Claims through these entities.

WITHDRAWN

[10] HMIT respectfully requests that this Motion be addressed and decided on an expedited basis that provides HMIT sufficient time to bring the proposed action timely. In the event the Court denies the requested relief, HMIT respectfully requests prompt notice of the Court's ruling to allow HMIT sufficient

II. Summary of Claims

7. HMIT requests leave to commence the proposed Adversary Proceeding, attached as Exhibit 1, seeking redress for breaches of duty owed to HMIT, breaches of duties owed to the Original Debtor's Estate, aiding and abetting breaches of those fiduciary duties, conspiracy, unjust enrichment, and fraud. HMIT also alleges several viable remedies, including (i) imposition of a constructive trust; (ii) equitable disallowance of any unpaid balance on the claims at issue;[11] (iii) disgorgement of ill-gotten profits (received by Farallon, Stonehill, Muck and Jessup) to be restituted to the Claimant Trust; (iv) disgorgement of ill-gotten compensation (received by Seery) to be restituted to the Claimant Trust; (v) declaratory judgment relief; (vi) actual damages; and (vii) punitive damages.

III. Standing

8. **HMIT.** Prior to the Plan's Effective Date, HMIT was the largest equity holder in the Original Debtor and held a 99.5% limited partnership interest. HMIT currently holds a Class 10 Claim as a contingent Claimant Trust Interest under the CTA

time to seek, if necessary, appropriate relief in the United States District Court. In order to have a fair opportunity to seek such relief on a timely basis and protect HMIT's rights and the rights of the Reorganized Debtor, HMIT will need to seek such relief on or before Wednesday, April 5, 2023, if this Motion has not been resolved.

[11] In the alternative only, subordination of Muck's and Jessup's General Unsecured Claim Trust Interests and Subordinated Claim Trust Interests to all other interests in the Claimant Trust, including HMIT's Contingent Trust Interest, is necessary and appropriate to remedy Muck's and Jessup's wrongful conduct, and is also consistent with the purposes of the Bankruptcy Code.

(Doc. 3521-5). Upon information and belief, all conditions precedent to HMIT's certification as a vested Claimant Trust Beneficiary would be readily satisfied but for the Defendants' wrongful actions and conduct described in this Motion and the attached Adversary Proceeding.

9. **Reorganized Debtor.** Although HMIT has standing as a former Class B/C Equity Holder, Class 10 claimant, and now contingent Claimant Trust Interest under the CTA,[12] this Motion separately seeks authorization to prosecute the Adversary Proceeding derivatively on behalf of the Reorganized Debtor and Claimant Trust. All conditions precedent to bringing a derivative action are satisfied.

10. Fed. R. Civ. P. 23.1 provides the procedural steps for "derivative actions," and applies to this proceeding pursuant to Fed. R. Bank. P. 7023.1. Applying Rule 7023.1, the Proposed Defendants' wrongful conduct occurred, and the improper trades consummated, in the spring and early summer of 2021, before the Effective Date in August 2021. During this period, HMIT was the 99.5% Class B/C limited partner in the original Debtor. As such, HMIT has individual standing to bring this action because Seery owed fiduciary duties directly to HMIT at that time, and the other Proposed Defendants aided and abetted breaches of those duties at that time.

[12] The last transaction at issue involved Claim 190, the Notice for which was filed on August 9, 2021. (Doc. 2698).

11. The derivative nature of this proceeding is also appropriate because any demand on Seery would be futile.[13] Seery is the Claimant Trustee under the terms of the CTA. Furthermore, any demand on the Oversight Board to prosecute these claims would be equally futile because Muck and Jessup, both of whom are Proposed Defendants, dominate the Oversight Board.[14]

12. The "classic example" of a proper derivative action is when a debtor-in-possession is "unable or unwilling to fulfill its obligations" to prosecute an otherwise colorable claim where a conflict of interest exists. *Cooper*, 405 B.R. at 815 (quoting *Louisiana World*, 858 F.2d at 252). Here, because HMIT's proposed Adversary Proceeding includes claims against Seery, Muck, and Jessup, the conflicts of interest are undeniable. Seery is the Trustee of the Claimant Trust Assets under the CTA, and he also serves as the "Estate Representative."[15] Muck and Jessup, as successors to Acis, the Redeemer Committee and UBS, effectively control the Oversight Board, with the responsibility to "monitor and oversee the administration of the Claimant Trust and the Claimant Trustee's performance . . . ."[16]

---

[13] Any demand on the Litigation Sub-Trust would be equally futile for the same reasons addressed herein, since the Litigation Trustee serves at the direction of the Oversight Board.

[14] *See* Footnote 8, *infra.* In December 2021, several stakeholders made a demand on the Debtor through James Seery, in his capacity as Trustee to the Claimant Trust, to pursue claims related to these insider trades.

[15] *See* Claimant Trust Agreement (Doc. 3521-5), Sec. 3.11.

[16] *Id.* at Sec. 4.2(a) and (b).

13. Creditors' committees frequently bring suit on behalf of bankruptcy estates. Yet, it is clear that any ***appropriately designated party*** also may bring derivative claims. *In re Reserve Prod., Inc.*, 232 B.R. 899, 902 (Bankr. E.D. Tex. 1999) (citations omitted); *see In re Enron Corp.*, 319 B.R. 128, 131 (Bankr. S.D. Tex. 2004). As this Court has held in *In Re Cooper*:

> In Chapter 11 [cases], there is both a textual basis . . . and, frequently, a non-textual, equitable rationale for granting a creditor or creditors committee derivative standing to pursue estate actions (*i.e.*, the equitable rationale coming into play when the debtor-in-possession has a conflict of interest in pursuing an action, such as in the situation of an insider-defendant).

In re Cooper, 405 B.R. 801, 803 (Bankr. N.D. Tex. 2009) (also noting that "[c]onflicts of interest are, of course, frequently encountered in Chapter 11, where the metaphor of the 'fox guarding the hen house' is often apropos"); *see also In re McConnell*, 122 B.R. 41, 43-44 (Bankr. S.D. Tex. 1989) ("[I]ndividual creditors can also act in lieu of the trustee or debtor-in-possession . . . ."). Here, the Proposed Defendants are the "*foxes guarding the hen house*," and their conflicts of interest abound.[17] Proceeding in a derivative capacity is necessary, if not critical.

[17] *See Citicorp Venture Cap., Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982, 987 (3d Cir. 1998) (settlement noteholders purchased Debtors' securities with "the benefit of non-public information acquired as a fiduciary" for the "dual purpose of making a profit and influenc[ing] the reorganization in [their] own self-interest."), *see also, Wolf v. Weinstein*, 372 U.S. 633, 642, 83 S.Ct. 969, 10 L.Ed.2d 33 (1963) ("Access to inside information or strategic position in a corporate reorganization renders the temptation to profit by trading in the Debtor's stock particularly pernicious.").

14. The proposed Adversary Proceeding also sets forth claims that readily satisfy the Court's threshold standards requiring "colorable" claims, as well as the requirements for a derivative action. This Motion WITHDRAWN is supported by WITHDRAWN WITHDRAWN historical filings in the bankruptcy proceedings WITHDRAWN WITHDRAWN. At the very least, this WITHDRAWN satisfies the Court's threshold requirements of willful misconduct and fraud set forth in the "gatekeeping" orders, as well as the injunction and exculpation provisions in the Plan.[18] This WITHDRAWN also supports well-pleaded allegations exempted from the scope of the releases included in the Plan.

15. HMIT is an appropriate party to bring this action on behalf of the Reorganized Debtor and the Claimant Trust. If successful, the Adversary Proceeding will likely recover well over $100 million for the Claimant Trust, thereby enabling the Reorganized Debtor and Claimant Trust to pay off any remaining innocent creditors and make significant distributions to HMIT as a vested Claimant Trust Beneficiary.

16. As of December 31, 2022, the Claimant Trust had distributed 64.2% of the total $397,485,568 par value of all Class 8 and Class 9 unsecured creditor claims. The

[18] HMIT recognizes that it is an "Enjoined Party" under the Plan. The Plan requires a showing, *inter alia*, of bad faith, willful misconduct, or fraud against a "Protected Party." Seery is a "Protected Party" and an "Exculpated Party" in his capacity as an Independent Director. Muck and Jessup *may* be "Protected Parties" as members of the Oversight Committee, but they were not "protected" when they purchased the Claims before the Effective Date. While it is HMIT's position that Farallon and Stonehill do not qualify as "Protected Parties," they are included in this Motion in the interest of judicial economy.

Claims acquired by Muck and Jessup have an allowed par value of $365,000,000. Based on these numbers, the innocent unsecured creditors hold approximately $32 million in allowed claims.[19]

17. As of December 31, 2022, the Claimant Trust has distributed $255,201,228.[20] On a *pro rata* basis, that means that innocent creditors have received approximately $22,373,000 in distributions against the stated value of their allowed claims. That leaves a remaining unpaid balance of approximately $9,627,000.

18. Muck and Jessup already have received approximately $232.8 million on their Claims. Assuming and original investment of approximately $160 million, this represents over $72 million in ill-gotten profits that, if disgorged, would be far more than what is required to fully pay all other innocent creditors - immediately placing HMIT in the status of a vested Claimant Trust Beneficiary. The benefits to the Reorganized Debtor, the Claimant Trust and innocent stakeholders are undeniable.[21]

19. Seery and the Oversight Board should be estopped from challenging HMIT's status to bring this derivative action on behalf of the Claimant Trust. Seery, Muck and Jessup have committed fraud, acted in bad faith and have unclean hands, and they should not be allowed to undermine the proposed Adversary Proceeding - which seeks

[19] Doc. 3653.

[20] *Id.*

[21] Further, under the present circumstances and time constraints, this Motion should be granted to avoid the prospect of the loss of some of HMIT's and the Claimant Trust's claims and denial of due process.

to rectify significant wrongdoing. To hold otherwise would allow Seery, Muck, Jessup, Stonehill, and Farallon the opportunity to not just "guard the hen house," but to also open the door and take what they want.[22] HMIT seeks a declaratory judgment of its rights, accordingly.

IV. The Proposed Defendants

20. Seery acted in several capacities during relevant times. He served as the Debtor's Chief Executive Officer ("CEO") and Chief Restructuring Officer ("CRO"). He also served as member of the Debtor's Independent Board.[23] He currently serves as Claimant Trustee under the CTA and remains the CEO of the Reorganized Debtor.

21. There is no doubt Seery owed the Original Debtor's Estate, as well as equity, fiduciary duties, including the duty of loyalty and the duty to avoid conflicts of interest. *See In re Xtreme Power Inc.*, 563 B.R. 614, 632-33 (Bankr. W.D. Tex. 2016) (detailing fiduciary duties owed by corporate officers and directors under Delaware law); *Louisiana World*, 858 F.2d at 245-46 (detailing duties owed by debtors-in-possession).[24]

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[22] "The doctrine of 'unclean hands' provides that "a litigant who engages in reprehensible conduct in relation to the matter in controversy ... forfeits his right to have the court hear his claim, regardless of its merit. [T]he purpose of the clean hands maxim is to protect the court against misuse by one who, because of his conduct, has forfeited his right to have the court consider his claims, regardless of their merit. As such it is not a matter of defense to be applied on behalf of a litigant; rather it is a rule of public policy." *Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 80–81 (Del. Ch. 2008) (citations omitted) (internal quotations omitted for clarity).

[23] Seery is the beneficiary of the Court's "gatekeeping" orders and is an "exculpated" party in his capacity as an Independent Director. He is also a "Protected Party."

[24] The Internal Affairs Doctrine dictates choice of law. Here, the Debtor, Highland Capital Management, was organized under the law of Delaware. As much, Seery's fiduciary duties and claims involving breaches of those duties will be governed by Delaware law.

22. Farallon and Stonehill are capital management companies which manage hedge funds; they are also Seery's close business allies with a long history of business ventures and close affiliation. Although they were strangers to the Original Debtor's bankruptcy on the petition date, and were not original creditors, they became entangled in this bankruptcy at Seery's invitation and encouragement—and then knowingly participated in the wrongful insider trades at issue. By doing so, Seery was able to plant friendly allies onto the Oversight Board to rubber stamp compensation demands. The proposed Adversary Proceeding alleges that Farallon and Stonehill bargained to receive handsome pay days in exchange.

23. Muck and Jessup are special purpose entities, admittedly created by Farallon and Stonehill on the eve of the alleged insider trades, and they were used as vehicles to assume ownership of the purchased claims.[WITHDRAWN] WITHDRAWN Muck and Jessup ***did not exist*** before confirmation of the Plan in February 2021.[26] Now, however, Muck and Jessup serve on the Oversight Board with immense powers under the CTA.[27] When they purchased the claims at issue, Muck and Jessup were ***not*** acting in their official capacities on the Oversight Committee and, therefore, they were not "Protected Persons" under the Plan.

[WITHDRAWN] WITHDRAWN

[26] WITHDRAWN Muck was created on March 9, 2021 before the Effective Date. Jessup was created on April 8, 2021, before the Effective Date.

[27] *See* Doc. 3521-5, Sec. 4(a) and 4(b).

24. By trading on the alleged material non-public information, Farallon, Stonehill, Muck, and Jessup became non-statutory "insiders" with duties owed directly to HMIT at a time when HMIT was the largest equity holder.[28] *See S.E.C. v. Cuban*, 620 F.3d 551, 554 (5th Cir. 2010) ("The corporate insider is under a duty to 'disclose or abstain'—he must tell the shareholders of his knowledge and intention to trade or abstain from trading altogether."). In this context, there is no credible doubt that Farallon's and Stonehill's dealings with Seery were ***not*** arms-length. Again, Farallon and Stonehill were Seery's past business partners and close allies.[29] By virtue of the insider trades at issue, Farallon and Stonehill acquired control (acting through Muck and Jessup) over the Original Debtor and Reorganized Debtor through Seery's compensation agreement and awards, as well as supervisory powers over the Claimant Trust. This makes Farallon and Stonehill paradigm non-statutory insiders.

25. HMIT also seeks recovery against John Doe Defendant Nos. 1 through 10.[30] It is clear Farallon and Stonehill refuse to disclose the precise details of their legal

[28] Because of their "insider" status, this Court should closely scrutinize the transactions at issue.

[29] Farallon and Stonehill are two capital management firms (similar to HCM) with whom Seery has had substantial business relationships. Also, Seery previously served as legal counsel to Farallon. Seery also has a long-standing relationship with Stonehill. GCM Grosvenor, a global asset management firm, held four seats on the Redeemer Committee (an original member of the Unsecured Creditors Committee in HCM's bankruptcy). Upon information and belief, GCM Grosvenor is a significant investor in Stonehill and Farallon. GCM Grosvenor, through Redeemer, also played a large part in appointing Seery as a director of Strand Advisors and approved his appointment as HCM's CEO and CRO.

[30] Farallon and Stonehill consummated their trades concealing their actual involvement through Muck and Jessup as shell companies. Farallon's and Stonehill's identities were not discovered until much later after the fact.

relationships with Muck and Jessup. They resisted such discovery in the prior Rule 202 Proceedings in state district court.[WITHDRAWN] They also refused to disclose such details in response to a prior inquiry to their counsel.[WITHDRAWN] Furthermore, the corporate filings of both Muck and Farallon conspicuously omit the identity of their respective members or managing members.[WITHDRAWN] Accordingly, HMIT intends to prosecute claims against John Doe Defendant Nos. 1 -- 10 seeking equitable tolling pending further discovery whether Farallon and Stonehill inserted intermediate corporate layers between themselves and the special purpose entities (Muck and Jessup) they created. *See In re ATP Oil & Gas Corp.*, No. 12-36187, 2017 WL 2123867, *4 (Bankr. S.D. Tex. May 16, 2017) (lsgur .J.); *see also In re IFS Fin. Corp.* No. 02-39553, 2010 WL 4614293, *3 (Bankr. S.D. Tex. No. 2, 2010) ("The identity of the party concealing the fraud is immaterial, the critical factor is whether any of the parties involved concealed property of the estate." "In either case, the trustee must demonstrate that despite exercising diligence, he could not have discovered the identity of the [unnamed] defendants prior to the expiration of the limitations period.") *ATP Oil*, 2017 WL 2123867 at *4. That burden is easily satisfied here.

[WITHDRAWN]
[WITHDRAWN]
[WITHDRAWN]

V. Background

26. As part of this Court's Governance Order, an independent board of directors—which included Seery as one of the selections of the Unsecured Creditor's Committee—was appointed to the Board of Directors (the "Board") of Strand Advisors, Inc., ("Strand Advisors"), the Original Debtor's general partner. Following approval of the Governance Order, the Board then appointed Seery as the Original Debtor's CEO and CRO. [34] Following the Effective Date of the Plan, Seery now serves as Trustee of the Claimant Trust (the Reorganized Debtor's sole post-reorganization limited partner), and continues to serve as the Reorganized Debtor's CEO. [35]

27. Imbued with his powers as CEO and CRO, Seery negotiated and obtained bankruptcy court approval of several settlements prior to the Effective Date, resulting in the following approximate allowed claims (hereinafter "Claims"):[36]

Creditor	**Class 8**	**Class 9**
Redeemer	$137 mm	$0 mm
Acis	$23 mm	$0 mm
HarbourVest	$45 mm	$35 mm
UBS	$65 mm	$60 mm
(Totals)	$270 mm	$95 mm

[34] Doc. 854, Order Approving Retention of Seery as CEO/CRO.

[35] *See* Doc. 1943, Order Approving Plan, p. 34.

[36] Orders Approving Settlements [Doc. 1273, Doc. 1302, Doc. 1788, Doc. 2389].

Each of the settling parties curiously sold their Claims to Farallon or Stonehill (or their affiliated special purpose entities) shortly after they obtained court approval of their settlements. One of these "trades" occurred within just a few weeks before the Effective Date. Farallon and Stonehill coordinated and controlled the purchase of these Claims through Muck and Jessup, and they admitted in open court that Muck and Jessup were created to allow their purchase of the Claims.[WITHDRAWN]

28. HMIT alleges that Seery filed (or caused to be filed) deflated, misleading projections regarding the value of the Debtor's Estate,[38] while inducing unsecured creditors to discount and sell their Claims to Farallon and Stonehill. But [WITHDRAWN] [WITHDRAWN] it is now known that Seery provided material, non-public information to Farallon. The circumstantial evidence is also clear that both Farallon and Stonehill had access to and used this non-public information in connection with their purchase decisions.

29. Farallon and Stonehill are registered investment advisors who have their own fiduciary duties to their investors, and they are acutely aware of what these duties entail. Yet, upon information and belief, they collectively invested over $160 million dollars to purchase the Claims in the absence of any publicly available information that

[WITHDRAWN] [WITHDRAWN]

[38] The pessimistic projections were issued as part of the Plan Analysis on February 2, 2021. [Doc. 1875-1]. The Debtor projected 0% return on Class 9 claims and only 71.32% return on Class 8 Claims.

could rationally justify such investments. These "trades" become even more suspect because, at the time of confirmation, the Plan provided pessimistic projections advising stakeholders that the Claim holders would never receive full satisfaction:

- From October 2019, when the original Chapter 11 Petition was filed, to January 2021, just before the Plan was confirmed, the valuation of HCM's assets dropped over $200 million from $566 million to $328.3 million.[39]
- HCM's Disclosure Statement projected payment of 71.32% of Class 8 claims, and 0% of claims in Classes 9-11;[40]
  - This meant that Farallon and Stonehill invested more than $103 million in Claims ***when the publicly available information indicated they would receive $0 in return on their investment as Class 9 creditors and substantially less than par on their Class 8 Claims***.
- In HCM's Q3 2021 Post-Confirmation Report, HCM reported that the amount of Class 8 claims expected to be paid dropped even further from 71% *to 54%*;[41]

30. In the third financial quarter of 2021, just over $6 million of the projected $205 million available to satisfy general unsecured creditors was disbursed.[42] No additional distributions were made to the unsecured claimholders until, suddenly, in Q3 2022 almost $250 million was paid toward Class 8 general unsecured claims—**$45 million more than was *ever* projected**.[43]

[39] Doc. 1473, Disclosure Statement, p. 18.

[40] Doc. 1875-1, Plan Supplement, p. 4.

[41] Doc 2949.

[42] Doc 3200.

[43] Doc 3582.

31. According to Highland Capital's Motion for Exit Financing,[44] and a recent motion filed by Dugaboy Investment Trust,[45] there remain ***substantial*** assets to be monetized for the benefit of the Reorganized Debtor's creditors. Thus, upon information and belief, Stonehill and Farallon, stand to realize significant profits on their wrongful investments. In turn, Stonehill and Farallon will garner (and already have garnered) substantial fees – both base fees and performance fees – as the result of their acquiring and/or managing the Claims. Upon information and belief, HMIT also alleges that Seery has received excessive compensation and bonuses approved by Farallon (Muck) and Stonehill (Jessup) as members of the Oversight Board.

32. WITHDRAWN

- Farallon admitted it conducted no due diligence and relied upon Seery in making its multi-million-dollar investment decisions at issue.[WD]
- Farallon admitted it was unwilling to sell its stake in these Claims at any price because Seery assured Farallon that the Claims were tremendously valuable.[WD]
- Farallon bragged about the value of its investment referencing non-public information regarding Amazon, Inc.'s ("Amazon") interest in acquiring Metro-Goldwyn-Mayer Studios Inc. ("MGM").[WD]

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[44] Doc 2229.

[45] Doc 3382.

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- Farallon was unwilling to sell its stake in the newly acquired Claims even though publicly available information suggested that Farallon would lose millions of dollars on its investment.[49]

Farallon can offer ***no credible explanation*** to explain its significant investment, and its refusal to sell at any price, ***except*** Farallon's access to material non-public information. In essence, Seery became the guarantor of Farallon's significant investment. Farallon admitted as much in its statements to James Dondero.

33. The same holds true for Stonehill. Given the negative, publicly available information, Stonehill's multi-million-dollar investments make no rational sense unless Stonehill had access to material non-public information.

34. Fed. R. Bank. P. 2015.3 requires debtors to "file periodic financial reports of the value, operations, and profitability of each entity that is not a publicly traded corporation or a debtor in a case under title 11, and in which the estate holds a substantial or controlling interest." However, no public reports required by Rule 2015.3 were filed. Seery testified they simply "fell through the cracks." [50]

35. Six days prior to the filing of the motion seeking approval of the HarbourVest Settlement, Seery acquired material non-public information regarding Amazon's interest in acquiring MGM.[51] Upon receipt of this material non-public

[49] *See* WITHDRAWN Doc. 1875-1.

[50] Doc. 1905, February 3, 2021, Hearing Transcript, 49:5-21.

[51] *See* Adversary No. 20-3190-sgj11, Doc. 150-1.

information, MGM should have been placed on the Original Debtor's "restricted list," but Seery continued to move forward with deals that involved MGM stock and notes.[52] Because the Original Debtor additionally held direct interests in MGM,[53] the value of MGM was of paramount importance to the value of the estate.

36. Armed with this and other insider information, Farallon—through Muck—proceeded to invest in the Claims and, acting through Muck, acceded to a powerful position on the Oversight Board to oversee future distributions to Muck and itself. It is no coincidence Seery invited his business allies into these bankruptcy proceedings with promises of great profits. Seery's allies now oversee his compensation.[54]

37. The Court also should be aware that the Texas States Securities Board ("TSSB") opened an investigation into the subject matter of the insider trades at issue, and this investigation has not been closed. The continuing nature of this investigation

[52] As part of the HarbourVest Settlement, Seery negotiated the purchase of HarbourVest's interest in HCLOF for approximately $22.5 million as part of the transaction. Approximately 19.1% of HCLOF's assets were comprised of debt and equity in MGM. The HCLOF interest was not to be transferred to the Debtor for distribution as part of the bankruptcy estate, but rather to "to an entity to be designated by the Debtor"—*i.e.*, one that was not subject to typical bankruptcy reporting requirements. Doc. 1625, p. 9, n. 5. Doc. 1625.

[53] *See* Doc. 2229, Motion for Exit Financing.

[54] Amazon closed on its acquisition of MGM in March 2022, but the evidence strongly suggests that agreements for the trades already had been reached - while announcement of the trades occurred strategically after the MGM news became public. Now, as a result of their wrongful conduct, Stonehill and Farallon profited significantly on their investments, and they stand to gain substantially more profits.

underscores HMIT's position that the claims described in the attached Adversary Proceeding are plausible and certainly far more than merely "colorable."

VI. Argument

A. HMIT has asserted Colorable Claims against Seery, Stonehill, Farallon, Muck, and Jessup.

38. Unlike the terms "Enjoined Party," "Protected Party," or "Exculpated Party," the Plan does not define what constitutes a "colorable" claim. Nor does the Bankruptcy Code define the term. However, relevant authorities suggest that a Rule 12(b)(6) standard is an appropriate analogue.

39. The Fifth Circuit has held that a "colorable" claim standard is met if a [movant], such as HMIT, has asserted claims for relief that, on appropriate proof, would allow a recovery. A court need not and should not conduct an evidentiary hearing but must ensure that the claims do not lack any merit whatsoever. *Louisiana World Exposition v. Fed. Ins. Co.*, 858 F.2d 233, 248 (5th Cir. 1988). Stated differently, the Court need not be satisfied there is an evidentiary basis for the asserted claims but instead should allow the claims if they ***appear*** to have ***some*** merit.

40. Other federal appellate courts have reached similar conclusions. For example, the Eighth Circuit holds that "creditors' claims are colorable if they would survive a motion to dismiss." *In re Racing Services, Inc.*, 540 F.3d 892, 900 (8th Cir. 2008); *accord In Re Foster*, 516 B.R. 537, 542 (B.A.P. 8th Cir. 2014), aff'd 602 Fed. Appx. 356 (8th Cir. 2015) (*per curiam*). The Sixth Circuit has adopted a similar test requiring that the court

look ***only*** to the face of the complaint to determine if claims are colorable. *In re The Gibson Group, Inc.*, 66 F.3d 1436, 1446 (6th Cir. 1995) (emphasis added).

41. Although there is a dearth of federal court authorities in Texas, other federal courts have adopted the same standard—*i.e.*, a claim is colorable if it is "plausible" and could survive a motion to dismiss. *See In re America's Hobby Center, Inc.*, 223 B.R. 273, 282 (S.D.N.Y 1998). In addition, in the non-bankruptcy context, the District Court for the Northern District of Texas explained that "[t]he requirement of a 'colorable claim' means only that the plaintiff must have an '*arguable* claim' and not that the plaintiff must be able to succeed on that claim." *Gonzales v. Columbia Hosp. at Med. City Dallas Subsidiary, L.P.*, 207 F. Supp. 2d 570, 577 (N.D. Tex. 2002) (Emphasis added).

42. Thus, in this instance, this Court's gatekeeping inquiry is properly limited to whether HMIT has stated a plausible claim on the face of the proposed pleadings involving "bad faith," "willful misconduct," or "fraud." Because the face of the Adversary Complaint alleges plausible facts, HMIT's Motion is properly granted. Clearly, the attached Adversary Proceeding would survive a Rule 12(b)(6) challenge. Furthermore, the supporting WITHDRAWN documentary evidence provide additional support, and the circumstantial evidence proves that Farallon and Stonehill, strangers to the bankruptcy on the petition date, would not have leaped into these proceedings without undisclosed assurances of profit.

B. Fraud

43. As set forth in the proposed Adversary Proceeding, HMIT alleges a colorable claim for fraud—both fraud by knowing misrepresentation and fraud by omission of material fact. Here, these allegations of fraud are appropriately governed by Texas law under appropriate choice of law principals.[55]

44. Seery had a duty to not provide material inside information to his business allies. But, he did so. At the latest, Seery became aware of the potential sale of MGM in December 2020 when he received an email from Jim Dondero. [redacted] Thus, Seery knew at that time that this potential sale would likely yield significant value to the Original Debtor's Estate. Yet, the financial disclosures associated with the Plan's confirmation, which were provided only a month later, presented an entirely different outlook for both Class 8 and Class 9 unsecured creditors.[57] Seery knew at that time that these pessimistic disclosures were misleading, if not inaccurate.

45. There is no credible doubt Seery intended that innocent stakeholders would rely upon the pessimistic projections set forth in the Plan Analysis. Indeed, the singular purpose of the Plan Analysis was to advise stakeholders. As such, HMIT alleges that Seery knowingly made misrepresentations with the intention that innocent stakeholders

[55] However, Delaware law is substantially similar on the elements of fraud. *See Malinals v. Kramer*, No. CIV.A. CPU 6-11002145, 2012 WL 174958, at 2 (Del. Com. PI. Jan. 5, 2012)

[redacted] WITHDRAWN

[57] *See* Doc. 1875-1, Plan Analysis, February 1, 2021.

would rely, and that he failed to disclose material information concerning his entanglements with Farallon and Stonehill, as well as the related negotiations that were chock full of conflicts of interest.

46. On the flip side of this conspiracy coin, Farallon and Stonehill were engaged in negotiations to acquire the Claims at discounted prices; and, they successfully did so. HMIT alleges that their success was based on knowledge that the financial disclosures associated with the Plan Analysis were significantly understated. Otherwise, it would make no financial sense for Farallon and Stonehill to do the deals at issue. Indeed, Farallon admitted that it would not sell the Claims at any price, expressing great confidence in the substantial profits it expected even in the absence of any supporting, publicly available information.

47. All of the Proposed Defendants had a duty of affirmative disclosure under these circumstances. Seery always had this duty. Muck, Jessup, Farallon, and Stonehill assumed this duty when they became non-statutory "insiders." Thus, all of the Proposed Defendants are liable for conspiring to perpetrate a fraud by omission of material facts.

48. HMIT also claims that Seery and the other Proposed Defendants failed to disclose material information concerning Seery's involvement in brokering the Claims in exchange for *quid pro quo* assurances of enhanced compensation. Seery's compensation

WITHDRAWN

should be disgorged or, alternatively, such compensation constitutes a damage recoverable by the Reorganized Debtor and Claimant Trust as assignees (or transferees) of the Original Debtor's causes of action. This compensation was the product of the alleged self-dealing, breaches of fiduciary duty, and fraud.

C. Breaches and Aiding and Abetting Breaches of Fiduciary Duties

49. It is beyond dispute Seery owed fiduciary duties to the Estate. *See Xtreme Power*, 563 B.R. at 632-33 (detailing fiduciary duties owed by corporate officers and directors under Delaware law);[59] *Louisiana World*, 858 F.2d at 245-46 (5th Cir. 1988) (detailing duties owed by debtors-in-possession). Although Seery did not buy the Claims at issue, he stood to profit from these sales because his close business allies would do his bidding after they had acceded to positions of power and control on the Oversight Board. Muck and Jessup were essentially stepping into the shoes of three of the largest unsecured creditors who were already slated to serve on the Oversight Board. Thus, by acquiring their Claims, all of the Proposed Defendants knew that Muck and Jessup would occupy these powerful oversight positions after the Effective Date.

50. Thus, the alleged conspiracy was successfully implemented before the Effective Date. Farallon and Stonehill now occupy control positions through the shell

[59] The *Xtreme* case also notes that "several Delaware courts have recognized that 'directors who are corporate employees lack independence because of their substantial interest in retaining their employment." 563 B.R. at 633-34. Because Muck and Jessup are now in control of Seery's compensation, it follows that Seery is beholden to them, and Seery's disclosure of inside information to Stonehill and Farallon confirms his conflict of interest.

entities (Muck and Jessup) overseeing large compensation packages for Seery. Of course, this control (and the opportunity to control) presented a patent conflict of interest which Seery should have avoided, but instead knowingly created, fostered, and encouraged. HMIT alleges that Seery breached his duty to avoid this conflict or otherwise disclose this conflict and Farallon and Stonehill aided and abetted this breach.

51. The Original Debtor, as an investment adviser registered with the SEC, is also required to make public disclosures on its Form ADV, the uniform registration form for investment advisers required by the SEC. These Form ADV disclosures, which were in effect at the time of the insider trades at issue, explicitly forbade "any access person from trading either personally or on behalf of others . . . on material non-public information or communicating material non-public information to others in violation of the law or duty owed to another party."[60] It now appears these representations were false when made. Seery's alleged conduct also violated, at minimum, the duties Seery owed in his various capacities with the Original Debtor under the Form ADV disclosures.

52. Although initially strangers to the original bankruptcy, by accepting and using inside information, Farallon and Stonehill became "temporary insiders" and thus owed separate duties to the Estate. *See S.E.C. v. Cuban*, 620 F.3d 551 (5th Cir. 2010) ("[E]ven

[60] *See, e.g.*, https://files.adviserinfo.sec.gov/IAPD/Content/Common/crd_iapd_Brochure.aspx?BRCHR_VRSN_ID=777026.

an individual who does not qualify as a traditional insider may become a 'temporary insider' if by entering 'into a special confidential relationship in the conduct of the business of the enterprise [they] are given access to information solely for corporate purposes." *In re Washington Mut., Inc.*, 461 B.R. 200 (Bankr. D. Del. 2011), *vacated in part*, 08-12229 MFW, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012) (finding that equity committee stated colorable claim for equitable disallowance against creditors who "became temporary insiders of the Debtors when the Debtors gave them confidential information and allowed them to participate in negotiations with JPMC for the shared goal of reaching a settlement that would form the basis of a consensual plan of reorganization"; vacated in part as a condition of settlement only);[61] *See also, In re Smith*, 415 B.R. 222, 232-33 (Bankr. N.D. Tex. 2009) ("[a]n insider is an entity or person with 'a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor.' 'Thus, the term "insider" is viewed to encompass two classes: (1) per se insiders as listed in the Code and (2) extra-statutory insiders that do not deal at arm's length.'" (citations omitted)). Farallon, Stonehill, Muck, and Jessup clearly fall into this latter category.

[61] Although the *Washington Mutual* case was subsequently vacated, the Court's intellectual reasoning remains valid because the vacatur was mandated by a mediated settlement, not because the court's logic was flawed or changed, and the court expressly noted that the parties' settlement was conditioned on vacatur. *See In re Washington Mut., Inc.*, No. 08-12229 MFW, 2012 WL 1563880, *8 (Bankr. D. Del. Feb. 24, 2012) ("grant[ing] partial vacatur . . . *in furtherance of the settlement embodied in the Plan*," and noting that "absent the requested vacatur, the collapse of the Plan could result in the termination of the Global Settlement Agreement." (emphasis added)).

53. Because Farallon and Stonehill (acting through Muck and Jessup) now hold the majority of the seats on the Oversight Board, they, along with Seery, exercise control of the reorganization proceedings. At no time were Farallon, Stonehill, or Seery's plans disclosed to the other creditors or equity. In fact, the only inference that can be reasonably drawn is that Farallon and Stonehill brazenly sought to conceal their involvement by establishing shell entities—Muck and Jessup—to nominally hold the Claims and create an opaque barrier to any effort to identify the "*Oz behind the curtain*." Such conduct aligns precisely with the inequitable conduct detailed in *Citicorp* and *Adelphia* (discussed below).

54. In sum, the proposed Adversary Proceeding sets forth plausible allegations that Stonehill and Farallon were aware of Seery's fiduciary duties. Indeed, as registered investment advisors, both Farallon and Stonehill were acutely aware of Seery's fiduciary obligations, including, without limitation, the duty to act in the best interests of the Original Debtor's Estate and the duty not to engage in insider trading that would benefit Seery, as an insider, and themselves, as non-statutory insiders. By accepting and then acting on material non-public information, Farallon and Stonehill (as well as Muck and Jessup) aided and abetted breaches of these fiduciary duties. By placing themselves in positions to control Seery's compensation, Farallon and Stonehill (acting through Muck and Jessup) induced, encouraged, aided and abetted Seery's self-dealing.

D. Equitable Disallowance is an Appropriate Remedy

55. HMIT also seeks equitable disallowance. Although the Fifth Circuit in *Matter of Mobile Steel Co.* generally limited the court's equitable powers to subordination rather than disallowance,[62] the Fifth Circuit **did *not* foreclose** the viability of equitable disallowance as a potential remedy. *See* 563 F.2d 692, 699 n. 10 (5th Cir. 1977). Binding U.S. Supreme Court precedent in *Pepper v. Litton* also permits bankruptcy courts to fashion disallowance remedies. 308 U.S. 295, 304-11 (1939). Bankruptcy Code § 510, which supplies the authority for equitable subordination, was "intended to codify case law, such as *Pepper v. Litton . . . and is not intended to limit the court's power in any way…. Nor does [it] preclude a bankruptcy court from completely disallowing a claim in appropriate circumstances*." *In re Adelphia Commun. Corp.*, 365 B.R. 24, 71-72 (Bankr. S.D.N.Y. 2007), *aff'd in part sub nom. Adelphia Recovery Tr. v. Bank of Am., N.A.*, 390 B.R. 64 (S.D.N.Y. 2008), *adhered to on reconsideration*, 05 CIV. 9050 (LMM), 2008 WL 1959542 (S.D.N.Y. May 5, 2008) (emphasis and omissions in original).[63]

56. The Fifth Circuit's decision in *Mobile Steel* also was premised on the notion that disallowance would not add to the quiver of defenses to fight unfairness because

[62] Equitable subordination is an inadequate remedy in this instance.

[63] In *Washington Mutual*, the Court's intellectual reasoning when imposing disallowance is instructive. *See In re Washington Mut., Inc.*, No. 08-12229 MFW, 2012 WL 1563880, *8 (Bankr. D. Del. Feb. 24, 2012) ("grant[ing] partial vacatur . . . *in furtherance of the settlement embodied in the Plan*," and noting that "absent the requested vacatur, the collapse of the Plan could result in the termination of the Global Settlement Agreement." (emphasis added)).

creditors "are fully protected by subordination" and "[i]f the misconduct directed against the bankrupt is so extreme that disallowance might appear to be warranted, then *surely* the claim is either invalid or the bankrupt possesses a clear defense against it." *Mobile Steel*, 563 F.2d at 699 n. 10 (emphasis added). Importantly, however, the factual scenarios considered in *Mobile Steel* do not exist here.

57. Here, Muck and Jessup purchased both Class 8 and Class 9 Claims, and they now effectively occupy more than 90% of the entire field of unsecured creditors in these two claimant tiers. Thus, subordination cannot effectively address the current facts where the Original Debtor's CEO and CRO conspired directly with close business allies who acquired the largest unsecured claims to the detriment of other innocent creditors and *former equity*. The reasoning in published cases from other circuits supports this conclusion. *See Adelphia*, 365 B.R. at 71-73; *Citicorp Venture Capital, Ltd. v. Comm. of Creditors Holding Unsecured Claims*, 160 F.3d 982, 991 n. 7 (3d Cir. 1998).

58. The purpose of equitable subordination is to assure that the wrongdoer does not profit from bad conduct. In the typical case, subordination to other creditors will achieve this deterrence. But, it is clear that the Third Circuit's decision in *Citicorp* was structured to use subordination as just one tool in a larger tool box to make sure "at a minimum, the remedy here should deprive – [the fiduciary] of its profit on the purchase of the notes." *Id* at 991. In *Adelphia*, the Southern District of New York also used equitable

subordination as a remedy to address wrongs of non-insiders who aided and abetted breaches a fiduciary duty by the debtor's management. 365 B.R. at 32.

59. But subordination cannot adequately address the wrongful conduct at issue. This is because subordination is typically limited to instances where one creditor is subordinated to other creditors, not equity. Here, for all practical purposes, there are only a few other unsecured creditors with relatively small stakes. Therefore, subordination as a weapon of deterrence is neutered.

60. In sum, by engaging in the alleged wrongful acts, including aiding and abetting Seery's breaches of fiduciary duty, Farallon, Stonehill, Muck, and Jessup should not be rewarded. The Proposed Defendants engaged in alleged conduct which damaged the Original Debtor's estate, including improper agreements to compensate Seery under the terms of the CTA. Equitable disallowance is an appropriate remedy which, when combined with disgorgement of all ill-gotten profits, will deprive the Proposed Defendants of their ill-gotten gains.

E. Disgorgement and Unjust Enrichment

61. The law is clear that disgorgement is an available remedy for breach of fiduciary duty both under Texas Law, see *Kinzbach Tool Co. v. Corbett-Wallace Corporation*, 160 S.W. 2d 509 (Tex. 1942), and under Delaware law, see *Metro Storage International, LLC v. Harron*, 275 A.3d 810 (Del. Ch. 2022). Disgorgement is also an appropriate remedy for unjust enrichment under Texas law, *Hunter v. Shell Oil Co.*, 198 F.2d 485 (5th Cir. 1952),

and under Delaware law, *In re Tyson Foods, Inc. Consolidated Shareholder Litigation*, 919 A.2d 563 (Del. Ch. 2007).[64]

62. Likewise, the imposition of a constructive trust is proper for addressing unjust enrichment under both Delaware and Texas law, see *Teacher's Retirement System of Louisiana v. Aidinoff*, 900 A.2d 654 (Del. Ch. 2006) and *Hsin-Chi-Su v. Vantage Drilling Company*, 474 S.W. 3d 384 (Tex. App. – 14th Dist. 2015), pet. denied. The elements of unjust enrichment are: (1) the defendant must have gained a benefit (2) at the expense of plaintiff, (3) and retention of that benefit must be shown to be unjust. *See Restatement (Third) of Restitution and Unjust Enrichment* §321, cmt. e (2011).

63. Here, the imposition of a constructive trust and disgorgement are clearly appropriate to provide redress for the alleged breaches of fiduciary duty and the knowing participation in (or aiding and abetting) those breaches. Furthermore, the imposition of a constructive trust and disgorgement are appropriate to disgorge the improper benefits that all of the Proposed Defendants received by virtue of collusion and insider trading.

64. As set forth in the proposed Adversary Proceeding, Seery gained the opportunity to have his compensation demands rubber stamped. The other Defendants gained the opportunity to purchase valuable claims at a discount knowing that

[64] It is likely that the Internal Affairs Doctrine will dictate that Delaware choice of law governs the breach of fiduciary duty claims.

pessimistic financial projections were false and that the upside investment potential was great. Retention of the benefits they received would be unjust and inequitable.

65. Clearly, the Debtor's Estate was damaged by virtue of the claimed conduct. Seery obtained profits and compensation to the detriment of that estate as well as the estate of the Reorganized Debtor, other innocent creditors and HMIT, as former equity and as a contingent Claimant Trust Beneficiary.

F. Declaratory Relief

66. HMIT also seeks declaratory relief pursuant to Fed. R. Bank P. 7001(9). Specifically, HMIT seeks a declaratory judgment that: (a) there is a ripe controversy concerning HMIT's rights and entitlements under the Claimant Trust Agreement; (b) as a general matter, HMIT has standing to bring an action against a trustee even if its interest is considered "contingent;" (c) HMIT's status as a Claimant Trust Beneficiary is fully vested upon disgorgement of the ill-gotten profits of Muck and Jessup, and by extension, Farallon and Stonehill; (d) HMIT's status as a Claimant Trust Beneficiary is fully vested upon the equitable disallowance of the Claims held by Muck and Jessup over and above their initial investments; (e) Seery is properly estopped from asserting that HMIT is not an appropriate party to bring this derivative action on behalf of the Reorganized Debtor and/or the Claimant Trust because of fraudulent conduct, bad faith, willful misconduct, and unclean hands; (f) Muck and Jessup are properly estopped from asserting that HMIT is not an appropriate party to bring this derivative action on behalf of the Reorganized

Debtor and the Claimant Trust because of their fraudulent conduct, bad faith, willful misconduct, and unclean hands; and (g) all of the Proposed Defendants are estopped from asserting that HMIT does not have standing in its individual capacity due to their fraudulent conduct, bad faith, willful misconduct, and unclean hands.

G. HMIT has Direct Standing.

67. The Texas Supreme Court recently held that "a partner or other stakeholder in a business organization has constitutional standing to sue for an alleged loss in the value of its interest in the organization." *Pike v. Texas EMC Mgt., LLC*, 610 S.W.3d 763, 778 (Tex. 2020). In so holding, the Court considered federal law and found that the traditional "incantation that a shareholder may not sue for the corporation's injury" is really a question of capacity, which goes to the merits of a claim, rather than an issue of standing that would impact subject matter jurisdiction. *Id.* at 777 (noting that the 5th Circuit and "[o]ther federal circuits agree that a plaintiff has standing to sue for the lost value of its investment in a corporation"). Because Seery, Muck, Jessup, Stonehill, Farallon's alleged actions devalued HMIT's interest in the Debtor's Estate, including, without limitation, payment of excessive compensation to Seery, HMIT has standing to pursue its common law claims directly. HMIT also has direct standing to seek declaratory relief as set forth in the proposed Adversary Proceeding.

VII. Prayer

WHEREFORE, PREMISES CONSIDERED, Hunter Mountain Investment Trust respectfully requests this Court grant HMIT leave authorizing it to file the Adversary Complaint, attached as Exhibit 1, as an Adversary Proceeding in this United States Bankruptcy Court for the Northern District of Texas, in its own name and as a derivative action on behalf of the Debtor Highland Capital Management, L.P., against Muck Holdings, LLC, Jessup Holdings, LLC, Farallon Capital Management, LLC, Stonehill Capital Management, LLC, James P. Seery, Jr., and John Doe Defendants Nos. 1 – 10, and further grant HMIT all such other and further relief to which HMIT may be justly entitled.

Dated: March 28, 2023

Respectfully Submitted,
PARSONS MCENTIRE MCCLEARY PLLC

By: */s/ Sawnie A. McEntire*

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CERTIFICATE OF CONFERENCE

Beginning on March 24, 2023, and also on March 27, 2023, the undersigned counsel conferred either by telephone or via email with all counsel for all Respondents regarding the relief requested in the foregoing Motion, including John A. Morris on behalf of James P. Seery, and Brent McIlwain on behalf of Muck Holdings LLC, Jessup Holdings LLC, Stonehill Capital Management, and Farallon Capital Management. Mr. Seery is opposed to this Motion. Based upon all communications with Mr. McIlwain, it is reasonably believed his clients are also opposed and we advised him that this recitation would be placed in the certificate of conference.

/s/ Sawnie A. McEntire
Sawnie A. McEntire

CERTIFICATE OF SERVICE

I certify that on the 28th day of March 2023, a true and correct copy of the foregoing Motion was served on all counsel of record or, as appropriate, on the Respondents directly.

/s/ Sawnie A. McEntire
Sawnie A. McEntire

Exhibit 1 to Emergency Motion

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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.	§	
HUNTER MOUNTAIN INVESTMENT TRUST, INDIVIDUALLY, AND ON BEHALF OF THE DEBTOR HIGHLAND CAPITAL MANAGEMENT, L.P. AND THE HIGHLAND CLAIMANT TRUST	§	**Adversary Proceeding No. _____**
PLAINTIFFS,	§	

v.	§
	§
MUCK HOLDINGS, LLC, JESSUP HOLDINGS, LLC, FARALLON CAPITAL MANAGEMENT, LLC, STONEHILL CAPITAL MANAGEMENT, LLC, JAMES P. SEERY, JR., AND JOHN DOE DEFENDANTS NOS. 1-10	§
DEFENDANTS.	§

VERIFIED ADVERSARY COMPLAINT

Hunter Mountain Investment Trust ("HMIT") files this Verified Adversary Complaint in its individual capacity and, as a derivative action on behalf of the Reorganized Debtor, Highland Capital Management L.P. ("HCM" or "Reorganized Debtor") and the Highland Claimant Trust (collectively "Plaintiffs"), complaining of Muck Holdings, LLC ("Muck"), Jessup Holdings, LLC ("Jessup"), Farallon Capital Management, LLC ("Farallon"), Stonehill Capital Management, LLC ("Stonehill"), James P. Seery, Jr., ("Seery") and John Doe Defendant Nos. 1-10 (Muck, Jessup, Stonehill, Farallon, Seery and the John Doe Defendants Nos. 1-10 are collectively "Defendants"), and would show:

I. Introduction

1. HMIT brings this Verified Adversary Complaint ("Complaint") on behalf of itself, individually, and as a derivative action benefitting the Reorganized Debtor and

on behalf of the Highland Claimant Trust ("Claimant Trust"), as defined in the Claimant Trust Agreement (Doc. 3521-5) ("CTA").[1] This derivative action is specifically brought pursuant to Rule 23.1 of the Federal Rules of Civil Procedure and B. R. Rule 7023.1. At the time of the transactions at issue, HMIT held a 99.5% limited partnership in Highland Capital Management, LP, the Original Debtor, as described herein. This derivative action is not a collusive effort to confer jurisdiction that the Court would otherwise lack.

2. Upon the Effective Date, the assets of the bankruptcy estate of Highland Capital Management, L.P., as the Original Debtor (the "Debtor's Estate") were transferred to the Highland Claimant Trust under the terms of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) [Doc. 1943, Exhibit A] (the "Plan") and as defined in the CTA. These assets include all "causes of action" that the Debtor's Estate had before the Effective Date including, without limitation, the causes of action set forth in this Adversary Proceeding. Furthermore, the Claimant Trust is managed by the Claimant Trustee, Seery. Therefore, any demand upon Seery to prosecute the claims set forth in this Complaint would be futile because Seery is a Defendant. Similarly, the Oversight Board exercises supervision over Seery as Claimant

[1] Solely in the alternative, and in the unlikely event HMIT's proposed causes of actions against Seery, Stonehill, Farallon, Muck, and/or Jessup are considered to be "Estate Claims" as those terms are used and defined within the CTA and Exhibit A to the Notice of Final Term Sheet [Docket No. 354] in HCM's bankruptcy (and without admitting the same), HMIT alternatively seeks standing to bring this action as a derivative action on behalf of the Litigation Sub-Trust as appropriate. Any demand on the Litigation Sub-Trust would be equally futile for the same reasons addressed in HMIT's Emergency Motion for Leave (Doc. __).

Trustee, and Muck and Jessup are members of the Oversight Board. Any demand upon Muck and Jessup to prosecute these claims would be equally futile. All conditions precedent to bringing this derivative action have otherwise been satisfied.

3. This action has become necessary because of Defendants' tortious conduct. This tortious conduct occurred before the Effective Date of the Plan, but its effects have caused damage both before and after the Effective Date. Prior to the Effective Date, HMIT owned 99.5% of the limited partnership interest in the Original Debtor and was the beneficiary of fiduciary duties owed by Seery.

4. Seery, the Original Debtor's CEO and former Chief Restructuring Officer ("CRO"), wrongfully facilitated and promoted the sale of large unsecured creditor claims to his close business allies and friends, Farallon and Stonehill. He did so by providing material non-public information to them concerning the value of the Original Debtor's Estate that other stakeholders did not know. Farallon and Stonehill, who were otherwise strangers to the bankruptcy proceedings, wrongfully purchased the claims through their special purpose entities, Muck and Jessup, based upon this inside information, and they are now profiting from their misconduct. Seery's dealings with the other Defendants were not arm's length, but instead were covert, undisclosed, and collusive.

5. Motivated by corporate greed, the other Defendants aided and abetted or, alternatively, knowingly participated in Seery's wrongful conduct. They also breached their own duties as "non-statutory insiders." Because of their long-standing, historical

relationships with Seery, and their use of material non-public information, Farallon, Stonehill, Muck, and Jessup assumed positions of control over the affairs of the Debtor's bankruptcy, including compensation awards to Seery. As such, they became non-statutory insiders.

6. HMIT was formerly the largest equity holder in the Debtor, holding a 99.5% limited partnership interest. HMIT now holds an Allowed Class 10 Class B/C Limited Partnership Interest and a Contingent Trust Interest under the CTA. Given HMIT's' position as former equity, HMIT's right to recover from the Claimant Trust is junior to the Reorganized Debtor's unsecured creditors, now known as Claimant Trust Beneficiaries. However, the vast majority of the approved unsecured claims superior to HMIT's interest are the claims wrongfully acquired by insider trading and the breaches of duty at issue in this proceeding.

7. By wrongfully soliciting, fostering, and encouraging the wrongful insider trades, Seery violated his fiduciary duties to the Debtor's Estate, specifically his duty of loyalty and his duty to maximize the value of the Estate with corresponding recovery by legitimate creditors and former equity. Seery was motivated out of self-interest to garner personal benefit (to the detriment of the Debtor's Estate) by strategically benefitting his business allies with non-public information. He then successfully "planted" his allies onto the Oversight Board, which, as a consequence does not act as an independent board in the exercise of its responsibilities. Rather, imbued with powers to oversee Seery's

future compensation, the other Defendants are postured to reward Seery financially regarding Defendants' illicit dealings and, upon information and belief, they have done so.

8. By receiving and acting upon material non-public information concerning the financial condition of the Debtor's Estate, Stonehill and Farallon, acting individually and through special purpose shell entities they created and controlled, directly or indirectly, are also liable for aiding and abetting Seery's breaches of fiduciary duties. By acquiring the claims at issue, Muck and Jessup, the shell entities created and controlled by Stonehill and Farallon, also became non-statutory insiders owing duties of disclosure which they also breached.

9. HMIT separately seeks recovery against John Doe Defendant Nos. 1-10. Farallon actively concealed the precise legal relationship between Farallon and Muck. Stonehill actively concealed the precise legal relationship between Stonehill and Jessup. What is known, however, is that Farallon and Stonehill created these special purpose shell entities on the eve of the insider trades to acquire ownership of the claims and to otherwise control the affairs of the Oversight Board. Both Farallon and Stonehill rejected inquiries concerning the exact nature of their relationship with these special purpose entities. Accordingly, HMIT seeks equitable tolling of any statute of limitations concerning claims against unknown business entities that Farallon and Stonehill may have created and inserted as intermediate corporate layers in the transactions at issue.

10. HMIT seeks to disgorge all Defendants' ill-gotten profits and equitable disallowance of the remaining unpaid balances on the following allowed claims: Claim Nos. 23, 72, 81, 143, 147, 149, 150, 153, 154, 190, and 191 (the "Claims") currently held by Muck and Jessup. Because Defendants received substantial distributions from the Claimant Trust in connection with these Claims, HMIT seeks to disgorge all such distributions above Defendants' initial investment—compelling restitution of such funds to the Claimant Trust for the benefit of innocent creditors and former equity pursuant to the waterfall established under the Plan and the CTA. HMIT also seeks to disgorge Seery's compensation from the date his collusive conduct first occurred. Alternatively, HMIT seeks damages on behalf of the Claimant Trust in an amount equal to all compensation paid to Seery from the onset of his collusive conduct to present.

II. Jurisdiction and Venue

11. Pursuant to *Misc. Order No. 33 Order of Reference of Bankruptcy Cases, U.S. District Court for N.D. Texas* (the "Order of Reference"), this Complaint is commenced in the Bankruptcy Court because it is "related to a case under Title 11." The filing of this Complaint is expressly subject to and without waiver of Plaintiff' rights and ability to seek withdrawal of the reference pursuant to 28 U.S.C. § 157(d), FED. R. BANKR. P. 5011, and Local Bankruptcy Rule 5011-1. Plaintiffs hereby demand a right to a trial by jury of all claims asserted herein and nothing in this Complaint, nor Plaintiffs' compliance with the Order of Reference, shall be deemed a waiver of this right.

12. This Court has jurisdiction of the subject matter and the parties as a "related to" proceeding pursuant to 28 U.S.C. §§ 1334 and 157(a) and Articles IX.F, and XI. of the Plan.

13. Pursuant to Rule 7008 of the Bankruptcy Rules, Plaintiffs do **not** consent to the entry of final orders or judgment by the bankruptcy court.

14. Venue is proper in this district and division pursuant to 28 U.S.C. §§ 1408 and 1409, and Articles IX.F, and XI. of the Plan.

III. Parties

15. HMIT is a Delaware statutory trust that was the largest equity holder in the Original Debtor, holding a 99.5% limited partnership interest. HMIT is also the holder of a Contingent Trust Interest in the Claimant Trust, but should be treated as a vested Claimant Trust Beneficiary due to Defendants' wrongful conduct.

16. Pursuant to the Plan and the CTA, the Claimant Trust holds the assets of the Reorganized Debtor, including the causes of action that accrued to the Original Debtor before the Effective Date. The Claimant Trust is established in accordance with the Delaware Statutory Trust Act and Treasury Regulatory Section 301.7701-4(d).

17. Muck is a Delaware limited liability company, with its principal office in California, and may be served with process at One Maritime Plaza, Suite 2100, San Francisco, CA 94111. Muck has made prior appearances in the Debtor's bankruptcy.

18. Jessup is a Delaware limited liability company, with its principal office in New York, and may be served with process via its registered agent, Vcorp Services, LLC, at 108 W. 13th Street Suite 100, Wilmington, Delaware 19801. Jessup has made prior appearances in the Debtor's bankruptcy.

19. Farallon is a Delaware limited liability company, with its principal office in California, and may be served with process at One Maritime Plaza, Suite 2100, San Francisco, CA 94111. Farallon is a capital management company that manages hedge funds and is a registered investment advisor. This Court has personal jurisdiction over Farallon because Farallon's conduct giving rise to or relating to the claims in this Adversary Proceeding occurred in Texas, thereby satisfying all minimum contacts requirements and due process considerations.

20. Stonehill is a Delaware limited liability company, with its principal office in New York, and may be served with process at 320 Park Avenue, 26th Floor, New York, NY 10022. Stonehill is a capital management company managing hedge funds and is a registered investment advisor. This Court has personal jurisdiction over Stonehill because Stonehill's conduct giving rise to or relating to the claims in this Adversary Proceeding occurred in Texas, thereby satisfying all minimum contacts and all due process considerations.

21. Seery is an individual citizen and resident of the State of New York. Mr. Seery may be served with process at 100 Crescent Court, Suite 1805, Dallas, Texas 75201.

22. John Doe Defendant Nos. 1-10 are currently unknown individuals or business entities who may be identified in discovery as involved in the wrongful transactions at issue.

IV. Facts

A. *Procedural Background*

23. On October 16, 2019, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in Delaware Bankruptcy Court,[2] which was later transferred to the Northern District of Texas Bankruptcy Court, Dallas Division, on December 4, 2019.[3]

24. On October 29, 2019, the U.S. Trustee's office appointed a four-member Unsecured Creditors Committee ("UCC") consisting of three judgment creditors—the Redeemer Committee of the Highland Crusader Fund ("Redeemer"); Acis Capital Management, L.P. and Acis Capital Management GP, LLC (collectively "Acis"); and UBS Securities LLC and UBS AG London Branch (collectively "UBS")—and an unpaid vendor, Meta-E Discovery.

25. Following the venue transfer to Texas, on December 27, 2019, the Debtor filed its *Motion of the Debtor for Approval of Settlement with the Official Committee of*

[2] Doc. 3. Unless otherwise referenced, all documents referencing "Doc." refer to the docket maintained in Case No. 19-34054-sgj11 (Bankr. N.D. Tex.).

[3] Doc. 1.

Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course ("Governance Motion").[4] On January 9, 2020, the Court signed a Governance Order granting the Governance Motion.[5]

26. As part of the Governance Order, an independent board of directors—which included Seery as one of the selections of the Unsecured Creditors Committee—was appointed to the Board of Directors (the "Board") of Strand, the Original Debtor's general partner. The Board then appointed Seery as the Chief Executive Officer in place of the previous CEO, Mr. James Dondero, as well as the CRO.[6] Seery currently serves as Trustee of the Claimant Trust under the terms of the CTA and the CEO of the Reorganized Debtor.[7]

B. *The Targeted Claims*

27. In his capacity as the Original Debtor's CEO and CRO, Seery negotiated and obtained court approval for settlements with several large unsecured creditors including Redeemer, Acis, UBS, and another major unsecured creditor, HarbourVest (Redeemer, Acis, UBS, and HarbourVest are collectively the "Settling Parties"), resulting in the following allowed Claims:

Creditor	**Class 8**	**Class 9**
Redeemer	$137 mm	$0 mm

[4] Doc. 281.

[5] Doc. 339.

[6] Doc. 854, Order Approving Retention of Seery as CEO/CRO.

[7] *See* Doc. 1943, Order Approving Plan, p. 34.

Acis	$23 mm	$0 mm
HarbourVest	$45 mm	$35 mm
UBS	$65 mm	$60 mm
(Totals)	$270 mm	$95 mm

As reflected in these settlements, HarbourVest and UBS owned Class 9 claims in addition to Class 8 Claims. Class 9 Claims were subordinated to Class 8 Claims in the distribution waterfall in the Plan.

28. Each of the Settling Parties sold their Claims to Farallon and Stonehill (or affiliated special purpose entities) shortly after receiving court approval of the settlements. One of these "trades" took place within just a few weeks before the Plan's Effective Date.[8] All of these trades occurred when HMIT held its 99.5% equity stake in the Debtor. Notice of these trades was first provided in filings in the records of the Original Debtor's bankruptcy proceedings, as follows: Claim No. 23 (Doc. 2211, 2212, and 2215), Claim Nos. 190 and 191 (Doc. 2697 and 2698), Claim Nos. 143, 147, 149, 150, 153 and 154 (Doc. 2263), Claim No. 81 (Doc. 2262), Claim No. 72 (Doc. 2261).

29. Farallon and Stonehill, both of whom are registered investment advisors that manage hedge funds, have fiduciary duties to their own investors. As such, they are acutely aware of their duties and obligation as fiduciaries. Yet, they both invested many tens of millions of dollars, directly or indirectly, to acquire the Claims in the absence of

[8] Docs. 2697, 2698.

any publicly available information that could provide any economic justification for their investment decisions.

30. Upon information and belief, Stonehill and Farallon collectively invested an estimated $160 million to acquire the Claims with a face amount of $365 million, and they did so in the absence of any meaningful due diligence. Indeed, Farallon has admitted that it conducted no due diligence but relied on Seery's guarantees.

31. Stonehill and Farallon's investments become even more suspicious because the Plan provided the ***only*** publicly available information, which, at the time, included pessimistic projections that the Claims would ever receive full payment:

a. From October 2019, when the original Chapter 11 Petition was filed, to January 2021, just before the Plan was confirmed, the projected value of HCM's assets dropped over $200 million from $566 million to $364 million.[9]

b. HCM's Disclosure Statement projected payment of 71.32% of Class 8 claims, and 0% of claims in Classes 9-11.[10]

   - This meant that Farallon and Stonehill invested more than $163 million in Claims when the publicly available information indicated they would receive $0 in return on their investment as Class 9 creditors and substantially less than par on their Class 8 Claims.

c. In HCM's Q3 2021 Post-Confirmation Report, HCM reported that the amount of Class 8 claims expected to be paid dropped even further from 71% to 54%.

[9] Doc. 1473, Disclosure Statement, p. 18.

[10] Doc. 1875-1, Plan Supplement, Ex. A, p. 4.

d. Despite the stark decline in the value of the estate and in the midst of substantial reductions in the percentage of Class 8 Claims expected to be satisfied, Stonehill, through Jessup, and Farallon, through Muck, nevertheless purchased the four largest bankruptcy claims from the Redeemer Committee/Crusader Fund, Acis, HarbourVest, and UBS (collectively, again, the "Claims") in April and August of 2021 in the combined amount of $163 million.[11]

32. Upon information and belief, Stonehill, through its special purpose entity, Jessup, acquired the Redeemer Committee's claim for $78 million.[12] Upon information and belief, the $23 million Acis claim[13] was sold to Farallon/Muck for $8 million. Upon information and belief, HarbourVest sold its combined $80 million in claims to Farallon/Muck for $27 million. UBS sold its combined $125 million in claims for $50 million to both Stonehill/Jessup and Farallon/Muck. In the instance of UBS, ***the total projected payout was only $35 million***. Indeed, as part of these transactions, both Farallon and Stonehill purchased Class 9 Claims at a time when the Debtor's Estate projected a zero dollar return on all such Claims.

[11] Notices of Transfers [Docs. 2212, 2215, 2261, 2262, 2263, 2215, 2297, 2298]. The Acis claim was transferred on April 16, 2021; the Redeemer, Crusader, and HarbourVest claims were transferred on April 30, 2021; and the UBS claims were transferred on August 9, 2021.

[12] July 6, 2021, letter from Alvarez & Marsal CRF Management, LLC to Highland Crusader Funds Stakeholders.

[13] Seery/HCM have argued that $10 million of the Acis claim is self-funding.

C. *Material Non-Public Information is Disclosed to Seery's Affiliates at Stonehill and Farallon.*

33. One of the significant assets of the Debtor's Estate was the Debtor's direct and indirect holdings in Metro-Goldwyn-Mayer Studios, Inc. ("MGM").[14]

34. On December 17, 2020, James Dondero, sent an email to Seery. At that time, Dondero was a member of the MGM board, and the email contained material non-public information regarding Amazon and Apple's interest in acquiring MGM.[15] Of course, any such sale would significantly enhance the value of the Original Debtor's estate.

35. Upon receipt of this material non-public information, Seery should have halted all transactions involving MGM stock, yet just six days later Seery filed a motion in this Court seeking approval of the Original Debtor's settlement with HarbourVest - resulting in a transfer to the Original Debtor of HarbourVest's interest in a Debtor-advised fund, Highland CLO Funding, Ltd. ("HCLOF"), which held substantial MGM debt and equity.[16] Conspicuously, the HCLOF interest was not transferred to the Original Debtor for distribution as part of the bankruptcy estate, but rather to "to an entity to be designated by the Debtor"—*i.e.*, one that was not subject to typical bankruptcy reporting requirements.[17]

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[14] *See* Doc. 2229, p. 6.

[15] *See* Adversary Case No. 20-3190-sgj11, Doc. 150-1, p. 1674.

[16] Doc. 1625. Approximately 19.1% of HCLOF's assets were comprised of debt and equity in MGM.

[17] Doc. 1625.

36. Upon information and belief, aware that the Debtor's stake in MGM afforded a new profit center, Seery saw an opportunity to increase his own compensation and enlisted the help of Stonehill and Farallon to extract further value from the Original Debtor's Estate at the expense of other innocent creditors and equity. This *quid pro quo* included, at a minimum, a tacit, if not express, understanding that Seery would be well-compensated.

37. Until 2009, Seery was the Global Head of Fixed Income Loans at Lehman Brothers[18] where, on information and belief, he conducted substantial business with Farallon. Following the collapse of Lehman Brothers, Seery continued to work with, and indeed represented Farallon as its legal counsel. Seery ultimately joined a hedge fund, River Birch Capital,[19] which, along with Stonehill, served on the creditors committee in other bankruptcy proceedings. GCM Grovesnor, a global asset management firm, held four seats on the Redeemer Committee[20] and, upon information and belief, is a significant investor in Stonehill and Farallon. Grovesnor, through Redeemer, played a large part in appointing Seery as a director of Strand Advisors. Seery was beholden to Grovesnor from the outset, and, by extension, Grovesnor's affiliates Stonehill and Farallon.

[18] Seery Resume [Doc. 281-2].

[19] *Id*.

[20] Declaration of John A. Morris [Doc. 1090], Ex. 1, pp. 15.

38. As successful capital management firms, with advisory and fiduciary duties to their own clients, Stonehill and Farallon typically engage in robust due diligence before making significant investments. Yet, in this case, it would have been *impossible* for Stonehill and Farallon to forecast *any* profit at the time of their multi-million-dollar investments given the negative financial information disclosed by the Original Debtor's Estate. Seery, as the CEO, was aware of and involved in approving these negative financial projections. In doing so, Seery intentionally caused the publication of misleading, false information.

39. Seery shared with Stonehill and Farallon *non-public* information concerning the value of the Original Debtor's Estate which was higher than publicly available information. Thus, the only logical conclusion is that all Defendants knew that the publicly available projections, which accompanied the Plan, were understated, false, and misleading. Otherwise, Farallon, Muck, Stonehill and Jessup would not have made their multi-million-dollar investments. None of the Defendants disclosed their knowledge of the misleading nature of these financial projections when they had a duty to do so. None of the Defendants disclosed the nature of their dealings in acquiring the Claims.

40. By wrongfully exploiting non-public insider information, Stonehill and Farallon—acting through Muck and Jessup—became the largest holders of unsecured claims in the Debtor's Estate with resulting control over the Oversight Board and a front row seat to the reorganization and distribution of Claimant Trust Assets. As such, they

were given control (through Muck and Jessup) to approve discretionary bonuses and success fees for Seery from these assets.

D. ***Distributions***

41. The MGM sale was ultimately consummated in March 2022 for $6.1 billion in cash, plus $2.5 billion in debt that Amazon assumed and immediately repaid.[21]

42. By the end of Q3 2021, just over $6 million of the projected $205 million available for general unsecured claimants had been disbursed.[22] No additional distributions were made to general unsecured claimholders until, suddenly, in Q3 2022 almost $250 million was paid toward Class 8 general unsecured claims—$45 million more than was *ever* projected.[23] Thus, Stonehill (Jessup) and Farallon (Muck) have already received returns that far eclipse their investment. They also stand to make further significant profits on their investments, including payments on Class 9 Claims.

43. As of December 31, 2022, the Claimant Trust has distributed $255,201,228. On a pro rata basis, that means that innocent creditors have received approximately $22,373,000 in distributions against the stated value of their allowed claims. That leaves a remaining unpaid balance of approximately $9,627,000.

[21] Amazon Q1 2022 10-Q.

[22] Doc. 3200.

[23] Doc. 3582.

44. Muck and Jessup already have received approximately $232.8 million on their Claims. Assuming and original investment of approximately $160 million, this represents over $72 million in ill-gotten profits that, if disgorged, would be far more than what is required to fully pay all other innocent creditors - immediately placing HMIT in the status of a vested Claimant Trust Beneficiary.

45. It is clear Seery facilitated the sale of the Claims to Stonehill (Jessup) and Farallon (Muck) at discounted prices and used misleading financial projections to facilitate these trades. This was part of a larger strategy to install Stonehill (Jessup) and Farallon (Muck), his business allies, onto the Oversight Board where they would oversee lucrative bonuses and other compensation for Seery in exchange for hefty profits they expected to receive.

V. Causes of Action

A. Count I (against Seery): Breach of Fiduciary Duty

46. The allegations in paragraphs 1-45 above are incorporated herein as if set forth verbatim.

47. As CEO and CRO of a debtor-in-possession, Seery owed fiduciary duties to HMIT, as equity, and to the Debtor's Estate, including, without limitation, the duty of loyalty. Seery also was under a duty to avoid conflicts of interests, but Seery willfully and knowingly engaged in conduct which conflicted with his fiduciary duties—and he did so out of financial self-interest.

48. By fraudulently providing and/or approving negative projections of the Debtor's Estate when he knew otherwise, Seery willfully and knowingly breached his fiduciary duties.

49. By misusing and disclosing confidential, material non-public information to Stonehill and Farallon, Seery willfully and knowingly breached his fiduciary duties.

50. By failing to disclose his role in the inside trades at issue, Seery willfully and knowingly breached his fiduciary duties.

51. As a result of his willful misconduct, Seery was unfairly advantaged by receiving additional undisclosed compensation and bonuses from the assets of the Debtor's Estate and from the Claimant Trust Assets—to the detriment of other innocent stakeholders, including HMIT, as former equity and a contingent Claimant Trust Beneficiary.

52. To remedy these breaches, Seery is liable for disgorgement of all compensation he received since his collusion with Farallon and Stonehill first began. Alternatively, Seery should be disgorged of all compensation paid to him under the terms of the CTA since the Effective Date of the Plan in August 2021.

53. Alternatively, Plaintiffs are entitled to recover damages measured by all ill-gotten compensation which Seery has received since his first collusive conduct began.

B. Count II (against Stonehill, Farallon, Jessup and Muck): Breaches of Fiduciary Duty and Knowing Participation in Breach of Fiduciary Duty

54. The allegations in paragraphs 1-53 above are incorporated herein as if set forth verbatim.

55. Seery owed fiduciary duties to HMIT and the Debtor's Estate, and he willfully and knowingly breached these duties. Without limiting the foregoing, Seery owed a duty of loyalty which he willfully and knowingly breached. Seery also owed a duty to not engage in self-interested conduct to the detriment of the Debtor's Estate and innocent stakeholders. Seery also willfully and knowingly breached this duty.

56. Stonehill and Farallon were aware of Seery's fiduciary duties and, by purchasing the Claims and approving bonuses and other compensation for Seery, Stonehill (acting through Jessup) and Farallon (acting through Muck), willfully and knowingly participated in Seery's breaches or, alternatively, willfully aided and abetted such breaches.

57. Stonehill (Jessup) and Farallon (Muck) unfairly received many millions of dollars in profits and fees—and stand to earn even more profits and fees—to the detriment of innocent stakeholders, including HMIT.

58. Stonehill and Farallon are liable for disgorgement of all profits earned from their purchase of the Claims. In addition, they are liable in damages for excessive compensation paid to Seery as part of the covert *quid pro quo* with Seery.

C. Count III (against all Defendants): Fraud by Misrepresentation and Material Nondisclosure

59. The allegations in paragraphs 1-58 above are incorporated herein as if set forth verbatim.

60. Based on Seery's duties as CEO and CRO of a debtor-in-possession, and the other Defendants' duties as non-statutory insiders, Seery, Stonehill (Jessup), and Farallon (Muck) had a duty to disclose Stonehill and Farallon's plans to purchase the Claims, but they deliberately failed to do so. Seery also had a duty to disclose correct financial projections but, rather, misrepresented such values or failed to correct false and misleading projections. These factual misrepresentations and omissions were material.

61. The withheld financial information was material because it has had an adverse impact on control over the eventual distributions to creditors and former equity, as well as the right to control Seery's compensation. By withholding such information, Seery was able to plant friendly business allies on the Oversight Board to the detriment of innocent stakeholders.

62. Defendants knew that HMIT and other creditors were ignorant of their plans, and HMIT and other stakeholders did not have an equal opportunity to discover their scheme. HMIT and the other innocent stakeholders justifiably relied on misleading information relating to the value of the Original Debtor's Estate.

63. By failing to disclose material information, and by making or aiding and abetting material misrepresentations, Seery, Stonehill, Farallon, Muck, and Jessup intended to induce HMIT to take no affirmative action.

64. HMIT justifiably relied on Seery, Stonehill, Farallon, Muck, and Jessup's nondisclosures and representations, and HMIT was injured as a result and the Debtor's Estate was also injured.

65. As a result of their frauds, all Defendants should be disgorged of all profits and ill-gotten compensation derived from their fraudulent scheme. Seery is also liable for damages measured by excessive compensation he has received since he first engaged in willful misconduct.

D. Count IV (against all Defendants): Conspiracy

66. The allegations in paragraphs 1-65 above are incorporated herein as if incorporated herein verbatim.

67. Defendants conspired with each other to unlawfully breach fiduciary duties to HMIT and the Debtor's Estate, to conceal their fraudulent trades, and to interfere with HMIT's entitlement to the residual of the Claimant Trust Asset.

68. Seery's disclosure of material non-public information to Stonehill and Farallon, and Muck and Jessup's purchase of the Claims, are each overt acts in furtherance of the conspiracy.

69. HMIT's interest in the residual of the Claimant Trust Assets has been adversely impacted by this conspiracy. The assets have been depleted by virtue of Seery's compensation awards.

E. Count V (against Muck and Jessup): Equitable Disallowance

70. The allegations in paragraphs 1-69 above are incorporated herein as if set forth verbatim.

71. By purchasing the Claims based on material non-public information, Stonehill and Farallon, through Jessup and Muck, engaged in inequitable conduct.

72. By earning significant profits on their purchases, Muck and Jessup have been unfairly advantaged to the detriment of the remaining stakeholders, including HMIT.

73. Given this inequitable conduct, equitable disallowance of Muck's and Jessup's Claims to the extent over and above their initial investment is appropriate and consistent with the purposes of the Bankruptcy Code.

74. Pleading in the alternative only, subordination of Muck's and Jessup's General Unsecured Claim Trust Interests and Subordinated Claim Trust Interests to all other interests in the Claimant Trust, including HMIT's Contingent Trust Interest, is necessary and appropriate to remedy Muck's and Jessup's wrongful conduct, and is also consistent with the purposes of the Bankruptcy Code.

***F. Count VI (against all Defendants): Unjust Enrichment and Constructive* Trust**

75. The allegations in paragraphs 1-74 above are incorporated herein as if set forth verbatim.

76. By acquiring the Claims using material non-public information, Stonehill and Farallon breached a relationship of trust with the Original Debtor's Estate and other innocent stakeholders and were unjustly enriched and gained an undue advantage over other creditors and former equity.

77. Allowing Stonehill, Farallon, Muck and Jessup to retain their ill-gotten benefits at the expense of other innocent stakeholders and HMIT, as former equity, would be unconscionable.

78. Stonehill, Farallon, Muck, and Jessup should be forced to disgorge all distributions over and above their original investment in the Claims as restitution for their unjust enrichment.

79. The proceeds Stonehill, Farallon, Muck, and Jessup have received from the Claimant Trust are traceable and identifiable. A constructive trust should be imposed on such proceeds to secure the restitution of these improperly retained benefits.

F. Count VI (Against all Defendants): Declaratory Relief

80. The allegations in paragraphs 1-79 are incorporated herein as if set forth verbatim.

81. HMIT seeks declaratory relief. The Court has jurisdiction to provide declaratory judgment relief when there is an actual controversy that has arisen and exists relating to the rights and duties of the parties.

82. Bankruptcy Rule 7001 provides that "a proceeding to recover property or money," may include declaratory relief. *See*, Fed. R. Bank P. 7001(1), (9).

83. The Claimant Trust Agreement is governed under Delaware law. The Claimant Trust Agreement incorporates and is subject to Delaware trust law. HMIT seeks a declaration, as follows:

a. There is a ripe controversy concerning HMIT's rights and entitlements under the Claimant Trust Agreement;

b. As a general matter, HMIT has standing to bring an action against a trustee even if its interest is considered contingent;

c. HMIT's status as a Claimant Trust Beneficiary is fully vested upon disgorgement of the ill-gotten profits of Muck and Jessup, and by extension, Farallon and Stonehill;

d. HMIT's status as a Claimant Trust Beneficiary is fully vested upon the equitable disallowance of the Claims held by Muck and Jessup over and above their initial investments. Alternatively, HMIT's status as a Claimant Trust Beneficiary is fully vested when all of Muck's and Jessup's trust interests are subordinated to the trust interests held by HMIT;

e. Seery is properly estopped from asserting that HMIT is not an appropriate party to bring this derivative action on behalf of the Reorganized Debtor and/or the Claimant Trust because of Seery's fraudulent conduct, bad faith, willful misconduct and unclean hands;

f. Muck and Jessup are properly estopped from asserting that HMIT is not an appropriate party to bring this derivative action on behalf of the Reorganized Debtor and the Claimant Trust because of their fraudulent conduct, bad faith, willful misconduct and unclean hands;

g. All Defendants are estopped from asserting that HMIT does not have standing in its individual capacity due to their fraudulent conduct, bad faith, willful misconduct and unclean hands.

VI. Punitive Damages

84. The allegations in paragraphs 1-74 are incorporated herein as if set forth verbatim.

85. The Defendants' misconduct was intentional, knowing, willful and fraudulent and in total disregard of the rights of others. An award of punitive damages is appropriate and necessary under the facts of this case.

86. All conditions precedent to recovery herein have been satisfied.

VII. Prayer

WHEREFORE, HMIT prays for judgment as follows:

1. Equitable disallowance of the Claims over and above Muck's and Jessup's original investments (or, alternatively, subordination of their Claimant Trust Interests, as addressed herein);

2. Disgorgement of all funds distributed from the Claimant Trust to Muck and/or Jessup over and above their original investments;

3. Disgorgement of compensation paid to Seery in managing or administering the Original and Reorganized Debtor's Estate;

4. Imposition of a constructive trust;

5. Declaratory relief as described herein;

6. An award of actual damages as described herein;

7. An award of exemplary damages as allowed by law;

8. Pre- and post-judgment interest; and,

9. All such other and further relief to which HMIT may be justly entitled.

Respectfully Submitted,

PARSONS MCENTIRE MCCLEARY PLLC

By: /s/

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Appendix Exhibit 140

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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]	)	Case No. 19-34054-sgj11
Reorganized Debtor.	)	

HIGHLAND CAPITAL MANAGEMENT, L.P.'S MOTION FOR (A) BAD FAITH FINDING AND (B) ATTORNEYS' FEES AGAINST NEXPOINT REAL ESTATE PARTNERS LLC (F/K/A HCRE PARTNERS, LLC) IN CONNECTION WITH PROOF OF CLAIM 146

Highland Capital Management, L.P. ("Highland"), the reorganized debtor in the above-captioned bankruptcy case, by and through its undersigned counsel, hereby files this *Motion for (A) Bad Faith Finding and (B) Attorneys' Fees Against NexPoint Real Estate Partners, LLC (f/k/a*

[1] Highland's last four digits of its taxpayer identification number are (8357). The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

HCRE Partners LLC) in Connection with Proof of Claim 146 (the "Motion") against NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC ("HCRE" and together with Highland, the "Parties"). In support of its Motion, Highland states as follows:

I. PRELIMINARY STATEMENT[2]

1. After two years of litigation—including two separate rounds of discovery sandwiched around a motion to disqualify HCRE's counsel and a full evidentiary hearing—the Court issued an order sustaining Highland's Objection to HCRE's Proof of Claim and denying *without prejudice* Highland's request for a bad faith finding and an award of attorneys' fees.

2. By this Motion, Highland renews its request for a bad faith finding and for an award of attorneys' fees on the ground that HCRE—and its principals, Messrs. Dondero and McGraner—lacked a good faith basis to file and prosecute its Proof of Claim. As described more fully below, the Motion is based on the following indisputable facts adduced during the Trial:

- Mr. Dondero signed the Proof of Claim on behalf of HCRE under penalty of perjury without a reasonable basis to believe the Proof of Claim was "true and correct," as required by law; and
- The Amended LLC Agreement accurately and unambiguously reflected the parties' intent such that no factual or legal basis existed to support HCRE's contentions that the Amended LLC Agreement "improperly allocate[d] the ownership percentages of the members thereto due to mutual mistake, lack of consideration, and/or failure of consideration," or its "claim to reform, rescind and/or modify" the Amended LLC Agreement.

3. This entire proceeding was a complete waste of judicial resources and of the Claimant Trust's assets; the relief sought therefore constitutes reasonable and appropriate remedies. Moreover, a bad faith finding and an award of attorneys' fees and related expenses in

[2] Capitalized terms not defined in this Preliminary Statement shall have the meanings ascribed to them below.

the aggregate amount of $825,940.55 should be imposed to (hopefully) deter Mr. Dondero and his affiliated entities and lawyers from filing further frivolous claims and pursuing meritless litigation.

II. RELEVANT BACKGROUND

A. HCRE Files the Proof of Claim, Highland Objects, and a Contested Matter Is Initiated

4. On April 8, 2020, James Dondero ("Mr. Dondero") signed and caused HCRE to file a proof of claim that was denoted by Highland's claims agent as proof of claim number 146 (the "Proof of Claim"). Morris Dec. Ex. A (at Ex. A).[3] In its Proof of Claim, HCRE asserted, among other things, that:

> [HCRE] may be entitled to distributions out of SE Multifamily, but such distributions have not been made because of the actions or inactions of the Debtor.[4] Additionally, [HCRE] contends that all or a portion of Debtor's equity, ownership, economic rights, equitable or beneficial interests in SE Multifamily does [not] belong to the Debtor or may be the property of [HCRE]. Accordingly, Claimant may have a claim against the Debtor. Claimant has requested information from the Debtor to ascertain the exact amount of its claim. This process is on-going. Additionally, this process has been delayed due to the outbreak of the Coronavirus. Claimant is continuing to work to ascertain the exact amount of its claim and will update its claim in the next ninety days.

Id.

5. On July 30, 2020, Highland objected to HCRE's Proof of Claim (the "Objection"), contending it had no liability thereunder. Morris Dec. Ex. B.

6. On October 19, 2020, HCRE filed its response to the Objection (the "Response"), stating, among other things, as follows:

> After reviewing what documentation is available to [HCRE] with the Debtor, [HCRE] believes the organizational documents relating to SE Multifamily Holdings, LLC (the "SE Multifamily Agreement") ***improperly allocates the ownership percentages of the members thereto due to mutual mistake, lack of***

[3] Citations to "Morris Dec. Ex. __" refer to the *Declaration of John A. Morris in Support of Motion for (A) Bad Faith Finding and (B) Attorneys' Fees Against NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC) in Connection with Proof of Claim 146* being filed concurrently with the Motion.

[4] "Debtor" is used interchangeably with Highland, as applicable.

> ***consideration, and/or failure of consideration. As such, [HCRE] has a claim to reform, rescind and/or modify the agreement.*** However, [HCRE] requires additional discovery, including, but not limited to, email communications and testimony, to determine what happened in connection with the memorialization of the parties' agreement and improper distribution provisions, evaluate the amount of its claim against the Debtor, and protect its interests under the agreement.

Morris Dec. Ex. C ¶ 5 (emphasis added).

B. The Parties Engage in Two Rounds of Discovery Sandwiched Around Highland's Motion to Disqualify HCRE's Counsel

7. Consistent with a Court-approved pre-trial schedule entered on December 14, 2020 [Docket No. 1568], the Parties engaged in a first round of discovery by (a) serving deposition notices and subpoenas, (b) exchanging discovery demands and written responses, and (c) searching for and producing voluminous documents. *See, e.g.*, Docket Nos. 1898, 1918, 1964, 1965, 1995, 1996, 2118, 2119, 2134, 2135, 2136, and 2137.

8. During the course of discovery, Highland became aware that HCRE's counsel, Wick Phillips Gould & Martin, LLP ("Wick Phillips"), had jointly represented the Parties in connection with the underlying transactions. Highland timely moved (a) to disqualify Wick Phillips from representing HCRE in connection with the Proof of Claim litigation (the "Disqualification Motion"), and (b) for an award of costs and fees incurred in bringing the Disqualification Motion. On December 10, 2021, following a lengthy hearing, the Court issued an order disqualifying Wick Phillips from representing HCRE in this matter but denying Highland's fee request. Morris Dec. Ex. D at 6-7 (citing to Docket No. 3106).

9. After HCRE retained new counsel, Hoge & Gameros, the Parties amended the pre-trial schedule (Docket Nos. 3356 and 3368), and participated in an extensive second round of discovery, including exchanging another set of written discovery requests and document productions, serving deposition notices and subpoenas, and taking and defending multiple depositions. Morris Dec. Ex. D at 9.

C. Just Before Its Witnesses Were to Be Deposed, HCRE Abruptly Moves to Withdraw Its Proof of Claim

10. On August 12, 2022, as the Parties were nearing the completion of discovery, and just days before Highland was scheduled to depose HCRE's witnesses, HCRE abruptly filed its *Motion to Withdraw Proof of Claim* [Docket No. 3442] (the "Motion to Withdraw"), in which HCRE sought leave from the Court to withdraw its Proof of Claim. HCRE filed its Motion to Withdraw (a) two business days after HCRE completed the depositions of Highland's witnesses, (b) one day after HCRE produced more than 4,000 pages of documents, and (c) two business days before consensually-scheduled depositions of HCRE's witnesses were set to begin. Shortly thereafter, HCRE unilaterally cancelled the depositions of its witnesses.[5]

11. On September 2, 2022, Highland objected to HCRE's Motion to Withdraw [Docket No. 3487] (the "Objection to Motion to Withdraw"), and to HCRE's Motion to Quash, and cross-moved to compel the depositions of Mr. Dondero, Mr. McGraner, and HCRE's Rule 30(b)(6) witness. [Docket No. 3483] (the "Objection to Motion to Quash and Cross-Motion to Compel, and together with the Motion to Withdraw and Motion to Quash, the "Motions").

12. On September 12, 2022, following argument on the Motions, the Court denied the Motion to Withdraw after HCRE failed to unambiguously represent that by withdrawing the Proof of Claim with prejudice, HCRE was also waiving and relinquishing any right to re-litigate or challenge Highland's ownership interest in SE Multifamily. *See* Morris Dec. Ex. D n.36. *See also Amended Order Denying Motion to Withdraw Proof of Claim* [Docket No. 3525] (denying Motion to Withdraw and directing the Parties to (a) confer in good faith to complete the

[5] In response, on August 16, 2022, Highland filed subpoenas directed to Messrs. Dondero and McGraner [Docket Nos. 3451 and 3452] and a Rule 30(b)(6) deposition notice directed to HCRE [Docket No. 3453], calling for the witnesses to sit for depositions on August 24 and 25, 2022. On August 23, 2022, the day before the depositions were to begin, HCRE filed a *Motion to Quash and for Protection* [Docket No. 3464] (the "Motion to Quash"), seeking to quash the subpoenas and deposition notice.

depositions of Mr. Dondero, Mr. McGraner, and HCRE; (b) otherwise comply with the Amended Scheduling Order; and (c) appear for an evidentiary hearing on the Proof of Claim on November 1 and 2, 2022).

D. A Trial Is Held on the Proof of Claim and the Court Issues Its Order

13. On November 1, 2022, after discovery was (finally) completed, the Court held an evidentiary hearing on the Proof of Claim and the Objection (the "Trial"). *See* Morris Dec. Ex. E.

1. Mr. Dondero Had No Basis to Swear Under Penalty of Perjury that the Proof of Claim Was True and Correct

14. Mr. Dondero signed and executed HCRE's Proof of Claim under penalty of perjury, purportedly attesting to its truth and accuracy. Yet, as the Court has already found and determined, Mr. Dondero lacked any basis to believe that the information in the Proof of Claim was "true and correct." On cross-examination, Mr. Dondero admitted that he:

- could not recall "personally [doing] any due diligence of any kind to make sure that Exhibit A was truthful and accurate before [he] authorized it to be filed;"
- did not review or provide comments to the Proof of Claim or its Exhibit A before it was filed;
- did not review the applicable agreements or any other documents before signing the Proof of Claim;
- did not know (a) whose idea it was to file the Proof of Claim, (b) who at HCRE worked with, or provided information to, Bonds Ellis to enable Bonds Ellis to prepare the Proof of Claim, (c) what information was given to Bonds Ellis to formulate the Proof of Claim, or (d) whether "Bonds Ellis ever communicated with anybody in the real estate group regarding" the Proof of Claim;
- "never specifically asked anyone in the real estate group if [the Proof of Claim] was truthful and accurate before [he] authorized it to be filed;
- "didn't check with any member of the real estate group to see whether or not they believed [the Proof of Claim] was truthful and accurate before [he] authorized Bonds Ellis to file it;" and

- failed to do "anything . . . to make sure that this proof of claim was truthful and accurate before [he] authorized [his] electronic signature to be affixed and to have it filed on behalf of HCRE."

Morris Dec. Ex. D at 4-5 (citing evidence). In a feeble attempt to excuse his failure to do *anything* to confirm that the Proof of Claim was "truthful and accurate" before authorizing his electronic signature to be affixed and filed on behalf of HCRE, Mr. Dondero vaguely testified that he relied on some unidentified "process" in choosing to proceed. Morris Dec. Ex. E at 58:4-59:2.

15. Mr. Dondero cannot hide behind an unidentified "process" (assuming a "process" actually existed) that completely failed to uncover the indisputable evidence (including Mr. McGraner's unqualified admissions) that the Amended LLC Agreement accurately reflected the Parties' intentions concerning capital contributions and the allocation of membership interests. Based on his own testimony, and this Court's findings of fact, Mr. Dondero signed the Proof of Claim on HCRE's behalf in bad faith.

2. <u>The Evidence Established that the Amended LLC Agreement Accurately and Unambiguously Reflected the Parties' Intent Leaving No Factual or Legal Basis for HCRE to File or Pursue the Proof of Claim</u>

16. The evidence at Trial, including documentary evidence and the testimony of Mr. Dondero, Mr. McGraner, and BH Equities (a third-party signatory to the Amended LLC Agreement), proves that HCRE filed its Proof of Claim in bad faith.

17. Specifically, the evidence indisputably and definitively established that the Amended LLC Agreement accurately and unambiguously reflected the signatories' intent concerning their respective capital contributions and the allocation of memberships interests in SE Multifamily:

- Representatives of the signatories exchanged views and drafts concerning capital contributions and ownership interests that were consistent with the final,

executed version of the Amended LLC Agreement (Morris Dec. Ex. D at 20-21 (citing evidence));

- Mr. Dondero "agreed that [Schedule A] comported with his expectations when he signed the Amended LLC Agreement on behalf of HCRE and Highland, including his expectation that Highland's 49% interest was going to be diluted by the 6% being granted to BH Equities." (*Id*. at 21-22 (citing evidence));

- Mr. McGraner (a) reviewed Schedule A before the Amended LLC Agreement was executed, (b) saw that it showed Highland made a capital contribution of $49,000 and was receiving a 46.06% interest in SE Multifamily, and (c) concluded that this allocation reflected his understanding of the terms between HCRE and Highland (*Id*. at 22 (citing evidence));

- BH Equities' corporate representative also acknowledged during his deposition that "'BH Equities agreed that [Highland] would hold a 46.06 percentage interest in SE Multifamily while making a capital contribution of $49,000' and 'believed Schedule A accurately reflected the intent of the parties.'" (*Id*. (citing evidence));

- Numerous other provisions in the Amended LLC Agreement ratified the allocation of membership interests set forth in Schedule A (*Id*. at 23-25 (citing evidence)); and

- Based on information provided by HCRE, SE Multifamily's tax returns "confirm that the parties intended that Highland, having made a capital contribution of $49,000, owned 46.06% of the SE Multifamily membership interests." (*Id*. at 25-26 (citing evidence)).

18. At the conclusion of the Hearing, HCRE requested that the Court "grant the proof of claim and reallocate the equity [in SE Multifamily] based on the capital contribution[s]."[6] *Id*. at 11. Highland requested that the Court enter an order (i) disallowing HCRE's Proof of Claim and (ii) finding that HCRE filed its Proof of Claim in bad faith and awarding the Reorganized Debtor its "costs." *Id.*

[6] Despite (a) the explicit claims asserted in HCRE's own Response (Morris Dec. Ex. B ¶ 5), and (b) the Court's concerns of "gamesmanship" expressed in connection with HCRE's Motion to Withdraw (*see, e.g.*, Morris Dec. Ex. D at n.36), HCRE's counsel persisted—in yet another act of bad faith—to attempt to preserve the very claims that formed the basis of HCRE's Proof of Claim: "HCRE's counsel also argued that the issues of reformation, rescission, and modification, of the Amended LLC Agreement were not before the court and that, if the court were to grant the Reorganized Debtor's Objection, it should enter only a simple order denying the claim, without making any findings." Morris Dec. Ex. D at 12.

19. On April 28, 2023, the Court issued its *Memorandum Opinion and Order Sustaining Debtor's Objection to, and Disallowing, Proof of Claim Number 146 [Dkt. No. 906]* (the "Order"), Morris Dec. Ex. D, in which the Court sustained Highland's Objection to the Proof of Claim, and disallowed the Proof of Claim for all purposes. The Court denied, without prejudice, Highland's oral request for a bad faith finding and for sanctions against HCRE in the form of reimbursement of Highland's attorney's fees and costs because HCRE did not have an opportunity to respond to such requests. *Id*. at 38-39.

III. ARGUMENT

A. HCRE's Proof of Claim Was Filed in Bad Faith

20. The undisputed documentary and testimonial evidence adduced at Trial establishes that HCRE filed and prosecuted the Proof of Claim in bad faith.

21. As the Court has already found and determined, Mr. Dondero failed to conduct any due diligence before signing HCRE's Proof of Claim and otherwise lacked ***any*** basis (let alone a reasonable basis) to believe that the Proof of Claim was truthful. Indeed, had Mr. Dondero simply asked Mr. McGraner, he would have learned that the Amended LLC Agreement accurately and unambiguously reflected the Parties' intent—and that there was therefore no basis to "reform, rescind and/or modify" the Amended LLC Agreement. *See* Morris Dec. Ex. D at 3-5.

22. That is what Highland established during the Trial. Mr. McGraner, the "quarterback" of Project Unicorn, admitted that at the time he reviewed the ownership allocations in SE Multifamily before the operative documents were signed, he had no reason to believe there was any "mistake." The Court made numerous other factual findings that prove there was no "dispute" concerning the Parties' respective membership interests in SE Multifamily. Morris Dec. Ex. D at 19-26 (citing to substantial documentary and testimonial evidence); *see also supra* ¶ 17.

23. Based on the foregoing, the Court should find that HCRE's Proof of Claim was filed and prosecuted in bad faith.

B. Highland Is Entitled to Attorneys' Fees from HCRE for Costs Incurred in Connection with the Bad Faith Filing of the Proof of Claim

24. HCRE should be sanctioned for its bad faith filing and prosecution of the Proof of Claim by reimbursing Highland for attorneys' fees and expenses incurred in connection with litigating the Proof of Claim.

25. Bankruptcy courts possess inherent authority under section 105 of the Bankruptcy Code to issue sanctions after making a finding of bad faith. *See In re Yorkshire, LLC*, 540 F3d 328, 332 (5th Cir. 2008) (affirming bankruptcy court's imposition of sanctions for bad faith filing "following an extensive hearing in which the bankruptcy court heard testimony from the parties and witnesses and made certain credibility determinations," and "made specific findings that Appellants acted in bad faith."); *In re Brown*, 444 B.R. 691, 695 (E.D. Tex. 2009) (issuing sanctions against party and their counsel, and relying on section 105(a) of the Bankruptcy Code as a basis for awarding attorney's fees against parties for acting "with reckless disregard of their duty to this Court"); *In re Paige*, 365 BR 632, 637-399 (Bankr. N.D. Tex. 2007) (awarding attorneys' fees against debtor for their "bad faith" conduct during bankruptcy case, noting "[t]he sanction here is derived from the Court's inherent power to sanction" under section 105(a)); *In re Lopez*, 576 B.R. 84, 93 (S.D. Tex. 2017) (same).

26. Here, the Bankruptcy Court should award sanctions against HCRE in the form of attorneys' fees and expenses incurred by Highland in connection with the bad faith filing and prosecution of the Proof of Claim, in the aggregate amount of $825,940.55. Morris Dec. ¶¶ 10-17, Morris Dec. Exs. F-I.

CONCLUSION

WHEREFORE, for the foregoing reasons, Highland respectfully requests that the Court enter an order (a) finding that HCRE filed and prosecuted the Proof of Claim in bad faith, (b) entering sanctions against HCRE in the form of reimbursement to Highland of Highland's costs and expenses incurred in objecting to HCRE's Proof of Claim in the aggregate amount of $825,940.55; and (c) granting such other and further relief that the Court deems just and proper under the circumstances.

Dated: June 16, 2023

PACHULSKI STANG ZIEHL & JONES LLP

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Counsel for Highland Capital Management, L.P.

CERTIFICATE OF CONFERENCE

I hereby certify that, on June 16, 2023, Mr. John A. Morris, counsel for Highland Capital Management, L.P., corresponded with Ms. Amy Ruhland and Mr. William Gameros, counsel for HCRE, regarding the relief requested in the foregoing Motion. As of the filing of this Motion, counsel for HCRE had not responded to Mr. Morris' correspondence; however, given the nature of the relief requested in the Motion, it is presumed that HCRE is **OPPOSED** to such requested relief.

/s/ Zachery Z. Annable
Zachery Z. Annable

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
Reorganized Debtor.	)	

ORDER GRANTING HIGHLAND CAPITAL MANAGEMENT, L.P.'S MOTION FOR (A) BAD FAITH FINDING AND (B) ATTORNEYS' FEES AGAINST NEXPOINT REAL ESTATE PARTNERS LLC (F/K/A HCRE PARTNERS, LLC) IN CONNECTION WITH PROOF OF CLAIM 146

Having considered (a) the *Motion for (A) Bad Faith Finding and (B) Attorneys' Fees Against NexPoint Real Estate Partners, LLC (f/k/a HCRE Partners LLC) in Connection with Proof of Claim 146* (the "Motion")[2] filed by Highland Capital Management, L.P. ("Highland"), the reorganized debtor in the above-captioned bankruptcy case (the "Bankruptcy Case"), (b) the

[1] Highland's last four digits of its taxpayer identification number are (8357). The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

[2] Capitalized terms not otherwise defined in this Order shall have the meanings set forth in the Motion.

evidence set forth in the *Declaration of John A. Morris in Support of Motion for (A) Bad Faith Finding and (B) Attorneys' Fees Against NexPoint Real Estate Partners LLC (f/k/a HCRE Partners, LLC) in Connection with Proof of Claim 146* (the "Morris Declaration"), and (c) the record of proceedings in this Bankruptcy Case, the Court finds and concludes that (i) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; (ii) this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (iii) notice of the Motion was sufficient under the circumstances; (iv) NexPoint Real Estate Partners, LLC f/k/a HCRE Partners, LLC ("HCRE") filed and prosecuted proof of claim number 146 (the "Proof of Claim") in bad faith; and (v) as a sanction for HCRE's bad-faith conduct in filing and prosecuting the Proof of Claim, HCRE should be required to reimburse Highland's costs and expenses incurred in objecting to HCRE's Proof of Claim. Accordingly, it is therefore

ORDERED that HCRE reimburse Highland's costs and expenses incurred in objecting to HCRE's Proof of Claim in the aggregate amount of $825,940.55; and it further

ORDERED that the Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Order.

End of Order

Appendix Exhibit 141

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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]	§	Case No. 19-34054-sgj11
Reorganized Debtor.	§	

NOTICE OF FILING OF
THE CURRENT BALANCE SHEET OF THE HIGHLAND CLAIMANT TRUST

PLEASE TAKE NOTICE that, pursuant to the Court's *Order (A) Continuing Hearing on Motion to Stay and to Compel Mediation [Dkt. 3752] and (B) Directing Certain Actions in Advance of Continued Hearing* [Docket No. 3870], Highland Capital Management, L.P., the reorganized debtor in the above-captioned bankruptcy case, and the Highland Claimant Trust hereby file the

[1] The last four digits of the Reorganized Debtor's taxpayer identification number are 8357. The headquarters and service address for the Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

current balance sheet attached hereto as **Exhibit A** showing the general categories of assets and liabilities of the Highland Claimant Trust, subject to the accompanying notes.

[*Remainder of Page Intentionally Left Blank*]

Dated: July 6, 2023

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EXHIBIT A

Highland Claimant Trust
Summarized Consolidated Balance Sheet [1]
As of May 31, 2023
The accompanying notes are integral to understanding this balance sheet
(Estimated and unaudited, $ in millions)

	Balance per books	adjustments (see notes)	Adjusted balance
Assets			
Cash and equivalents	$ 13	$ -	$ 13
Disputed claims reserve [2]	12	-	12
Other restricted cash	12	-	12
Investments [3]	118	(12) [6]	106
Notes receivable, net [4]	86	(83) [4]	3
Other assets	6	-	6
Total assets	**$ 247**	**$ (95)**	**$ 152**
Liabilities			
Secured and other debt	$ -	$ -	$ -
Distribution payable [2]	12	-	12
Additional indemnification reserves	-	90 [5]	90
Other liabilities	15	13 [5]	28
Total liabilities [5]	**$ 27**	**$ 103**	**$ 130**
Book/adjusted book equity (see accompanying notes) [5]	**220**	**(198)**	**22**
Total liabilities and book/adjusted book equity	**$ 247**	**$ (95)**	**$ 152**

Supplemental Info: [7]

Sum of remaining allowed Class 8 Trust Beneficiaries, excluding interest	$ 27
Sum of remaining allowed Class 9 Trust Beneficiaries, excluding interest	99
Sum of face amount of pending Class 8/9 potential Trust Beneficiaries, excluding interest	13
Sub-total	$ 139

{SEE ACCOMPANYING NOTES ON THE FOLLOWING PAGE}

The information contained in this summarized consolidated balance sheet (the "Summary") is based on estimates, and therefore should not be relied upon, as actual results may differ materially from the estimates contained herein.

This Summary is neither an offer nor a solicitation of an offer to buy or sell securities.

Information contained herein is not indicative of, nor does it guarantee, future results. The information contained in this Summary is based on matters as they exist as of the date of preparation and not as of any future date. Valuations do not reflect performance in different economic or market cycles and there can be no assurances that valuations will be achieved. Trust Beneficiaries may experience materially different results and outcomes.

Highland Claimant Trust
Summarized Consolidated Balance Sheet [(1)]
As of May 31, 2023

Notes:

(1) This presentation is not in accordance with US GAAP and is unaudited, but has nevertheless been prepared in good faith and with the intention of providing the reader with a comprehensible understanding of the remaining assets and liabilities of the Highland Claimant Trust, Highland Capital Management, LP, HCMLP GP LLC, and Highland Litigation Trust (the "Consolidated Entities"). These entities have each been aggregated on a stand-alone basis, with intercompany amounts eliminated. Funds and entities that may otherwise be consolidated by one or more of the Consolidated Entities under US GAAP are not fully consolidated and rather are included solely at their equity value. For example, if Highland Capital Management, LP is a 20% investor in a managed fund with assets of $100 million and liabilities of zero that would normally require consolidation under US GAAP, the presentation contained herein reflects an investment of $20 million as opposed to fully consolidating the $100 million fund and reflecting minority interest of $80 million. The value of the Highland Indemnity Trust is not included herein. As of May 31, 2023, $35 million has been funded to the Highland Indemnity Trust. Highland Indemnity Trust beneficiaries are Claimant Trust Indemnified Parties. Any unused assets remaining after satisfying indemnification obligations will be transferred to the Highland Claimant Trust or otherwise be distributed to the Claimant Trust Beneficiaries in accordance with the Indemnity Trust Agreement. For presentation purposes, it is assumed that outstanding indemnification obligations will consume the entirety of the Highland Indemnity Trust. Further, no current recovery amount has been ascribed to the "Kirschner Adversary" as all such value is considered to be contingent, nor have any liabilities been reserved for various success fees payable to professionals associated with the Kirschner Adversary or any other litigations. Such liabilities are also contingent in nature.

(2) Amounts already authorized for distribution, but reserved in the Disputed Claims Reserve related to resolution of pending disputed claims.

(3) Value reflected herein consists primarily of ownership in private funds and subsidiaries, valued using NAV as the practical expedient, public & private investments (including residual sale escrows), valued at fair value, and SE Multifamily Holdings, LLC, valued using book equity value as of the most recent financials received. See note 6 for further information. There is substantial risk and uncertainty with respect to the timing and ultimate cash value to be received from monetizations of these investments and such value could ultimately be materially impacted by actual monetizations.

(4) Book amounts reflect principal amounts outstanding on various notes, without discount, adjustment, or estimates of future costs of collection, with two exceptions. The first exception is to the note receivable from Hunter Mountain Investment Trust for which over $90 million of principal and interest is currently due, payable, and in default. These notes are a component of the "Kirschner Adversary" which is currently stayed. These principal and interest amounts are fully reserved based on the assumption that Hunter Mountain Investment Trust has no other assets other than a contingent, unvested interest in the Highland Claimant Trust. That assumption is subject to change. The second exception relates to the note receivable from Highland Select Equity Master Fund, LP. This amount is fully reserved based on the pendency of the Ch. 7 proceeding for Highland Select Equity Master Fund, LP and the minimal remaining value of Highland Select Equity Master Fund, LP's assets, which is expected to be further consumed (at least in part) by trustee and professional fees. Aside from these exceptions, approximately $65 million of these principal amounts (further described below) are subject to ongoing litigation with various note counterparties who are contesting the validity of their obligations. These disputed amounts are contained within the "Balance per books" column herein without discount or adjustment. While the makers have asserted defenses, Highland believes they are meritless and is confident that judgments will ultimately be entered in Highland's favor. However, based on Mr. Dondero's history of failing to satisfy judgments entered against his affiliates by others (e.g., UBS, the Redeemer Committee, Joshua Terry, and Patrick Daugherty), the effect of complete non-payment of principal is reflected in the "adjustments" column, which also assumes non-payment of the currently performing $18 million note receivable from The Dugaboy Investment Trust. Ultimate recoveries from these notes could differ materially from the current principal outstanding depending on the outcome of the pending litigation and no recovery can be assured. Accrued interest is captured in the "Other assets" line item, subject to the exceptions discussed within this footnote. While there is currently a report & recommendation from the bankruptcy court for summary judgment, plus costs of collection, no costs of collection are reflected as assets on this balance sheet, so would be incremental. The estimated amount of such costs of collections are over $3 million.

Detail of note principal amounts subject to report & recommendations of the bankruptcy court, currently pending in district court (excludes accrued interest):

Note Maker	Principal O/S	Comments
NexPoint Advisors, LP	$ 25	Consists of a single note
NexPoint Real Estate Partners, LLC	12	fka HCRE Partners, LLC; five underlying notes comprise balance
NexPoint Asset Management, LP	11	fka Highland Capital Management Fund Advisors, LP; four underlying notes comprise balance
James Dondero	10	Three underlying notes comprise balance
Highland Capital Management Services, Inc.	7	Five underlying notes comprise balance
Sub-total	$ 65	

(5) The book equity amount reflects a multitude of estimates including, but not limited to the value of investments and collectability of notes receivable. For book purposes, no contingent liabilities or indemnification reserves have been recorded as liabilities that would reduce book equity, notwithstanding that it is currently expected that there will be a) a need to maintain further highly material indemnification reserves; and b) further incurrance of springing contingent liabilities if distribution milestones are achieved. The amount of further incremental indemnification reserves are currently expected to exceed $90 million, and may ultimately be greater, which will be required to be funded (at least in part) prior to any further material distributions to Trust Beneficiaries. In the absence of a global settlement that, among other things, fully and finally releases all Claimant Trust Indemnified Parties, Highland believes the additional indemnification reserves are required because, among other reasons, (a) based on the so-called "Dondero exclusion," insurance is likely to remain cost-prohibitive and/or unsatisfactory, leaving the Claimant Trust and Indemnity Trust assets as the sole sources of funding for indemnity obligations, (b) approximately twenty (20) matters are being actively litigated in at least 9 different forums; and (c) based on history, new litigation can be expected. Any unused assets remaining after satisfaction of indemnity obligations will be distributed as required by the Indemnity Trust Agreement. The amount of incremental springing contingent liabilities are expected to range from $5 million to $15 million, which are exclusive of various success fees associated with recoveries under the "Kirschner Adversary" and others. No reserves have been accrued for any current, pending, or threatened litigation brought by any Dondero-related parties. Lastly, it is expected that the trust and its subsidiaries will operate at an operating loss prospectively. The corresponding information in the "adjustments" column above is an estimate of the effects of these incremental indemnification reserves and contingent liabilities, but does not assume any expected future operating cash burn, which is expected to be significant.

6) The value of SE Multifamily Holdings LLC maintained on this balance sheet is $15.7 million, which is a component of the "Investments" line item and is based on a several years stale book-basis balance sheet. Notwithstanding Dondero-entities' previous disclosures of this interest at values of $20 million and $12 million, Highland also received interest from Dondero to acquire the interest for $3.8 million, among other assets. The purpose of this adjustment is to assume that the holding could be monetized at the lower $3.8 million level, which would result in a $11.9 million decrease to Highland's book equity if it were hypothetically transacted at that level. Highland has initiated proceedings in Delaware to receive books and records relating to SE Multifamily Holdings LLC, for which it has the contractual right and has been seeking for approximately a year, but for which Dondero-controlled entities have not provided to date.

7) Amounts described herein represent the face amounts of outstanding allowed and pending claims. The pending claim amounts do not include amounts that are the subject of various appeals or that are unliquidated. The allowed and pending claims (along with accrued interest) could ultimately be satisfied in part or in full using 1) the assets of the disputed claims reserve, 2) the residual amount of cash in the indemnity trust after satisfying all indemnification obligations, and 3) the residual amount of cash remaining after monetizing all other non-cash assets and paying liabilities and future expenses.

Appendix Exhibit 142

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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 7
HIGHLAND SELECT EQUITY MASTER FUND, L.P.,	)	Case No. 23-31037-swe7
Debtor.	)	

HIGHLAND CAPITAL MANAGEMENT, L.P.'S RESPONSE AND JOINDER TO MOTION TO TRANSFER/REASSIGN CASE

Highland Capital Management, L.P. ("HCMLP"), a creditor and party-in-interest in the above-referenced bankruptcy case, by and through its undersigned counsel, hereby files its response to *Creditor The Dugaboy Investment Trust's Objection to Debtor's Motion to Transfer* [Docket No. 17] and joinder to *Debtor's Motion to Transfer/Reassign Case* [Docket No. 9] (the "Motion") filed by Highland Select Equity Master Fund, L.P. (the "Select Fund") and Highland Select Equity Fund GP, L.P. ("Select GP," and together with the Select Fund, the "Debtors"). In

support of thereof, HCMLP adopts the legal arguments and authorities in the Motion and respectfully states as follows:

PRELIMINARY STATEMENT[1]

1. The Debtors' cases are directly related to and intertwined with the HCMLP Case and should therefore be re-assigned to Judge Jernigan, the judge who has overseen the HCMLP Case since it was transferred to her court in December 2019.

2. HCMLP is one of the Debtors' two creditors. It is indisputable that HCMLP is indirectly the sole limited partner of the Select Fund and owner of Select GP and that the Debtors act through HCMLP. The Debtors' only other purported creditor is Dugaboy, James Dondero's family trust which he controls and of which he is the lifetime beneficiary.

3. Regrettably, Dugaboy has intimated that it intends to investigate (and then pursue) baseless claims against HCMLP, its court-appointed CEO, James P. Seery, Jr., and its other employees arising from acts occurring during the HCMLP Case. While any such investigation (let alone the pursuit of claims) would be a waste of resources, the mere possibility of such an investigation mandates re-assignment of the Debtors' cases to Judge Jernigan because:

- Any such claims would relate to conduct that occurred during the HCMLP Case and was (and still is) subject to Judge Jernigan's oversight;
- Judge Jernigan is thoroughly familiar with provisions of HCMLP's confirmed Plan that will likely apply here, including the discharge and gatekeeper provisions, as well as other applicable orders and deadlines in the HCMLP Case such as the Admin Bar Date; and
- If Dugaboy ever pursues claims against HCMLP or its employees (including Mr. Seery) for conduct arising during the HCMLP Case, Dugaboy would be required pursuant to various "gatekeeper" orders to obtain Judge Jernigan's approval before commencing suit.

4. If these facts were not enough—and they are—Dugaboy previously admitted that any purported claim it has against HCMLP for acts concerning the Debtors must be raised in the

[1] All capitalized terms used, but not defined, in this Preliminary Statement have the meanings given to them below.

HCMLP Case. In April 2020, Dugaboy filed a proof of claim in the HCMLP Case seeking to hold HCMLP liable for the Debtors' alleged obligations to Dugaboy. In response to HCMLP's objection to Dugaboy's claim, Dugaboy acknowledged that HCMLP's "Plan, as part of the gatekeeper provision in the Plan, vests exclusive jurisdiction of the claim of Dugaboy against" the Select Fund in Judge Jernigan's court. HCMLP Case Docket No. 2933 ¶ 5. Notably, Judge Jernigan ultimately disallowed Dugaboy's claim against HCMLP arising from its management of the Debtors with prejudice—thereby raising even more issues of judicial estoppel, collateral estoppel, and *res judicata*.

5. Separately, Mr. Dondero, through yet another controlled shell entity (*i.e.*, PCMG), commenced an action against HCMLP (this time, in the District Court) for alleged mismanagement of the Debtors. After the matter was referred to the Bankruptcy Court and HCMLP moved to dismiss, PCMG stipulated to the dismissal of the adversary proceeding with prejudice.

6. Regrettably, HCMLP believes that Dugaboy (and Mr. Dondero) will attempt to use the Debtors' bankruptcy cases as the latest vehicle to pursue baseless claims against HCMLP and its management and employees—even though any purported claims are barred for myriad reasons and would be subject to the Gatekeeper in HCMLP's Plan in any event. Such suits will indisputably affect HCMLP's bankruptcy estate and implicate the terms of HCMLP's Plan. Judicial economy therefore favors re-assigning these cases to Judge Jernigan as she will be involved in their management under any circumstances.

7. Despite the foregoing, Dugaboy has objected to re-assignment. The objection is ill-founded. The connections between these cases and the HCMLP Case are stark, indisputable, and dispositive. But Dugaboy objects to transfer solely because it dislikes Judge Jernigan, not because she is "biased" as they claim but because she understands Mr. Dondero's games—

litigation as harassment. That is what is going on here. In fact, HCMLP offered to waive its claim against the Debtors and allow Dugaboy, the Debtors' only other creditor, to have all of the Debtors' cash and investments to resolve these cases, after payment of estate expenses. Dugaboy never responded to HCMLP's offer (reiterated on the record before Judge Jernigan) but chose instead to propound more litigation.

JOINDER

I. Background to the Select Fund

8. The Select Fund is a Bermuda-based limited partnership that is managed by its general partner, Select GP. HCMLP is indirectly the sole limited partner of the Select Fund[2] and the owner of Select GP. The Select Fund's former investment manager was HCMLP. Prior to the filings, the Debtors had no employees and could act only through HCMLP.

9. Prior to HCMLP's bankruptcy in October 2019, James Dondero, a founder of HCMLP and its former Chief Executive Officer, controlled the Select Fund, Select GP, HCMLP, and Dugaboy.

10. Historically, the Select Fund had one asset: a prime brokerage account with Jefferies, which held a portfolio of liquid and illiquid securities (the "Jefferies Account"). The Select Fund was managed by HCMLP, then under the control of Mr. Dondero, and securities would be bought and sold in the Jefferies Account at Mr. Dondero's direction. Mr. Dondero also directed the Select Fund to borrow money from Jefferies on margin. The loans Mr. Dondero obtained from Jefferies were secured by the securities in the Jefferies Account and the proceeds were used to

[2] The Select Fund has one limited partner: Highland Select Equity Fund, L.P. ("Equity Fund"). Equity Fund is 100% owned by the Highland Claimant Trust. Prior to February 2021, PCMG Trading Partners XXIII, L.P. ("PCMG"), held a 0.024% limited partnership interest in Equity Fund. PCMG's limited partners are Mr. Dondero and Mark Okada, HCMLP's co-founder. Mr. Dondero holds 75% of PCMG's limited partnership interest and Mr. Okada holds the remainder. PCMG's general partner is Strand Advisors III, Inc., which is 100% owned and controlled by Mr. Dondero. PCMG's interest in Equity Fund was redeemed for cash in February 2021.

purchase more securities, which in turn were pledged to Jefferies. Mr. Dondero historically caused the Select Fund to borrow as much as was allowed against the securities in the Jefferies Account.

11. The Debtors have two creditors. HCMLP loaned the Select Fund $3 million (with the consent of the Committee) in March 2020 (the "HCMLP Loan") with the proceeds being used to fund a margin call from Jefferies.[3] The Debtors only other alleged creditor is The Dugaboy Investment Trust ("Dugaboy"). Dugaboy is Mr. Dondero's family trust of which Mr. Dondero is the lifetime beneficiary that previously held a 0.1866% limited partnership interest in HCMLP. Dugaboy's claim against the Debtors arises from a master securities lending agreement pursuant to which Dugaboy loaned the Select Fund certain equity securities (the "Loan Share Agreement"), which Mr. Dondero caused to be contributed to the Jefferies Account to allow Mr. Dondero to meet a then-outstanding margin call in October 2014.

II. HCMLP's Bankruptcy; Liquidation of the Jefferies Account

12. On October 16, 2019 (the "HCMLP Petition Date"), HCMLP filed for bankruptcy protection in the U.S. Bankruptcy Court for the District of Delaware (the "HCMLP Case").[4] At the request of HCMLP's creditors, the HCMLP Case was transferred to the U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court"), to be overseen by The Honorable Stacey Jernigan, in large part because of her familiarity with Mr. Dondero and certain of the entities he then controlled.[5]

[3] In May 2022, the Select Fund paid HCMLP approximately $363,000 on the HCMLP Loan, which represented HCMLP's *pro rata* share of the Select Fund's assets after setting an expense reserve of $100,000 and, assuming no default interest on the HCMLP Loan, leaving approximately $639,000 in cash at Select Fund.

[4] The HCMLP Case is styled as *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj11.

[5] Judge Jernigan's familiarity with Mr. Dondero came from her presiding over *In re Acis Capital Management, L.P.*, Case No. 18-30264-sgj-11 (Bankr. N.D. Tex.). Acis Capital Management, L.P., was a former HCMLP subsidiary, which was put into an involuntary bankruptcy after Mr. Dondero refused to pay an $8 million arbitration award to a former employee and instead chose to strip Acis of assets to make it judgment proof. *Acis* was marked by extremely acrimonious litigation brought by Mr. Dondero against his former employee through a series of controlled proxies. *See, e.g., In re Acis Cap. Mgmt., L.P.*, 2019 Bankr. LEXIS 292 (Bankr. N.D. Tex. Jan. 31, 2019); *In re Acis Cap. Mgmt., L.P.*, 584 B.R. 115 (Bankr. N.D. Tex. Apr. 13, 2018).

13. As of the month end prior to the HCMLP Petition Date, the Select Fund held approximately $171 million in long equity positions and $41 million of short equity positions in the Jefferies Account; had pledged those securities to secure $119 million in loans from Jefferies; and owed $1.1 million on an outstanding margin call in the Jefferies Account.

14. After HCMLP's creditors and the U.S. Trustee raised concerns about Mr. Dondero's ability to serve as an estate fiduciary because of his history of self-dealing, creditor-avoidance asset transfers, and other breaches of fiduciary duty, HCMLP, its official committee of unsecured creditors (the "Committee"), and Mr. Dondero entered into a settlement intended to avoid the appointment of a chapter 11 trustee. The settlement was approved by Judge Jernigan on January 9, 2020 [HCMLP Case Docket No. 339] (the "January Order").[6] Pursuant to the January Order:

- Mr. Dondero was removed from control of HCMLP and an independent board was appointed (the "Independent Board");[7] Mr. Dondero, however, remained an unpaid Highland portfolio manager.
- A "gatekeeper" provision was instituted prohibiting the pursuit or commencement of litigation against the Independent Directors without Judge Jernigan's prior authorization and limiting claims to those arising from willful misconduct or gross negligence.[8]
- A series of operating protocols were enacted which required HCMLP to seek Committee approval (and in some instances court approval) prior to entering into nearly any transaction, including transactions in the Jefferies Account [HCMLP Case Docket Nos. 354; 466] (the "Operating Protocols").

[6] Notwithstanding the January Order, the U.S. Trustee still pressed for the appointment of a chapter 11 trustee. [HCMLP Case Docket No. 271].

[7] The Independent Board was comprised of retired bankruptcy judge Russell Nelms, John Dubel, and James P. Seery, Jr. (the "Independent Directors").

[8] January Order ¶ 10 ("No entity may commence or pursue a claim or cause of action of any kind against any Independent Director . . . relating in any way to the Independent Director's role as an independent director ... 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 ...."). On July 16, 2020, Judge Jernigan approved Mr. Seery's appointment as HCMLP's chief executive officer and chief restructuring officer [HCMLP Case Docket No. 854] (the "July Order"). Like the January Order, the July Order prohibited litigation against Mr. Seery without Judge Jernigan's prior authorization and limited claims to those arising from willful misconduct or gross negligence. July Order ¶ 5.

15. During the fourth quarter of 2019 and first quarter of 2020, the Jefferies Account was often in margin deficit with the Select Fund (then managed by Mr. Dondero), routinely pushing back on requests to meet margin calls. In the first and second quarters of 2020, the margin shortfalls became much more acute as the world economy experienced global-pandemic-induced economic distress causing the market, including the value of the securities in the Jefferies Account, to plummet. The decline in value quickly eroded the equity in the Jefferies Account and caused a default allowing Jefferies to seize the Jefferies Account and liquidate essentially all the Select Fund's assets—including any securities allegedly loaned to the Select Fund by Dugaboy—to cover the amounts owed to Jefferies.

16. By June 30, 2020, Jefferies had substantially liquidated the Jefferies Account to repay Select Fund's loan, leaving the Jefferies Account with *de minimis* cash and illiquid investments.

III. Mr. Dondero's Attempts to "Burn [Highland] Down" and the Gatekeeper

17. In the fall of 2020, with the Committee refusing to capitulate to his demands, Mr. Dondero and his controlled entities, like Dugaboy, began interfering with HCMLP's management, threatening HCMLP's employees, and threatening to "burn [HCMLP] down."[9] Mr. Dondero's actions led Judge Jernigan to issue a temporary restraining order (the "TRO") against him,[10] which he promptly violated.[11]

[9] Confirmation Order (defined below), ¶¶ 74(b); 78.

[10] *Highland Cap. Mgmt., L.P. v. Dondero*, Adv. Pro. No. 20-03190-sgj, Docket No. 10 (Bankr. N.D. Tex. Dec. 10, 2020).

[11] Mr. Dondero was held in contempt for violating the TRO. *Highland Cap. Mgmt., L.P. v. Dondero (In re Highland Cap. Mgmt., L.P.)*, 2021 Bankr. LEXIS 1533 (Bankr. N.D. Tex. Jun. 7, 2021), *aff'd* 3:21-cv-01590-N, Docket No. 42 (N.D. Tex. Aug. 17, 2022).

18. On February 22, 2021, Judge Jernigan entered the Confirmation Order[12] confirming HCMLP's Plan.[13] HCMLP's Plan included a gatekeeper provision (the "Gatekeeper")[14] prohibiting "Enjoined Parties," like Dugaboy and Mr. Dondero, from bringing claims against "Protected Parties," like HCMLP and its employees and management, unless Judge Jernigan first determines the claims to be "colorable." The Gatekeeper was adopted (i) as a direct result of Mr. Dondero's history of harassing and costly litigation[15] and (ii) to prevent harassment of HCMLP's estate and abuse of judicial resources.[16]

19. Judge Jernigan also found, as a matter of fact, that Dugaboy and approximately 40 other entities were "marching pursuant to the orders of Mr. Dondero"[17] and objecting to the Plan, not to protect economic interests, but "to be disruptors."[18]

20. In addition to the Gatekeeper and numerous factual findings concerning Mr. Dondero's use of proxies to harass HCMLP, the Plan also included:

- A discharge of HCMLP under 11 U.S.C. § 1141(d)(1)(A) (Plan, Art. IX.B);
- An injunction prohibiting "Enjoined Parties," like Dugaboy, from pursuing claims against HCMLP or that affect its property, among other enjoined actions (*id.*, Art. IX.F);

[12] "Confirmation Order" refers to the *Order (i) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* [HCMLP Case Docket No. 1943].

[13] "Plan" refers to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [HCMLP Case Docket No. 1808].

[14] Plan, Art. IX.F.

[15] Confirmation Order, ¶ 77 ("During the last several months, Mr. Dondero and the Dondero Related Entities [including Dugaboy] have harassed [HCMLP], which has resulted in further substantial, costly, and time-consuming litigation for the Debtor.").

[16] *Id.*, ¶ 79 ("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 abuse of judicial time*** that properly could be used to consider the meritorious claims of other litigants.") (emphasis added).

[17] *See, e.g., id.* ¶ 19

[18] *See, e.g., id.* ¶ 17

- An exculpation provision limiting claims against Mr. Seery, in his role as an Independent Director, to those arising "from willful misconduct, criminal misconduct, or gross negligence" (*id.*, Art. IV.D); and

- An administrative bar date (the "Admin Bar Date") requiring all administrative claims against HCMLP to have been filed in the HCMLP Case by September 25, 2021 (*id.*, Art. II.A).

HCMLP's Plan, including the Gatekeeper, became effective on August 11, 2021. [HCMLP Case Docket No. 2700].

21. The Confirmation Order, including the Gatekeeper, was affirmed in all relevant respects by the Fifth Circuit. *NexPoint Advisors L.P. v. Highland Cap. Mgmt., L.P.* (*In re Highland Cap. Mgmt., L.P.*), 48 F.4th 419, 425–26, 435–39 (5th Cir. 2022). The factual findings in the Confirmation Order regarding Mr. Dondero's direct and indirect harassment of HCMLP were not challenged or disturbed on appeal.

IV. Mr. Dondero's (and Dugaboy's) Continued Efforts to Harass HCMLP

22. Notwithstanding the Plan, the Gatekeeper, and two orders holding him in contempt of court,[19] Mr. Dondero has not been cowed and, with his controlled entities, is currently involved in 30 proceedings against or affecting HCMLP—but those proceedings are a fraction of the litigation compounded against HCMLP, its estate, and its management by Mr. Dondero. The docket in the HCMLP Case contains nearly 3,900 entries; over 15 adversary proceedings have been filed by or against Mr. Dondero and his controlled affiliates; and Mr. Dondero and his controlled affiliates have filed over 25 appeals from Bankruptcy Court orders. Mr. Dondero's

[19] Mr. Dondero was held in contempt for violating the TRO (*see* n.11 *supra*). Separately, Mr. Dondero, entities he controls, and others were subsequently held in contempt for violating the gatekeeper provision in the July Order by pursuing claims against Mr. Seery without Judge Jernigan's authorization. *Charitable DAF Fund LP v. Highland Cap. Mgmt., LP*, 2021 Bankr. LEXIS 2074 (Bankr. N.D. Tex. Aug. 3, 2021), *aff'd* 2022 U.S. Dist. LEXIS 175778 (N.D. Tex. Sept. 28, 2022).

efforts to harass HCMLP also include numerous efforts to litigate matters appropriately in front of Judge Jernigan in other courts[20] and four motions to recuse Judge Jernigan.

23. Dugaboy has been an active participant in Mr. Dondero's harassment. Dugaboy joined in each motion to recuse and is currently the protagonist in seven pending actions and appeals against HCMLP.

24. Mr. Dondero's and Dugaboy's harassment of HCMLP and its affiliates and employees forced HCMLP to file a motion in the U.S. District Court for the Northern District of Texas (the "District Court") seeking an order (a) declaring Mr. Dondero, Dugaboy, and other entities controlled by Mr. Dondero "vexatious litigants," (b) enjoining them from commencing or pursuing any claim or cause of action in the District Court or the Bankruptcy Court without written permission, and (c) requiring them to file a copy of order finding them vexatious in any pending or future litigation or proceeding.[21]

25. Of particular relevance here, Mr. Dondero (through proxies, including Dugaboy) has twice attempted to pursue claims against HCMLP for its management of the Select Fund during the HCMLP Case.

26. **Dugaboy's Proof of Claim.** In April 2020, Dugaboy filed a proof of claim in the HCMLP Case (Proof of Claim #131) for $4 million alleging that HCMLP was somehow liable to Dugaboy because of the Select Fund's alleged failure to comply with the Loan Share Agreement. After HCMLP incurred the time and cost of objecting to Dugaboy's claim, Dugaboy withdrew it

[20] *Charitable DAF Fund, L.P., et al v. Highland Cap. Mgmt., L.P., et al*, Case No. 21-cv-0842-B (N.D. Tex. Apr. 12, 2021); *PCMG Trading Partners XXII, L.P. v. Highland Cap. Mgmt., L.P.*, Case No. 21-cv-01169-N (N.D. Tex. May 21, 2021); *The Dugaboy Inv. Tr. v. Highland Cap. Mgmt., L.P.*, Case No. 21-cv-01479-S (N.D. Tex. Jun. 23, 2021); *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, Case No. 21-cv-01710-N (N.D. Tex. Jul. 22, 2021).

[21] *Highland Capital Management, L.P.'s Motion to Deem the Dondero Entities Vexatious Litigants and for Related Relief*, Case No. 3:21-cv-00881-X, Docket No. 136 (N.D. Tex. Jul. 14, 2023); *Highland Capital Management, L.P.'s Memorandum of Law in Support of Its Motion to Deem the Dondero Entities Vexatious Litigants and for Related Relief*, Case No. 3:21-cv-00881-X, Docket No. 137 (N.D. Tex. Jul. 14, 2023).

with prejudice. In withdrawing its claim, Dugaboy conceded that HCMLP's Plan "vests exclusive jurisdiction of the claim of Dugaboy against [Select Fund] in [Judge Jernigan's] Court." HCMLP Case Docket No. 2933 ¶ 5.

27. **PCMG Complaint.** In May 2021, PCMG—another entity controlled by Mr. Dondero (*see* n.2 *supra*)—sued HCMLP in the District Court for breach of fiduciary duty because of HCMLP's alleged mismanagement of the Select Fund.[22] PCMG never served HCMLP with its complaint but instead obtained an *ex parte* stay.[23] HCMLP subsequently moved for reconsideration of the stay order,[24] and the District Court lifted the stay and referred the complaint to Judge Jernigan as a matter related to the HCMLP Case.[25] HCMLP subsequently moved to dismiss the complaint for failure to comply with the Admin Bar Date.[26] After forcing HCMLP to incur substantial costs, PCMG consented to the dismissal of its complaint with prejudice.

28. After Mr. Dondero's efforts to sue HCMLP over the Select Fund failed, Dugaboy filed suit against the Debtors in the U.S. District Court for the Southern District of New York (the "New York Action").[27] The New York Action is the sole reason the Debtors filed these cases. To avoid the costs of these cases, HCMLP offered to waive the balance of the HCMLP Loan and allow Dugaboy to take all remaining cash and investments at Select Fund in complete settlement of all parties' claims. To date, Dugaboy has not responded to that offer.

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[22] *PCMG Trading Partners XXII, L.P. v. Highland Cap. Mgmt., L.P.*, Case No. 21-cv-01169-N, Docket No. 1 (N.D. Tex. May 21, 2021).

[23] *Id.*, Docket No. 6.

[24] *Id.*, Docket No. 8.

[25] *Id.*, Docket No. 19.

[26] *PCMG Trading Partners XXIII, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, Adv. Proc. No. 22-03062-sgj, Docket No. 20 (Bankr. N.D. Tex. Jun. 16, 2022).

[27] *The Dugaboy Inv. Tr. v. Highland Select Equity Master Fund, L.P., et al*, Case No. 23-cv-01636 (S.D.N.Y. Feb. 27, 2023).

V. Dugaboy's Objection to Re-Assignment

29. Not surprisingly, Dugaboy has objected to re-assignment of these cases to Judge Jernigan [Docket No. 17] and, in doing so, ignores the reality of the HCMLP Case. Any investigation into these cases will involve conduct that occurred during, and as part of, the HCMLP Case and, among other things, will require analysis and application of the Gatekeeper, the January and July Orders, the Admin Bar Date, and HCMLP's Plan's discharge and exculpation provisions. Dugaboy cannot alter these indisputable realities nor preclude Judge Jernigan's necessary involvement in the management of these cases by alleging "bias."

30. But, importantly, Dugaboy's allegations of bias are unfounded. Judge Jernigan has ruled—many times—against Dugaboy and Mr. Dondero and made detailed factual findings about Mr. Dondero and his controlled affiliates. The driver of those rulings, however, was Mr. Dondero's conduct, not Judge Jernigan's "bias." Nearly every one of Judge Jernigan's rulings has been affirmed on appeal by the District Court and then by the Fifth Circuit. None of Judge Jernigan's factual findings have been overturned, notwithstanding Mr. Dondero's efforts. Mr. Dondero obviously dislikes Judge Jernigan's decisions, but they are not evidence of Judge Jernigan's bias; they are evidence of Mr. Dondero's vexatiousness.

31. Judge Jernigan made this clear in her two detailed rulings denying Mr. Dondero's many motions to recuse her. *In re Highland Cap. Mgmt., L.P.*, Case No. 19-30454-sgj11, Docket No. 2803 (Bankr. N.D. Tex. Mar. 22, 2021); *In re Highland Cap. Mgmt., L.P.*, 2023 Bankr. LEXIS 579 (Bankr. N.D. Tex. Mar. 5, 2023). Indeed, Judge Jernigan specifically addressed the meritless allegations raised by Dugaboy in its objection to re-assignment including its ludicrous allegations concerning Judge Jernigan's fictional novels. *Highland*, 2023 Bankr. LEXIS 579 at *50-52 ("The Presiding Judge's novels—again entirely fiction—are not about Mr. Dondero or the hedge fund industry in general … there are no characters or entities in her books that have been inspired by or

modeled after [Mr. Dondero and his controlled affiliate]"). Judge Jernigan also noted that Mr. Dondero's motion to recuse "[r]egrettably … contains several misstatements or partial descriptions of events … in several places that create misimpressions" and specifically addressed "[s]ome of the more problematic examples" of Mr. Dondero's mistruths.[28] Mr. Dondero (and Dugaboy) moved to appeal Judge Jernigan's rulings on their recusal motions. The District Court denied both leave to file an interlocutory appeal and the request for a writ of mandamus.[29]

32. Yet, despite these detailed findings, Dugaboy now seeks to have this Court determine Judge Jernigan is too biased to hear the Debtors' cases. That is improper. Mr. Dondero's desire for any judge but Judge Jernigan—notwithstanding her familiarity with, and all but certain involvement in, these cases—is its own brand of forum shopping and should not be countenanced.

33. Dugaboy is also wrong on the law. Judges "have the inherent power to transfer cases from one to another for the expeditious administration of justice." *U.S. v. Stones*, 411 F.3d 597, 598-99 (5th Cir. 1969); *see also Cook v. City of Dallas*, 683 F. App'x. 315, 322-23 (5th Cir. 2017). As evidenced by the Debtors' bankruptcy cases, Mr. Dondero's litigation crusade against HCMLP has metastasized to HCMLP's subsidiaries—subsidiaries that have no personnel of their own and therefore act only through HCMLP and its employees. Accordingly, it is highly likely that the Debtors' bankruptcy cases will affect the HCMLP Case and, wastefully and regrettably, spawn additional lawsuits against HCMLP and its employees, thus triggering the Gatekeeper. Judge Jernigan will be intimately involved in the Debtors' cases regardless of whether they are re-assigned to her. Re-assigning the Debtors' cases will therefore substantially aid judicial economy.

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[28] *Id.* at *27-50.

[29] *Dondero v. Jernigan (In re Highland Cap. Mgmt., L.P.)*, 2022 U.S. Dist. LEXIS 23454 (N.D. Tex. Feb. 9, 2022); Civ. Action No. 3:21-cv-0879-K, Docket Nos. 41, 42.

CONCLUSION

34. For the foregoing reasons, HCMLP respectfully requests that this Court grant (i) the Motion in its entirety and (ii) such other relief as this Court deems just and proper.

Dated: July 14, 2023

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Appendix Exhibit 143

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

In re:	)	Chapter 7
HIGHLAND SELECT EQUITY FUND GP, L.P.,	)	Case No. 23-31039-mvl7
Debtor.	)	

HIGHLAND CAPITAL MANAGEMENT, L.P.'S RESPONSE AND JOINDER TO MOTION TO TRANSFER/REASSIGN CASE

Highland Capital Management, L.P. ("HCMLP"), a creditor and party-in-interest in the above-referenced bankruptcy case, by and through its undersigned counsel, hereby files its response to *Creditor The Dugaboy Investment Trust's Objection to Debtor's Motion to Transfer* [Docket No. 20] and joinder to *Debtor's Motion to Transfer/Reassign Case* [Docket No. 9] (the "Motion") filed by Highland Select Equity Master Fund, L.P. (the "Select Fund") and Highland Select Equity Fund GP, L.P. ("Select GP," and together with the Select Fund, the "Debtors"). In

support of thereof, HCMLP adopts the legal arguments and authorities in the Motion and respectfully states as follows:

PRELIMINARY STATEMENT[1]

1. The Debtors' cases are directly related to and intertwined with the HCMLP Case and should therefore be re-assigned to Judge Jernigan, the judge who has overseen the HCMLP Case since it was transferred to her court in December 2019.

2. HCMLP is one of the Debtors' two creditors. It is indisputable that HCMLP is indirectly the sole limited partner of the Select Fund and owner of Select GP and that the Debtors act through HCMLP. The Debtors' only other purported creditor is Dugaboy, James Dondero's family trust which he controls and of which he is the lifetime beneficiary.

3. Regrettably, Dugaboy has intimated that it intends to investigate (and then pursue) baseless claims against HCMLP, its court-appointed CEO, James P. Seery, Jr., and its other employees arising from acts occurring during the HCMLP Case. While any such investigation (let alone the pursuit of claims) would be a waste of resources, the mere possibility of such an investigation mandates re-assignment of the Debtors' cases to Judge Jernigan because:

- Any such claims would relate to conduct that occurred during the HCMLP Case and was (and still is) subject to Judge Jernigan's oversight;
- Judge Jernigan is thoroughly familiar with provisions of HCMLP's confirmed Plan that will likely apply here, including the discharge and gatekeeper provisions, as well as other applicable orders and deadlines in the HCMLP Case such as the Admin Bar Date; and
- If Dugaboy ever pursues claims against HCMLP or its employees (including Mr. Seery) for conduct arising during the HCMLP Case, Dugaboy would be required pursuant to various "gatekeeper" orders to obtain Judge Jernigan's approval before commencing suit.

4. If these facts were not enough—and they are—Dugaboy previously admitted that any purported claim it has against HCMLP for acts concerning the Debtors must be raised in the

[1] All capitalized terms used, but not defined, in this Preliminary Statement have the meanings given to them below.

HCMLP Case. In April 2020, Dugaboy filed a proof of claim in the HCMLP Case seeking to hold HCMLP liable for the Debtors' alleged obligations to Dugaboy. In response to HCMLP's objection to Dugaboy's claim, Dugaboy acknowledged that HCMLP's "Plan, as part of the gatekeeper provision in the Plan, vests exclusive jurisdiction of the claim of Dugaboy against" the Select Fund in Judge Jernigan's court. HCMLP Case Docket No. 2933 ¶ 5. Notably, Judge Jernigan ultimately disallowed Dugaboy's claim against HCMLP arising from its management of the Debtors with prejudice—thereby raising even more issues of judicial estoppel, collateral estoppel, and *res judicata*.

5. Separately, Mr. Dondero, through yet another controlled shell entity (*i.e.*, PCMG), commenced an action against HCMLP (this time, in the District Court) for alleged mismanagement of the Debtors. After the matter was referred to the Bankruptcy Court and HCMLP moved to dismiss, PCMG stipulated to the dismissal of the adversary proceeding with prejudice.

6. Regrettably, HCMLP believes that Dugaboy (and Mr. Dondero) will attempt to use the Debtors' bankruptcy cases as the latest vehicle to pursue baseless claims against HCMLP and its management and employees—even though any purported claims are barred for myriad reasons and would be subject to the Gatekeeper in HCMLP's Plan in any event. Such suits will indisputably affect HCMLP's bankruptcy estate and implicate the terms of HCMLP's Plan. Judicial economy therefore favors re-assigning these cases to Judge Jernigan as she will be involved in their management under any circumstances.

7. Despite the foregoing, Dugaboy has objected to re-assignment. The objection is ill-founded. The connections between these cases and the HCMLP Case are stark, indisputable, and dispositive. But Dugaboy objects to transfer solely because it dislikes Judge Jernigan, not because she is "biased" as they claim but because she understands Mr. Dondero's games—

litigation as harassment. That is what is going on here. In fact, HCMLP offered to waive its claim against the Debtors and allow Dugaboy, the Debtors' only other creditor, to have all of the Debtors' cash and investments to resolve these cases, after payment of estate expenses. Dugaboy never responded to HCMLP's offer (reiterated on the record before Judge Jernigan) but chose instead to propound more litigation.

JOINDER

I. Background to the Select Fund

8. The Select Fund is a Bermuda-based limited partnership that is managed by its general partner, Select GP. HCMLP is indirectly the sole limited partner of the Select Fund[2] and the owner of Select GP. The Select Fund's former investment manager was HCMLP. Prior to the filings, the Debtors had no employees and could act only through HCMLP.

9. Prior to HCMLP's bankruptcy in October 2019, James Dondero, a founder of HCMLP and its former Chief Executive Officer, controlled the Select Fund, Select GP, HCMLP, and Dugaboy.

10. Historically, the Select Fund had one asset: a prime brokerage account with Jefferies, which held a portfolio of liquid and illiquid securities (the "Jefferies Account"). The Select Fund was managed by HCMLP, then under the control of Mr. Dondero, and securities would be bought and sold in the Jefferies Account at Mr. Dondero's direction. Mr. Dondero also directed the Select Fund to borrow money from Jefferies on margin. The loans Mr. Dondero obtained from Jefferies were secured by the securities in the Jefferies Account and the proceeds were used to

[2] The Select Fund has one limited partner: Highland Select Equity Fund, L.P. ("Equity Fund"). Equity Fund is 100% owned by the Highland Claimant Trust. Prior to February 2021, PCMG Trading Partners XXIII, L.P. ("PCMG"), held a 0.024% limited partnership interest in Equity Fund. PCMG's limited partners are Mr. Dondero and Mark Okada, HCMLP's co-founder. Mr. Dondero holds 75% of PCMG's limited partnership interest and Mr. Okada holds the remainder. PCMG's general partner is Strand Advisors III, Inc., which is 100% owned and controlled by Mr. Dondero. PCMG's interest in Equity Fund was redeemed for cash in February 2021.

purchase more securities, which in turn were pledged to Jefferies. Mr. Dondero historically caused the Select Fund to borrow as much as was allowed against the securities in the Jefferies Account.

11. The Debtors have two creditors. HCMLP loaned the Select Fund $3 million (with the consent of the Committee) in March 2020 (the "HCMLP Loan") with the proceeds being used to fund a margin call from Jefferies.[3] The Debtors only other alleged creditor is The Dugaboy Investment Trust ("Dugaboy"). Dugaboy is Mr. Dondero's family trust of which Mr. Dondero is the lifetime beneficiary that previously held a 0.1866% limited partnership interest in HCMLP. Dugaboy's claim against the Debtors arises from a master securities lending agreement pursuant to which Dugaboy loaned the Select Fund certain equity securities (the "Loan Share Agreement"), which Mr. Dondero caused to be contributed to the Jefferies Account to allow Mr. Dondero to meet a then-outstanding margin call in October 2014.

II. HCMLP's Bankruptcy; Liquidation of the Jefferies Account

12. On October 16, 2019 (the "HCMLP Petition Date"), HCMLP filed for bankruptcy protection in the U.S. Bankruptcy Court for the District of Delaware (the "HCMLP Case").[4] At the request of HCMLP's creditors, the HCMLP Case was transferred to the U.S. Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Bankruptcy Court"), to be overseen by The Honorable Stacey Jernigan, in large part because of her familiarity with Mr. Dondero and certain of the entities he then controlled.[5]

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[3] In May 2022, the Select Fund paid HCMLP approximately $363,000 on the HCMLP Loan, which represented HCMLP's *pro rata* share of the Select Fund's assets after setting an expense reserve of $100,000 and, assuming no default interest on the HCMLP Loan, leaving approximately $639,000 in cash at Select Fund.

[4] The HCMLP Case is styled as *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj11.

[5] Judge Jernigan's familiarity with Mr. Dondero came from her presiding over *In re Acis Capital Management, L.P.*, Case No. 18-30264-sgj-11 (Bankr. N.D. Tex.). Acis Capital Management, L.P., was a former HCMLP subsidiary, which was put into an involuntary bankruptcy after Mr. Dondero refused to pay an $8 million arbitration award to a former employee and instead chose to strip Acis of assets to make it judgment proof. *Acis* was marked by extremely acrimonious litigation brought by Mr. Dondero against his former employee through a series of controlled proxies. *See, e.g., In re Acis Cap. Mgmt., L.P.*, 2019 Bankr. LEXIS 292 (Bankr. N.D. Tex. Jan. 31, 2019); *In re Acis Cap. Mgmt., L.P.*, 584 B.R. 115 (Bankr. N.D. Tex. Apr. 13, 2018).

13. As of the month end prior to the HCMLP Petition Date, the Select Fund held approximately $171 million in long equity positions and $41 million of short equity positions in the Jefferies Account; had pledged those securities to secure $119 million in loans from Jefferies; and owed $1.1 million on an outstanding margin call in the Jefferies Account.

14. After HCMLP's creditors and the U.S. Trustee raised concerns about Mr. Dondero's ability to serve as an estate fiduciary because of his history of self-dealing, creditor-avoidance asset transfers, and other breaches of fiduciary duty, HCMLP, its official committee of unsecured creditors (the "Committee"), and Mr. Dondero entered into a settlement intended to avoid the appointment of a chapter 11 trustee. The settlement was approved by Judge Jernigan on January 9, 2020 [HCMLP Case Docket No. 339] (the "January Order").[6] Pursuant to the January Order:

- Mr. Dondero was removed from control of HCMLP and an independent board was appointed (the "Independent Board");[7] Mr. Dondero, however, remained an unpaid Highland portfolio manager.
- A "gatekeeper" provision was instituted prohibiting the pursuit or commencement of litigation against the Independent Directors without Judge Jernigan's prior authorization and limiting claims to those arising from willful misconduct or gross negligence.[8]
- A series of operating protocols were enacted which required HCMLP to seek Committee approval (and in some instances court approval) prior to entering into nearly any transaction, including transactions in the Jefferies Account [HCMLP Case Docket Nos. 354; 466] (the "Operating Protocols").

[6] Notwithstanding the January Order, the U.S. Trustee still pressed for the appointment of a chapter 11 trustee. [HCMLP Case Docket No. 271].

[7] The Independent Board was comprised of retired bankruptcy judge Russell Nelms, John Dubel, and James P. Seery, Jr. (the "Independent Directors").

[8] January Order ¶ 10 ("No entity may commence or pursue a claim or cause of action of any kind against any Independent Director . . . relating in any way to the Independent Director's role as an independent director ... 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 ...."). On July 16, 2020, Judge Jernigan approved Mr. Seery's appointment as HCMLP's chief executive officer and chief restructuring officer [HCMLP Case Docket No. 854] (the "July Order"). Like the January Order, the July Order prohibited litigation against Mr. Seery without Judge Jernigan's prior authorization and limited claims to those arising from willful misconduct or gross negligence. July Order ¶ 5.

15. During the fourth quarter of 2019 and first quarter of 2020, the Jefferies Account was often in margin deficit with the Select Fund (then managed by Mr. Dondero), routinely pushing back on requests to meet margin calls. In the first and second quarters of 2020, the margin shortfalls became much more acute as the world economy experienced global-pandemic-induced economic distress causing the market, including the value of the securities in the Jefferies Account, to plummet. The decline in value quickly eroded the equity in the Jefferies Account and caused a default allowing Jefferies to seize the Jefferies Account and liquidate essentially all the Select Fund's assets—including any securities allegedly loaned to the Select Fund by Dugaboy—to cover the amounts owed to Jefferies.

16. By June 30, 2020, Jefferies had substantially liquidated the Jefferies Account to repay Select Fund's loan, leaving the Jefferies Account with *de minimis* cash and illiquid investments.

III. Mr. Dondero's Attempts to "Burn [Highland] Down" and the Gatekeeper

17. In the fall of 2020, with the Committee refusing to capitulate to his demands, Mr. Dondero and his controlled entities, like Dugaboy, began interfering with HCMLP's management, threatening HCMLP's employees, and threatening to "burn [HCMLP] down."[9] Mr. Dondero's actions led Judge Jernigan to issue a temporary restraining order (the "TRO") against him,[10] which he promptly violated.[11]

[9] Confirmation Order (defined below), ¶¶ 74(b); 78.

[10] *Highland Cap. Mgmt., L.P. v. Dondero*, Adv. Pro. No. 20-03190-sgj, Docket No. 10 (Bankr. N.D. Tex. Dec. 10, 2020).

[11] Mr. Dondero was held in contempt for violating the TRO. *Highland Cap. Mgmt., L.P. v. Dondero (In re Highland Cap. Mgmt., L.P.)*, 2021 Bankr. LEXIS 1533 (Bankr. N.D. Tex. Jun. 7, 2021), *aff'd* 3:21-cv-01590-N, Docket No. 42 (N.D. Tex. Aug. 17, 2022).

18. On February 22, 2021, Judge Jernigan entered the Confirmation Order[12] confirming HCMLP's Plan.[13] HCMLP's Plan included a gatekeeper provision (the "Gatekeeper")[14] prohibiting "Enjoined Parties," like Dugaboy and Mr. Dondero, from bringing claims against "Protected Parties," like HCMLP and its employees and management, unless Judge Jernigan first determines the claims to be "colorable." The Gatekeeper was adopted (i) as a direct result of Mr. Dondero's history of harassing and costly litigation[15] and (ii) to prevent harassment of HCMLP's estate and abuse of judicial resources.[16]

19. Judge Jernigan also found, as a matter of fact, that Dugaboy and approximately 40 other entities were "marching pursuant to the orders of Mr. Dondero"[17] and objecting to the Plan, not to protect economic interests, but "to be disruptors."[18]

20. In addition to the Gatekeeper and numerous factual findings concerning Mr. Dondero's use of proxies to harass HCMLP, the Plan also included:

- A discharge of HCMLP under 11 U.S.C. § 1141(d)(1)(A) (Plan, Art. IX.B);
- An injunction prohibiting "Enjoined Parties," like Dugaboy, from pursuing claims against HCMLP or that affect its property, among other enjoined actions (*id.*, Art. IX.F);

[12] "Confirmation Order" refers to the *Order (i) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (ii) Granting Related Relief* [HCMLP Case Docket No. 1943].

[13] "Plan" refers to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* [HCMLP Case Docket No. 1808].

[14] Plan, Art. IX.F.

[15] Confirmation Order, ¶ 77 ("During the last several months, Mr. Dondero and the Dondero Related Entities [including Dugaboy] have harassed [HCMLP], which has resulted in further substantial, costly, and time-consuming litigation for the Debtor.").

[16] *Id.*, ¶ 79 ("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 abuse of judicial time*** that properly could be used to consider the meritorious claims of other litigants.") (emphasis added).

[17] *See, e.g., id.* ¶ 19

[18] *See, e.g., id.* ¶ 17

- An exculpation provision limiting claims against Mr. Seery, in his role as an Independent Director, to those arising "from willful misconduct, criminal misconduct, or gross negligence" (*id.*, Art. IV.D); and

- An administrative bar date (the "Admin Bar Date") requiring all administrative claims against HCMLP to have been filed in the HCMLP Case by September 25, 2021 (*id.*, Art. II.A).

HCMLP's Plan, including the Gatekeeper, became effective on August 11, 2021. [HCMLP Case Docket No. 2700].

21. The Confirmation Order, including the Gatekeeper, was affirmed in all relevant respects by the Fifth Circuit. *NexPoint Advisors L.P. v. Highland Cap. Mgmt., L.P.* (*In re Highland Cap. Mgmt., L.P.*), 48 F.4th 419, 425–26, 435–39 (5th Cir. 2022). The factual findings in the Confirmation Order regarding Mr. Dondero's direct and indirect harassment of HCMLP were not challenged or disturbed on appeal.

IV. Mr. Dondero's (and Dugaboy's) Continued Efforts to Harass HCMLP

22. Notwithstanding the Plan, the Gatekeeper, and two orders holding him in contempt of court,[19] Mr. Dondero has not been cowed and, with his controlled entities, is currently involved in 30 proceedings against or affecting HCMLP—but those proceedings are a fraction of the litigation compounded against HCMLP, its estate, and its management by Mr. Dondero. The docket in the HCMLP Case contains nearly 3,900 entries; over 15 adversary proceedings have been filed by or against Mr. Dondero and his controlled affiliates; and Mr. Dondero and his controlled affiliates have filed over 25 appeals from Bankruptcy Court orders. Mr. Dondero's

[19] Mr. Dondero was held in contempt for violating the TRO (*see* n.11 *supra*). Separately, Mr. Dondero, entities he controls, and others were subsequently held in contempt for violating the gatekeeper provision in the July Order by pursuing claims against Mr. Seery without Judge Jernigan's authorization. *Charitable DAF Fund LP v. Highland Cap. Mgmt., LP*, 2021 Bankr. LEXIS 2074 (Bankr. N.D. Tex. Aug. 3, 2021), *aff'd* 2022 U.S. Dist. LEXIS 175778 (N.D. Tex. Sept. 28, 2022).

efforts to harass HCMLP also include numerous efforts to litigate matters appropriately in front of Judge Jernigan in other courts[20] and four motions to recuse Judge Jernigan.

23. Dugaboy has been an active participant in Mr. Dondero's harassment. Dugaboy joined in each motion to recuse and is currently the protagonist in seven pending actions and appeals against HCMLP.

24. Mr. Dondero's and Dugaboy's harassment of HCMLP and its affiliates and employees forced HCMLP to file a motion in the U.S. District Court for the Northern District of Texas (the "District Court") seeking an order (a) declaring Mr. Dondero, Dugaboy, and other entities controlled by Mr. Dondero "vexatious litigants," (b) enjoining them from commencing or pursuing any claim or cause of action in the District Court or the Bankruptcy Court without written permission, and (c) requiring them to file a copy of order finding them vexatious in any pending or future litigation or proceeding.[21]

25. Of particular relevance here, Mr. Dondero (through proxies, including Dugaboy) has twice attempted to pursue claims against HCMLP for its management of the Select Fund during the HCMLP Case.

26. **Dugaboy's Proof of Claim.** In April 2020, Dugaboy filed a proof of claim in the HCMLP Case (Proof of Claim #131) for $4 million alleging that HCMLP was somehow liable to Dugaboy because of the Select Fund's alleged failure to comply with the Loan Share Agreement. After HCMLP incurred the time and cost of objecting to Dugaboy's claim, Dugaboy withdrew it

[20] *Charitable DAF Fund, L.P., et al v. Highland Cap. Mgmt., L.P., et al*, Case No. 21-cv-0842-B (N.D. Tex. Apr. 12, 2021); *PCMG Trading Partners XXII, L.P. v. Highland Cap. Mgmt., L.P.*, Case No. 21-cv-01169-N (N.D. Tex. May 21, 2021); *The Dugaboy Inv. Tr. v. Highland Cap. Mgmt., L.P.*, Case No. 21-cv-01479-S (N.D. Tex. Jun. 23, 2021); *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.*, Case No. 21-cv-01710-N (N.D. Tex. Jul. 22, 2021).

[21] *Highland Capital Management, L.P.'s Motion to Deem the Dondero Entities Vexatious Litigants and for Related Relief*, Case No. 3:21-cv-00881-X, Docket No. 136 (N.D. Tex. Jul. 14, 2023); *Highland Capital Management, L.P.'s Memorandum of Law in Support of Its Motion to Deem the Dondero Entities Vexatious Litigants and for Related Relief*, Case No. 3:21-cv-00881-X, Docket No. 137 (N.D. Tex. Jul. 14, 2023).

with prejudice. In withdrawing its claim, Dugaboy conceded that HCMLP's Plan "vests exclusive jurisdiction of the claim of Dugaboy against [Select Fund] in [Judge Jernigan's] Court." HCMLP Case Docket No. 2933 ¶ 5.

27. **PCMG Complaint.** In May 2021, PCMG—another entity controlled by Mr. Dondero (*see* n.2 *supra*)—sued HCMLP in the District Court for breach of fiduciary duty because of HCMLP's alleged mismanagement of the Select Fund.[22] PCMG never served HCMLP with its complaint but instead obtained an *ex parte* stay.[23] HCMLP subsequently moved for reconsideration of the stay order,[24] and the District Court lifted the stay and referred the complaint to Judge Jernigan as a matter related to the HCMLP Case.[25] HCMLP subsequently moved to dismiss the complaint for failure to comply with the Admin Bar Date.[26] After forcing HCMLP to incur substantial costs, PCMG consented to the dismissal of its complaint with prejudice.

28. After Mr. Dondero's efforts to sue HCMLP over the Select Fund failed, Dugaboy filed suit against the Debtors in the U.S. District Court for the Southern District of New York (the "New York Action").[27] The New York Action is the sole reason the Debtors filed these cases. To avoid the costs of these cases, HCMLP offered to waive the balance of the HCMLP Loan and allow Dugaboy to take all remaining cash and investments at Select Fund in complete settlement of all parties' claims. To date, Dugaboy has not responded to that offer.

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[22] *PCMG Trading Partners XXII, L.P. v. Highland Cap. Mgmt., L.P.*, Case No. 21-cv-01169-N, Docket No. 1 (N.D. Tex. May 21, 2021).

[23] *Id.*, Docket No. 6.

[24] *Id.*, Docket No. 8.

[25] *Id.*, Docket No. 19.

[26] *PCMG Trading Partners XXIII, L.P. v. Highland Cap. Mgmt., L.P. (In re Highland Cap. Mgmt., L.P.)*, Adv. Proc. No. 22-03062-sgj, Docket No. 20 (Bankr. N.D. Tex. Jun. 16, 2022).

[27] *The Dugaboy Inv. Tr. v. Highland Select Equity Master Fund, L.P., et al*, Case No. 23-cv-01636 (S.D.N.Y. Feb. 27, 2023).

V. Dugaboy's Objection to Re-Assignment

29. Not surprisingly, Dugaboy has objected to re-assignment of these cases to Judge Jernigan [Docket No. 20] and, in doing so, ignores the reality of the HCMLP Case. Any investigation into these cases will involve conduct that occurred during, and as part of, the HCMLP Case and, among other things, will require analysis and application of the Gatekeeper, the January and July Orders, the Admin Bar Date, and HCMLP's Plan's discharge and exculpation provisions. Dugaboy cannot alter these indisputable realities nor preclude Judge Jernigan's necessary involvement in the management of these cases by alleging "bias."

30. But, importantly, Dugaboy's allegations of bias are unfounded. Judge Jernigan has ruled—many times—against Dugaboy and Mr. Dondero and made detailed factual findings about Mr. Dondero and his controlled affiliates. The driver of those rulings, however, was Mr. Dondero's conduct, not Judge Jernigan's "bias." Nearly every one of Judge Jernigan's rulings has been affirmed on appeal by the District Court and then by the Fifth Circuit. None of Judge Jernigan's factual findings have been overturned, notwithstanding Mr. Dondero's efforts. Mr. Dondero obviously dislikes Judge Jernigan's decisions, but they are not evidence of Judge Jernigan's bias; they are evidence of Mr. Dondero's vexatiousness.

31. Judge Jernigan made this clear in her two detailed rulings denying Mr. Dondero's many motions to recuse her. *In re Highland Cap. Mgmt., L.P.*, Case No. 19-30454-sgj11, Docket No. 2803 (Bankr. N.D. Tex. Mar. 22, 2021); *In re Highland Cap. Mgmt., L.P.*, 2023 Bankr. LEXIS 579 (Bankr. N.D. Tex. Mar. 5, 2023). Indeed, Judge Jernigan specifically addressed the meritless allegations raised by Dugaboy in its objection to re-assignment including its ludicrous allegations concerning Judge Jernigan's fictional novels. *Highland*, 2023 Bankr. LEXIS 579 at *50-52 ("The Presiding Judge's novels—again entirely fiction—are not about Mr. Dondero or the hedge fund industry in general … there are no characters or entities in her books that have been inspired by or

modeled after [Mr. Dondero and his controlled affiliate]"). Judge Jernigan also noted that Mr. Dondero's motion to recuse "[r]egrettably … contains several misstatements or partial descriptions of events … in several places that create misimpressions" and specifically addressed "[s]ome of the more problematic examples" of Mr. Dondero's mistruths.[28] Mr. Dondero (and Dugaboy) moved to appeal Judge Jernigan's rulings on their recusal motions. The District Court denied both leave to file an interlocutory appeal and the request for a writ of mandamus.[29]

32. Yet, despite these detailed findings, Dugaboy now seeks to have this Court determine Judge Jernigan is too biased to hear the Debtors' cases. That is improper. Mr. Dondero's desire for any judge but Judge Jernigan—notwithstanding her familiarity with, and all but certain involvement in, these cases—is its own brand of forum shopping and should not be countenanced.

33. Dugaboy is also wrong on the law. Judges "have the inherent power to transfer cases from one to another for the expeditious administration of justice." *U.S. v. Stones*, 411 F.3d 597, 598-99 (5th Cir. 1969); *see also Cook v. City of Dallas*, 683 F. App'x. 315, 322-23 (5th Cir. 2017). As evidenced by the Debtors' bankruptcy cases, Mr. Dondero's litigation crusade against HCMLP has metastasized to HCMLP's subsidiaries—subsidiaries that have no personnel of their own and therefore act only through HCMLP and its employees. Accordingly, it is highly likely that the Debtors' bankruptcy cases will affect the HCMLP Case and, wastefully and regrettably, spawn additional lawsuits against HCMLP and its employees, thus triggering the Gatekeeper. Judge Jernigan will be intimately involved in the Debtors' cases regardless of whether they are re-assigned to her. Re-assigning the Debtors' cases will therefore substantially aid judicial economy.

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[28] *Id.* at *27-50.

[29] *Dondero v. Jernigan (In re Highland Cap. Mgmt., L.P.)*, 2022 U.S. Dist. LEXIS 23454 (N.D. Tex. Feb. 9, 2022); Civ. Action No. 3:21-cv-0879-K, Docket Nos. 41, 42.

CONCLUSION

34. For the foregoing reasons, HCMLP respectfully requests that this Court grant (i) the Motion in its entirety and (ii) such other relief as this Court deems just and proper.

Dated: July 14, 2023

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Appendix Exhibit 144

The following constitutes the ruling of the court and has the force and effect therein described.

Signed August 25, 2023

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.,	§	
	§	**Case No. 19-34054-sgj-11**
Reorganized Debtor.	§	

MEMORANDUM OPINION AND ORDER PURSUANT TO PLAN "GATEKEEPER PROVISION" AND PRE-CONFIRMATION "GATEKEEPER ORDERS": DENYING HUNTER MOUNTAIN INVESTMENT TRUST'S EMERGENCY MOTION FOR LEAVE TO FILE VERIFIED ADVERSARY PROCEEDING[1]
[BANKR. DKT. NOS. 3699, 3760, 3815, and 3816]

I. INTRODUCTION

BEFORE THIS COURT is yet another post-confirmation dispute relating to the Chapter 11 bankruptcy case of Highland Capital Management, L.P. ("Highland" or "Reorganized Debtor").

[1] On August 2, 2023, this court signed an Order [Bankr. Dkt. No. 3897] that was agreed to among various parties, after the filing of a Motion to Stay and Compel Mediation [Bankr. Dkt. No. 3752] filed by James D. Dondero and related entities. Pursuant to paragraph 7 of that order, certain pending matters in the bankruptcy court are stayed pending mediation. The parties did not agree to stay the matter addressed in this Memorandum Opinion and Order.

It is now more than two and half years since the confirmation of Highland's Plan[2]—the Plan having been confirmed on February 22, 2021.[3] The Plan was never stayed; it went effective on August 11, 2021 ("Effective Date"), and it was affirmed almost in its entirety by the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"), in late summer 2022, including an approval of the so-called Gatekeeper Provision[4] therein. The Gatekeeper Provision—and how and whether it should now be exercised or interpreted to allow a certain lawsuit to be filed—is at the heart of the current *Emergency Motion for Leave to File Verified Adversary Proceeding* [Bankr. Dkt. Nos. 3699, 3760, 3815, 3816] (collectively, the "Motion for Leave") filed by a movant known as Hunter Mountain Investment Trust ("HMIT").

A. Who is the Movant, HMIT?

Who is HMIT? It is undisputed that it is a former equity owner of Highland. It held 99.5% of Highland's Class B/C limited partnership interests and was classified in a Class 10 under the confirmed Plan, which class treatment provided it with a contingent interest in the Highland Claimant Trust ("Claimant Trust") created under the Plan, and as defined in the Claimant Trust Agreement. This means that HMIT could receive consideration under the Plan if all claims against Highland are ultimately paid in full, with interest. As later further discussed, it is undisputed that

[2] Capitalized terms not defined in this introduction shall have the meaning ascribed to them below.

[3] The court entered its *Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified) and (II) Granting Related Relief* ("Confirmation Order")[Bankr. Dkt. No. 1943].

[4] In an initial opinion dated August 19, 2022, the Fifth Circuit affirmed the Confirmation Order in large part, "revers[ing] only insofar as the plan exculpates certain non-debtors in violation of 11 U.S.C. § 524(e), strik[ing] those few parties from the plan's exculpation, and affirm[ing] on all remaining grounds." *In re Highland Capital Management, L.P.*, No. 21-10449, 2022 WL 3571094, at *1 (5th Cir. Aug. 19, 2022). On September 7, 2022, following a petition for limited panel rehearing filed by certain appellants on September 2, 2022, "for the limited purpose of clarifying and confirming one part of its August 19, 2022 opinion," the Fifth Circuit withdrew its original opinion and replaced it with its opinion reported at *NexPoint Advisors, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th 419, 424 (5th Cir. 2022). The substituted opinion differed from the original opinion only by the replacement of one sentence from section "IV(E)(2) – *Injunction and Gatekeeper Provisions*" of the original opinion: "The injunction and gatekeeper provisions are, on the other hand, perfectly lawful." was replaced with "We now turn to the Plan's injunction and gatekeeper provisions." In all other respects, the Fifth Circuit panel's original ruling remained unchanged. Petitions for writs of certiorari regarding the Confirmation Order have been pending at the United States Supreme Court since January 2023.

HMIT's only asset is its contingent interest in the Claimant Trust. It has no employees or revenue. HMIT's representative has testified that HMIT is liable on more than $62 million of indebtedness owed to The Dugaboy Investment Trust ("Dugaboy"), a family trust of which James Dondero ("Dondero"), the co-founder and former chief executive officer ("CEO") of Highland, and his family members are beneficiaries, and that Dugaboy also is paying HMIT's legal fees. HMIT vehemently disputes the suggestion that it is controlled by Dondero.

B. What Does the Movant HMIT Seek Leave to File?

HMIT seeks leave to file an adversary proceeding ("Proposed Complaint")[5] in the bankruptcy court to bring claims on behalf of itself and, derivatively, on behalf of the Reorganized Debtor and the Claimant Trust for alleged breach of fiduciary duties by the Reorganized Debtor's CEO and Claimant Trustee, James P. Seery, Jr. ("Seery") and conspiracy against: (1) Seery; and (2) purchasers of $365 million face amount of ***allowed*** unsecured claims in this case, who purchased their claims post-confirmation but prior to the occurrence of the Effective Date of the Plan ("Claims Purchasers,"[6] and with Seery, the "Proposed Defendants"). To be clear (and as later further explained), the claims acquired by the Claims Purchasers were acquired by them after extensive litigation, mediation, and settlements were approved by the bankruptcy court and after the original claims-holders had voted on the Plan and after Plan confirmation. As later explained,

[5] In its original Motion for Leave filed at Bankruptcy Docket No. 3699 on March 28, 2023, HMIT sought leave to file the proposed complaint ("Initial Proposed Complaint") attached as Exhibit 1 to the Motion for Leave. Nearly a month later, on April 23, 2023, HMIT filed a *Supplement to Emergency Motion for Leave to File Verified Adversary Proceeding* ("Supplement") [Bankr. Dkt. No. 3760], a revised proposed complaint as Exhibit 1-A, and stating that "[t]he Supplement is not intended to supersede the [Motion for Leave]; rather, it is intended as a supplement to address procedural matters and to bring forth additional facts that further confirm the appropriateness of the derivative action." Supplement, ¶ 1 and Exhibit 1-A. It is this revised proposed complaint to which this court will refer, when it uses the defined term "Proposed Complaint," even though HMIT filed redacted versions of its Motion for Leave on June 5, 2023 at Bankruptcy Docket Nos. 3815 and 3816 that attached the Initial Proposed Complaint as Exhibit 1.

[6] The Claims Purchasers identified in the Proposed Complaint are Farallon Capital Management, LLC ("Farallon"); Muck Holdings, LLC ("Muck"), which is a special purpose entity created by Farallon to purchase allowed unsecured claims against Highland; Stonehill Capital Management, LLC ("Stonehill"); and Jessup Holdings, LLC ("Jessup"), which is a special purpose entity created by Stonehill to purchase allowed unsecured claims against Highland.

the Claims Purchasers filed notices of their purchases as required by Bankruptcy Rule 3001(e)(2), and no objections were filed thereto. In any event, various damages or remedies are sought against the Proposed Defendants revolving around the Claims Purchasers' claims purchasing activities.

C. Why Does HMIT Need to Seek Leave?

As alluded to above, HMIT filed its Motion for Leave to comply with the provision in the Plan known as a "gatekeeper" provision ("Gatekeeper Provision") and with this court's prior gatekeeper orders entered in January and July 2020, which all require that, before a party may commence or pursue claims relating to the bankruptcy case against certain protected parties, it must first obtain (1) a finding from the bankruptcy court that its proposed claims ("Proposed Claims") are "colorable"; and (2) specific authorization by the bankruptcy court to pursue the Proposed Claims.[7] The Gatekeeper Provision was not included in the Plan *sans raison*. Indeed, as the Fifth Circuit recognized in affirming confirmation of the Plan, the Gatekeeper Provision (along with the other "protection provisions" in the Plan) had been included in the Plan to address the "continued litigiousness" of Mr. James Dondero ("Dondero"), Highland's co-founder and former chief executive officer ("CEO"), that began prepetition and escalated following the post-petition "nasty breakup" between Highland and Dondero, by "screen[ing] and prevent[ing] bad-faith litigation against Highland Capital, its successors, and other bankruptcy participants that could disrupt the Plan's effectiveness."[8]

[7] To be clear, the Gatekeeper Provision in the Plan was not the first or even second injunction of its type issued in this bankruptcy case. The Gatekeeper Orders were entered by the bankruptcy court pre-confirmation: (a) in January 2020, just a few months into the case, as part of this court's order approving a corporate governance settlement between Highland and its unsecured creditors committee, in which Dondero, Highland's co-founder and former CEO, was removed from any management role at Highland and three independent directors ("Independent Directors") were appointed in lieu of a chapter 11 trustee being appointed ("January 2020 Order"); and (b) in July 2020, in this court's order authorizing the employment of Seery (one of the three Independent Directors) as the Debtor's new Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative ("July 2020 Order," together with the January 2020 Order, the "Gatekeeper Orders").

[8] *See Highland Capital*, 48 F.4th at 427, 435.

D. Some Further Context Regarding Post-Confirmation Litigation Generally.

Since confirmation of the Plan, hundreds of millions of dollars have been paid out to creditors under the Plan, and there are numerous adversary proceedings and contested matters still pending, at various stages of litigation, in the bankruptcy court, the district court, and the Fifth Circuit, almost exclusively involving Dondero and entities that he owns or controls. To be sure, the post-confirmation litigation in this case does not consist of the usual adversaries and contested matters one typically sees by and against a reorganized debtor and/or litigation trustee, such as preference or other avoidance actions and litigation over objections to claims that are still pending after confirmation of a plan. Indeed, the claims of the largest creditors in this case (with claims asserted in the aggregate of more than one billion dollars) were successfully mediated and incorporated into the Plan—a plan which was ultimately accepted by the votes of an overwhelming majority of Highland's non-insider creditors. Dondero and entities under his control were the only parties who appealed the Confirmation Order, and Dondero and entities under his control have been the appellants in virtually every appeal that has been filed regarding this bankruptcy case. Petitions for writs of mandamus (which have been denied) have been filed in the district court and in the Fifth Circuit by some of these same entities, including one by HMIT, when this court denied setting an ***emergency*** hearing on the instant Motion for Leave (HMIT had sought a setting on three-days' notice).

A recent list of active matters involving Dondero and/or entities and/or individuals affiliated or associated with him, filed in the bankruptcy case by Highland and the Claimant Trust, reveals that there were at least 30 pending and "Active Dondero-Related Litigation" matters as of July 14, 2023: six (6) proceedings in this court; six (6) active appeals or actions are pending in the District Court for the Northern District of Texas; seven (7) appeals in the Fifth Circuit; two (2)

petitions for writs of certiorari in the United States Supreme Court; and nine (9) other proceedings or actions with or affecting the Highland Parties ("Highland," the "Claimant Trust," and "Seery") in various other state, federal, and foreign jurisdictions.[9]

The above-described context is included because the Proposed Defendants assert that the Motion for Leave is just a continuation of Dondero's unrelenting barrage of meritless and harassing litigation, making good on his oft-mentioned alleged threat to "burn down the place" after not achieving the results he wanted in the Highland bankruptcy case. Indeed, the Motion for Leave was filed after two years of unsuccessful attempts by, first, Dondero personally, and then HMIT to obtain pre-suit discovery from the Proposed Defendants (i.e., the Claims Purchasers) through two different Texas state court proceedings, pursuant to Tex. R. Civ. P. 202 ("Rule 202"). In each of these Rule 202 proceedings, Dondero and HMIT espoused the same Seery/Claims

[9] *See* Bankr. Dkt. No. 3880 (filed on July 14, 2023, providing a list of "Active Dondero-Related Litigation" and noting that the list is "a summary of active pending actions only and does not include actions that were resolved by final orders, including actions finally resolved after appeals to the U.S. District Court for the Northern District of Texas and/or the U.S. Court of Appeals for the Fifth Circuit."). Just since the filing by the Highland Parties of the list, ***three*** of the appeals pending in the Fifth Circuit have been decided against the Dondero-related appellants, two of which upheld the district court's dismissal of appeals by Dondero-related entities of bankruptcy court orders based on the lack of bankruptcy appellate standing on behalf of the appellant. On July 19, 2023, the Fifth Circuit affirmed the district court's dismissal of an appeal by NexPoint Advisors, L.P. ("NexPoint") of bankruptcy court orders approving professional compensation on the basis that NexPoint did not meet the bankruptcy appellate standing test of being a "person aggrieved" by the entry of the orders. *NexPoint Advisors, L.P. v. Pachulski Stang Ziehl & Jones, L.L.P. (In re Highland Capital Management, L.P.)*, 74 F.4th 361 (5th Cir. 2023). On July 31, 2023, the Fifth Circuit affirmed the district court's dismissal of an appeal by Dugaboy—the Dondero family trust that, like the movant here in this Motion for Leave, was the holder of a limited partnership interest in Highland, and, as such, now has a contingent interest in the Claimant Trust—which had appealed a bankruptcy court order approving a Rule 9019 settlement on the same basis: Dugaboy did not meet the bankruptcy appellate standing test of being a "person aggrieved" by the entry of the settlement order. *The Dugaboy Inv. Tr. v. Highland Capital Mgt., L.P. (In re Highland Capital Mgt., L.P.)*, No. 22-10960, 2023 WL 4861770 (5th Cir. July 31, 2023). The July 31, 2023 ruling followed the Fifth Circuit's ruling on February 21, 2023, affirming the district court's dismissal of an appeal by Dugaboy of yet another bankruptcy court order for lack of bankruptcy appellate standing. *The Dugaboy Inv. Tr. v. Highland Capital Mgt., L.P. (In re Highland Capital Mgt., L.P.)*, No. 22-10831, 2023 WL 2263022 (5th Cir. Feb. 28, 2023). These rulings by the Fifth Circuit are discussed in greater detail below. The third ruling by the Fifth Circuit since July 14, 2023, was issued by the Fifth Circuit in a per curium opinion not designated for publication on July 26, 2023, this one affirming the district court's affirmance of yet another Rule 9019 settlement order of the bankruptcy court that was appealed by Dugaboy, agreeing with the district court that the bankruptcy court had jurisdiction to approve a settlement among the Debtor, an entity affiliated with the Debtor but not a debtor itself, and UBS (the Debtor's largest prepetition creditor and the seller of its claims to the Claims Purchasers, which is one of the claims trading transactions HMIT complains about in the Proposed Complaint). *See The Dugaboy Inv. Tr. v. Highland Capital Mgt., L.P.*, No. 22-10983, 2023 WL 4842320 (5th Cir. July 26, 2023).

Purchasers conspiracy theory espoused in the Motion for Leave—that Seery must have provided one or more of the Claims Purchasers with material nonpublic information to induce them to want to purchase large, allowed, unsecured claims at a discount; a *quid pro quo* is suggested, such that the Claims Purchasers were allegedly told they would make a hefty profit on the claims they purchased and, in return, they would gladly "rubber stamp" Seery's "excessive compensation" as the Claimant Trustee of the Claimant Trust. In sum, HMIT alleges this constituted wrongful "insider trading" of the bankruptcy claims. In addition, certain lawyers for Dondero and Dugaboy sent letters reporting this alleged conspiracy and "insider trading" to the Texas State Securities Board ("TSSB") and the Executive Office of the United States Trustee ("EOUST").

It is against this background and in this context that the court must analyze, in the exercise of its gatekeeping function under the confirmed Plan and its prior Gatekeeping Orders, whether HMIT should be allowed to pursue the Proposed Claims (i.e., whether the Proposed Claims are "colorable" claims as contemplated under the Gatekeeper Orders and the Gatekeeper Provision of the Plan). The court held an evidentiary hearing on the Motion for Leave on June 8, 2023 ("June 8 Hearing"), during which the court admitted exhibits and heard testimony from three witnesses both in support of and in opposition to the Motion for Leave. Having considered the Motion for Leave, the response of the Proposed Defendants thereto, HMIT's reply to the response, and the arguments and evidence presented at the hearing on the Motion for Leave, the court denies HMIT's request for leave to pursue its Proposed Claims. The court's reasoning is set forth below.

II. BACKGROUND

A. Highland's Bankruptcy Case, Dondero's Removal as CEO, and the Plan

Highland was co-founded in Dallas in 1993 by Dondero and Mark Okada ("Okada"). It operated as a global investment adviser that provided investment management and advisory services and managed billions of dollars of assets, both directly and indirectly through numerous

affiliates. Highland's equity interest holders included HMIT (99.5%), Dugaboy (0.1866%), Okada, personally and through trusts (0.0627%), and Strand Advisors, Inc. ("Strand"), which was wholly owned by Dondero and was the only general partner of Highland (0.25%). On October 16, 2019 (the "Petition Date"), Highland, with Dondero in control[10] and acting as its CEO, president, and portfolio manager, and facing a myriad of massive, business litigation claims – many of which had finally become or were about to be liquidated (after a decade or more of contentious litigation in multiple fora all over the world—filed for relief under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. The bankruptcy case was transferred to the Northern District of Texas, Dallas Division in December 2019. The official committee of unsecured creditors (the "Committee") (and later, the United States Trustee) expressed a desire for the appointment of a chapter 11 trustee due to concerns over and distrust of Dondero, his numerous conflicts of interest, and his history of alleged mismanagement (and perhaps worse).

After many weeks under the specter of a possible appointment of a trustee, Highland and the Committee engaged in substantial and lengthy negotiations, resulting in a corporate governance settlement approved by this court on January 9, 2020.[11] As a result of this settlement, Dondero relinquished control of Highland and resigned his positions as officer or director of Highland and its general partner, Strand,[12] and three independent directors ("Independent Directors") were

[10] Mark Okada resigned from his role with Highland prior to the Petition Date.

[11] This order is hereinafter referred to as the "January 2020 Order" and was entered by the court on January 9, 2020 [Bankr. Dkt. 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* [Bankr. Dkt. No. 281].

[12] Dondero agreed to this settlement pursuant to a stipulation he executed and that was filed in connection with Highland's motion to approve the settlement. *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* [Bankr. Dkt. No. 338].

chosen to lead Highland through its chapter 11 case: Seery, John S. Dubel, and retired bankruptcy judge Russell Nelms. Given the Debtor's perceived culture of constant litigation while Dondero was at the helm, it was purportedly not easy to get such highly qualified persons to serve as independent board members. At the hearing on the corporate governance settlement motion, the court heard credible testimony that none of the Independent Directors would have taken on the role 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 from mere negligence claims; and (4) a gatekeeper provision prohibiting the commencement of litigation against the Independent Directors without the bankruptcy court's prior authority. The gatekeeper provision approved by the court in its January 9 Order states,[13]

> 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.

Dondero agreed to remain with Highland as an unpaid portfolio manager following his resignation and did so "subject at all times to the supervision, direction and authority of the Independent Directors" and to his agreement to "resign immediately" "[i]n the event the Independent Directors determine for any reason that the Debtor shall no longer retain Dondero as an employee"[14] and to "not cause any Related Entity to terminate any agreements with the Debtor."[15] The court later

[13] January 2020 Order, 3-4, ¶ 10.

[14] January 2020 Order, 3, ¶ 8.

[15] *Id.* at ¶ 9.

entered, on July 16, 2020, an order approving the appointment of Seery as Highland's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative,[16] which included essentially the same "gatekeeper" language with respect to the pursuit of claims against Seery acting in these roles. The gatekeeper provision in the July 2020 Order was essentially the same as the gatekeeper provision in the January 2020 Order:

> No entity may commence or pursue a claim or cause of action of any kind against Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Seery, and (ii) specifically authorizing such entity to bring such claim. The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

July 2020 Order, 3, ¶5. Neither the January 2020 Order nor the July 2020 Order were appealed.

Throughout the summer of 2020, Dondero informally proposed several reorganization plans, none of which were embraced by the Committee or the Independent Directors. When Dondero's plans failed to gain support, he and entities under his control engaged in substantial, costly, and time-consuming litigation for Highland.[17] As the Fifth Circuit described the situation, after Dondero's plans failed "he and other creditors began to frustrate the proceedings by objecting to settlements, appealing orders, seeking writs of mandamus, interfering with Highland Capital's management, threatening employees, and canceling trades between Highland Capital and its clients."[18] On October 9, 2020, Dondero resigned from all positions with the Debtor and its

[16] *See* the July 16, 2020 order approving the retention by Highland of Seery as Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative, *nunc pro tunc*, to March 15, 2020 ("July 2020 Order") [Bankr. Dkt. No. 854].

[17] According to Seery's credible testimony during the hearing on confirmation of the Plan that had been negotiated between the Committee and the Independent Directors, Dondero had threatened to "burn the place down" if his proposed plan was not accepted. *See* Transcript of Confirmation Hearing dated February 3, 2021 at 105:10-20. Bankr. Dkt. No. #1894.

[18] *Highland Capital*, 48 F.4th at 426 (citing *Highland Cap. Mgmt., L.P. v. Dondero (In re Highland Capital Mgmt., L.P.)*, Ch. 11 Case No. 19-34054-SGJ11, Adv. No. 20-03190-SGJ11, 2021 WL 2326350, at *1, *26 (Bankr. N.D. Tex.

affiliates in response to a demand by the Independent Directors made after Dondero's purported threats and disruptions to the Debtor's operations.[19]

The Independent Directors and the Committee had negotiated their own plan of reorganization which culminated in the filing by Highland of its *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (the "Plan") [Bankr. Dkt. No. 1808] on January 22, 2021.[20] Highland had negotiated settlements with most of its major creditors following mediation and had amended its initially proposed plan to address the objections of most of its creditors, leaving only the objections of Dondero and entities under his control (the "Dondero Parties") at the time of the confirmation hearing,[21] which was held over two days in early February 2021. The Plan is essentially an "asset monetization" plan pursuant to which the Committee was dissolved, and four new entities were created: the Reorganized Debtor; a new general partner for the Reorganized Debtor called HCMLP GP, LLC; the Claimant Trust (administered by Seery, its trustee); and a Litigation Sub-Trust (administered by its trustee, Marc Kirschner). Highland's various servicing agreements were vested in the Reorganized Debtor, which continues to manage collateralized loan obligation vehicles ("CLOs") and various other investments postconfirmation. The Claimant Trust owns the limited partnership interests in the Reorganized Debtor, HCMLP GP LLC, and the Litigation Sub-Trust and is charged with winding down the Reorganized Debtor over a three-year period by monetizing its assets and making

June 7, 2021) where this court "h[eld] Dondero in civil contempt, sanctioning him $100,000, and comparing this case to a 'nasty divorce.'").

[19] *See* Highland Ex. 13. The court shall refer to exhibits offered and admitted at the June 8 Hearing on the Motion for Leave by the Highland Parties as "Highland Ex. ___" and to exhibits offered and admitted by HMIT as "HMIT Ex. ___."

[20] The *Disclosure Statement for the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* was filed on November 24, 2020 ("Disclosure Statement") [Bankr. Dkt. No. 1473].

[21] The only other objection remaining was the objection of the United States Trustee to the Plan's exculpation, injunction, and release provisions.

distributions to Class 8 and Class 9 creditors as Claimant Trust Beneficiaries. The Claimant Trust is overseen by a Claimant Trust Oversight Board ("CTOB"), and pursuant to the terms of the Plan and the Claimant Trust Agreement ("CTA"),[22] the CTOB approved Seery's compensation package as the CEO of the Reorganized Debtor and the Claimant Trustee. Following their acquisition of their unsecured claims, representatives of Claims Purchasers Muck and Jessup became members of the CTOB.[23] Seery's compensation included the same base salary that he was receiving as CEO and CRO of Highland, plus an added incentive bonus tiered to recoveries and distributions to the creditors under the Plan. The Plan provides for the cancellation of the limited partnership interests in Highland held by HMIT, Dugaboy, and Okada and his family trusts in exchange for each holder's pro rata share of a contingent interest in the Claimant Trust ("Contingent Claimant Trust Interest"), as holders of allowed interests in Class 10 (holders of Class B/C limited partnership interests) or Class 11 (holders of Class A limited partnership interests) under the Plan.

B. Dondero Communicates Alleged Material Non-Public Information ("MNPI") to Seery, and Seery Allegedly Provides the MNPI to the Claims Purchasers in Furtherance of an Alleged Fraudulent Scheme to Have the Claims Purchasers "Rubber Stamp" His Compensation as Claimant Trustee Post-Confirmation

1. The December 17, 2020 MGM Email

Between Dondero's forced resignation from Highland in October 2020 and the confirmation hearing in February 2021, Dondero engaged in what appeared to be attempts to thwart, impede, and otherwise interfere with the Plan being proposed by the Independent Directors and the Committee. In the midst of this, on December 17, 2020, Dondero sent Seery[24] an email

[22] Highland Ex. 38

[23] The CTOB had three members: a representative of Muck (Michael Linn), a representative of Jessup (Christopher Provost), and an independent member (Richard Katz). *See* Joint Opposition ¶ 79.

[24] Dondero sent the email to others as well but did not copy counsel for the Independent Directors (including Seery) in violation of the terms of an existing temporary restraining order that enjoined Dondero from, among other things, "communicating . . . with any Board member" (including Seery) without including Debtor's counsel. Morris Dec. Ex. 23 ¶ 2(a). Citations to "Morris Dec. Ex. _" are to the exhibits attached to the *Declaration of John A. Morris in Support*

(the "MGM Email") that featured prominently in HMIT's Motion for Leave. According to HMIT and Dondero, the MGM Email contained material nonpublic information ("MNPI") regarding the possibility of an imminent acquisition of Metro-Goldwyn-Mayer Studios, Inc. ("MGM"), likely by either Amazon or Apple.[25] At the time Dondero sent the MGM Email, Dondero sat on the board of directors of MGM, and the Debtor owned MGM stock directly. The Debtor also managed and partially owned a couple of other entities that owned MGM stock and managed various CLOs that owned some MGM stock as well. HMIT alleges now that Seery later misused and wrongfully disclosed to the Claims Purchasers this purported MNPI as part of a *quid pro quo* scheme, whereby the Claims Purchasers agreed to approve excessive compensation for Seery in the future (in exchange for him providing this allegedly "insider" information that inspired them to purchase unsecured claims with an alleged expectation of future large profits).[26] A timeline of events (in late 2020) in the weeks leading up to Dondero's MGM Email to Seery, following Dondero's departure from Highland, helps to put the email in full context:

- October 16: Dondero and his affiliates attempt to impede the Debtor's trading activities by demanding—with no legal basis—that Seery cease selling certain assets;[27]

- November 24: Bankruptcy Court enters an Order approving the Debtor's Disclosure Statement, scheduling the confirmation hearing on the Debtor's Plan for January 13, 2021, and granting related relief;[28]

- November 24–27: Dondero personally interferes with the Debtor's

of Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery, Jr.'s Joint Opposition to Hunter Mountain Investment Trust's Motion for Leave to File Verified Adversary Proceeding, Bankr. Dkt. No. 3784.

[25] *See* Proposed Complaint ¶ 45.

[26] *See id.* ¶ 3 ("Thus, acting within a cloak of secrecy, Seery provided close business acquaintances, the [Claims Purchasers], with material non-public information concerning the value of assets which they then used to purchase the largest approved unsecured claims."); ¶ 4 ("As part of the scheme, the [Claims Purchasers] obtained a position to approve Seery's ongoing compensation – to Seery's benefit and also to the detriment of the Claimant Trust, the Reorganized Debtor, and HMIT.").

[27] *See* Highland Ex. 14, Dondero-Related Entities' October 16, 2020 Letter; Highland Ex. 15, *Memorandum Opinion and Order Holding Dondero in Contempt for Violation of TRO*, 13-15.

[28] *See* Bankr. Dkt. No. 1476.

implementation of certain securities trades ordered by Seery;[29]

- November 30: The Debtor provides written notice of termination of certain shared services agreements it had with Dondero's two non-debtor affiliates, NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P. ("HCMFA"; together with NexPoint, the "Advisors");[30]

- December 3: The Debtor makes written demands to Dondero and certain affiliates for payment of all amounts due under certain promissory notes they owed to the Debtor, that had an aggregate face amount of more than $60 million—this was part of creating liquidity for the Debtor's Plan;[31]

- December 3: Dondero responds with what appeared to be a threat of some sort to Seery in a text message: "***Be careful what you do -- last warning***;"[32]

- December 10: Dondero's interference and apparent threat cause the Debtor to seek and obtain a temporary restraining order ("TRO") against Dondero;[33]

- December 16: This court denies as "frivolous" a motion filed by certain affiliates of Dondero, in which they sought "temporary restrictions" on certain asset sales;[34] and

- December 17: Dondero sends the unsolicited MGM Email[35] to Seery, which violates the TRO entered just a week earlier.[36]

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[29] *See* Highland Ex. 15, 30-36.

[30] Morris Decl. Ex. 17; *see also* Transcript of June 8, 2023 Hearing on HMIT's Motion for Leave ("June 8 Hearing Transcript"), 273:23-24.

[31] Morris Decl. Exs. 18-21; *see also* June 8 Hearing Transcript, 273:23-274:1.

[32] Morris Decl. Ex. 22 (emphasis added); *see also* June 8 Hearing Transcript, 273:1-12 (where Seery testified about receiving the threat from Dondero: "A: [T]his came after he threatened me. He threatened me in writing. I'd never been threatened in my career. I've never heard of anyone else in this business who's been threatened in their career. So anything I would get from him, I was going to be highly suspicious.").

[33] *See* Morris Decl. Ex. 23, *Order Granting Debtor's Motion for a Temporary Restraining Order Against James Dondero* entered December 10, 2020 [Adv. Pro. No. 20-3190 Dkt. No. 10].

[34] *See* Morris Decl. Ex. 24, Transcript of December 16, 2020 Hearing, 63:5-64:15.

[35] Highland Ex. 11.

[36] Seery testified at the June 8 Hearing that Dondero knowingly violated the TRO when he sent the MGM Email:

> [The MGM Email] . . . followed the imposition of a TRO for interfering with the business. He knew what was in the TRO and he knew what it applied to, and it restricted him from communicating with me or any of the other independent directors without Pachulski [Debtor's counsel] being on it. Furthermore, Pachulski had advised Dondero's counsel that not only could they not communicate with us, if they wanted to communicate they had to prescreen the topics. And how do we know that? Because Dondero filed a motion to modify the TRO. And that was all before this email.

June 8 Hearing Transcript, 273:13-22.

The MGM Email had the subject line "Trading Restriction re MGM – material non public information" and stated:

> Just got off a pre board call, board call at 3:00. Update is as follows: Amazon and Apple actively diligencing in Data Room. Both continue to express material interest. Probably first quarter event, will update as facts change. Note also any sales are subject to a shareholder agreement.[37]

Seery credibly testified at the June 8 Hearing that he was "highly suspicious" when he received the MGM Email. This was because, among other reasons, Dondero sent it ***after***: (i) unsuccessful efforts to impede the Debtor's trading activities (followed by the TRO); (ii) the "be careful what you do" text to Seery by Dondero: (iii) Highland's termination of its shared service arrangements with Dondero's various affiliated entities; (iv) the bankruptcy court's approval of the disclosure statement; and (v) Highland's demand to collect on the demand notes for which Dondero and his entities were liable.[38] Highland's Chapter 11 case was fast approaching the finish line. Moreover, MGM was already on the restricted list at Highland Capital, and had been for a long time, and Dondero would know this.[39] Still further, as of December 17, 2020 (the date Dondero sent the unsolicited MGM Email to Seery), Dondero no longer owed a duty of any kind to the Debtor or any entity controlled by the Debtor, having surrendered in January 2020 direct and indirect control of the Debtor to the Independent Board as part of the corporate governance settlement[40] and having resigned from all roles at the Debtor and affiliates in October 2020. Still further, Dondero—to the extent he was sharing with Seery MNPI that he obtained as a member of the board of directors of MGM—would have been violating his own fiduciary duties to MGM.

[37] Highland Ex. 11.

[38] June 8 Hearing Transcript, 273:1-274:4.

[39] June 8 Hearing, 215:21-216:9.

[40] *See* Bankr. Dkt. Nos. 339, 354-1 (Term Sheet)).

In any event, in a declaration filed by Dondero in support of HMIT's Rule 202 petition in Texas state court for pre-suit discovery,[41] he indicated that his goal in sending the MGM E-mail was to impede the Debtor and Seery from engaging in any transactions involving MGM:

> On December 17, 2020, I sent an email to employees at HCM, including the then Chief Executive Officer and Chief Restructuring Officer Jim Seery, containing non-public information regarding Amazon and Apple's interest in acquiring MGM. I became aware of this information due to my involvement as a member of the board of MGM. ***My purpose was to alert Seery and others that MGM stock, which was owned either directly or indirectly by HCM, should be on a restricted list and not be involved in any trades***.

It is noteworthy that ***Dondero's labeling of the MGM Email (in the subject line) as a communication containing "material non public information" did not make it so***. In fact, it appears from the credible evidence presented at the June 8, 2023 hearing on HMIT's Motion for Leave that the MGM Email did not disclose information to Seery that was not already made available to the public at the time it was sent. Seery testified that he did not think the MGM Email contained MNPI and that he did not personally "take any steps . . . to make sure that MGM stock was placed on a restricted list at Highland Capital after [he] received [the MGM Email]" because—as earlier noted—"MGM was already on the restricted list at Highland Capital . . . before I got to Highland."[42] Indeed, MGM was ultimately purchased by Amazon after a sale process that had been quite publicly discussed in media reports for several months[43] and that was officially

[41] Highland Ex. 9 ¶ 3 (emphasis added).

[42] June 8 Hearing Transcript, 215:21-216:9. Seery elaborated upon further questioning from HMIT's counsel that he did not think the indications in the MGM Email (that came from a member of the board of directors of MGM) that "it was probably a first-quarter event" and that "Amazon and Apple were actively diligencing – are diligencing in the data room, both continue to express material interest" were not MNPI. *Id.*, 217:23-218:10. He testified that "it was clear [before he received the MGM Email] from the media reports and the actual quotes from Kevin Ulrich of Anchorage, who was the chairman at MGM, that a transaction would have to take place very quickly. And, in fact, the transaction did not take place in the first quarter." *Id.*, 219:3-7.

[43] *See* Highland Ex. 25 ("MGM has held preliminary talks with Apple, Netflix and other larger media companies . . . . MGM, in particular, seems like a logical candidate to sell this year. Its owners include Anchorage Capital, Highland Capital and Solus Alternative Asset Management, hedge funds that acquired the company out of bankruptcy in 2010.") (article dated 1/26/20); Highland Ex. 26 (describing prospects of an MGM sale, noting that, among its largest

announced to the public in late May 2021 (just a few weeks after the Claims Purchasers purchased some of their claims, but a few months ***before*** certain of their claims—the UBS claims—were purchased).[44] For example, as early as January 2020, Apple and Amazon were identified as being among a new group of "Big 6" global media companies, and MGM was identified as being a leading media acquisition target. Indeed, according to at least one media report on January 26, 2020, "MGM, in particular, seems like a logical candidate to sell this year" having already held "preliminary talks with Apple, Netflix and other larger media companies."[45] In October 2020, the Wall Street Journal reported that MGM's largest shareholder, Anchorage Capital Group ("Anchorage"), was facing mounting pressure to sell the company. Anchorage was led by Kevin Ulrich, who also served as Chairman of MGM's Board. The article reported that "[i]n recent months, Mr. Ulrich has said he is working toward a deal," and he specifically named Amazon and Apple as being among four possible buyers.[46] Thus, no one following the MGM story would have been surprised to learn in December 2020 that Apple and Amazon were conducting due diligence and had expressed "material interest" in acquiring MGM. Dondero testified during the June 8 Hearing that, at the time he sent the MGM Email, he "knew with certainty from the board level that Amazon had hit our price, and it was going to close in the next couple of months,"[47] that "as of December 17th, Amazon had made an offer that was acceptable to MGM, [and that] that's what the board meeting was. We were going into exclusive negotiations to culminate the merger with

shareholders, was "Highland Capital Management, LP") (article October 11, 2020). *See also* Highland Exs. 27-30 & 34 (various other articles regarding possible sale/suitors of MGM, dated in years 2020 and 2021, and ultimately announcing sale to Amazon on May 26, 2021, for $8.4 billion).

[44] The MGM-Amazon deal was ultimately consummated in March 2022 for approximately $6.1 billion, net of cash acquired, plus approximately $2.5 billion in debt that Amazon assumed and immediately repaid.

[45] Highland Ex. 25.

[46] Highland Ex. 26.

[47] June 8 Hearing Transcript, 127:2-4.

them."[48] Notwithstanding this testimony, Dondero eventually admitted (after a lengthy and torturous cross examination) that he did not actually communicate this supposed "inside" information to Seery in the MGM Email. He did not "say anything about Amazon hitting the price." He did not say anything about the MGM board going into exclusive negotiations with Amazon "to culminate the merger with them." Rather, he communicated information that Seery and any member of the public who cared to look could have gleaned from publicly available information as of December 17, 2020, regarding a much-written-about potential MGM transaction that involved interest from numerous companies, including, specifically, Amazon and Apple. When questioned why "[he felt] the need to mention Apple [in the MGM Email] if Amazon had already hit the price," Dondero simply answered, "The only way you generally get something done at attractive levels in business is if two people are interested," suggesting that he specifically ***did not*** communicate the purported inside information he obtained as a MGM board member—that Amazon had met MGM's strike price and that the MGM board was moving forward with exclusive negotiations with Amazon—because he wanted it to appear that there was still a competitive process going on that included both Amazon and Apple.[49]

Even if the MGM Email contained MNPI on the day it was sent (four months prior to the first of the Claim Purchases that occurred in April 2021), the information was fully and publicly disclosed to the market in the days and weeks that followed. For example, on December 21, 2020, just four days later, a Wall Street Journal article titled *MGM Holdings, Studio Behind 'James Bond,' Explores a Sale*, reported that MGM had "tapped investment banks Morgan Stanley and LionTree LLC and begun a formal sale process," and had "a market value of around $5.5 billion, based on privately traded shares and including debt." The Wall Street Journal Article reiterated

[48] *Id.*, 161:10-14.

[49] June 8 Hearing Transcript, 162:2-6.

that (i) Anchorage "has come under pressure in recent years from weak performance and defecting clients, and its illiquid investment in MGM has become a larger percentage of its hedge fund as it shrinks," and (ii) "Mr. Ulrich has told clients in recent months he was working toward a deal for the studio and has spoken of big technology companies as logical buyers."[50] (*Id*. Ex. 27.) The Wall Street Journal's reporting was picked up and expanded upon in other publications soon after. For example:

- On December 23, 2020, Business Matters published an article specifically identifying Amazon as a potential suitor for MGM. The article, titled *The world is net enough! Amazon joins other streaming services in £4bn bidding war for Bond films as MGM considers selling back catalogue*, cited the Wall Street Journal article and further reported that MGM "hopes to spark a battle that could interest streaming services such as Amazon Prime";[51]

- On December 24, 2020, an article in iDropNews specifically identified Apple as entering the fray. In an article titled *Could Apple be Ready to Gobble Up MGM Studios Entirely?*, the author observed that "it's now become apparent that MGM is actually up on the auction block," noting that the Wall Street Journal was "reporting that the studio has begun a formal sale process" and that Apple—with a long history of exploratory interest in MGM—would be a likely bidder;[52] and

- On January 15, 2021, Bulwark published an article entitled *MGM is For Sale (Again)* that identified attributes of MGM likely to appeal to potential purchasers and handicapped the odds of seven likely buyers—with Apple and Amazon named as two of three potential buyers most likely to close on an acquisition.[53]

Finally, Highland and entities it controlled did not sell their MGM stock while the MGM-Amazon deal was under discussion and/or not made public but, instead, they tendered their MGM holdings in connection with, and as part of, the ultimate MGM-Amazon transaction after it closed in March 2022.

[50] Highland Ex. 27.
[51] Highland Ex. 28.
[52] Highland Ex. 29.
[53] Highland Ex. 30.

2. No Evidence to Support HMIT/Dondero's Assumptions that Seery Shared Alleged MNPI in the MGM Email with Claims Purchasers

One of HMIT's allegations in the Proposed Complaint it seeks leave to file—which is central to HMIT's and Dondero's conspiracy theory—is that Seery shared the alleged MNPI from the MGM Email with the Claims Purchasers (or at least Farallon—the owner/affiliate of Muck, one of the Claims Purchasers) and that the Claims Purchasers only acquired the purchased claims ("Purchased Claims") based on, and because, of their receipt of the MNPI from Seery. HMIT essentially admits in the original version of its Motion for Leave that it has no direct evidence that Seery communicated the alleged MNPI to any of the Claims Purchasers. Rather, its allegation is based on inferences it wants the court to make based on "circumstantial" evidence and on the Dondero Declarations that were attached to the Motion for Leave, which described communications Dondero purportedly had with one or two representatives of Farallon in the "late spring" of 2021 concerning Farallon's recent acquisition of certain claims in the Highland bankruptcy case.[54] Based on these communications, HMIT and Dondero only assume Seery must have provided the MNPI about MGM to Farallon, which must have caused both Farallon and the other Claims Purchaser, Stonehill, to acquire the Purchased Claims.[55]

At the June 8 Hearing, HMIT offered Dondero's testimony that he had three telephone conversations with two representatives of Farallon, Mike Linn ("Linn") and Raj Patel ("Patel"),

[54] Motion for Leave (Bankr. Dkt. No. 3699) ¶ 1 and Ex. 3; *see also* Highland Ex. 9, *Declaration of James Dondero* (with Exhibit 1) dated February 15, 2023.

[55] Motion for Leave (Bankr. Dkt. No. 3699) ¶ 28. HMIT subsequently filed the final version of the Motion for Leave that was revised to withdraw the Dondero Declarations and delete all references therein to the Dondero Declarations (but, notably, leaving in the allegations that were based on the Dondero Declaration(s)). This was done after the court ruled that it would allow the Proposed Defendants to examine Dondero regarding his Declarations. HMIT contended at that point that the court should consider the Motion for Leave on a no-evidence Rule 12(b)(6) type basis (but could not explain why it had attached the Dondero Declarations as evidence that "supported" the Motion for Leave, if it believed no evidence should be considered). *See* Motion for Leave (Bankr. Dkt. No. 3816) ¶ 28; *see also infra* pages 45 to 47 regarding the "sideshow" litigation that occurred prior to the June 8 Hearing over whether the hearing on the Motion for Leave would be an evidentiary hearing.

who allegedly told him that they purchased the claims without conducting any due diligence and based solely on Seery's assurances that the claims were valuable. These conversations allegedly took place on May 28, 2021—two days after the MGM-Amazon deal was officially announced to the public (on May 26, 2021). Dondero also testified that a photocopy of handwritten notes ("Dondero Notes")[56] (which were partially cut off) were notes he took contemporaneously with these short telephone conversations he initiated (one with Patel and two follow-up conversations with Linn).[57] He testified that his purpose in taking these notes and in initiating the phone calls was that "[w]e'd been trying nonstop to settle the case for two-plus years. . . . [a]nd when we heard the claims traded, we realized there were new parties to potentially negotiate to resolve the case . . . [s]o I reached out [to] the Farallon guys,"[58] and further, on *voir dire* from the Proposed Defendants' counsel, that the purpose of taking the notes was so that he had "a written record of the important points that [he] discussed . . . so I know how to address it the next time."[59] The handwritten notes[60] stated:

Raj Patel bought it because of Seery	*1*
50-70¢ not compelling	*2*
Class 8	*3*
Asked what would be compelling	*4*
-- No Offer	*5*
Bought in Feb/March timeframe	*6*
Bought assets w/ Claims	*7*
Offered him 40-50% premium	*8*
130% of cost; "Not Compelling"	*9*
No Counter; Told Discovery coming	*10*

[56] HMIT Ex. 4. The handwritten notes were admitted into evidence after *voir dire*, not for the truth of anything Patel or Linn allegedly said to him during the three telephone conversations, but as Dondero's "present sense impression" of the telephone conversations.

[57] June 8 Hearing Transcript, 133:1-136:3.

[58] *See id.*, 133:13-23.

[59] *See id.* (on *voir dire*), 144:1838-145:4.

[60] HMIT Ex. 4. The court has placed in a table and numbered each line for ease of reference. The table does not include the separate apparent partial date from the top left corner that Dondero testified was the date that he made the initial call to Patel: May 28, 2021.

On direct examination, Dondero testified that line 1 is what he wrote contemporaneously with the short call he initiated to Patel of Farallon in which Patel allegedly told Dondero "that he bought it because Seery told him to buy it and they had made money with Seery before"[61] and that Farallon "bought [the claim] because he was very optimistic regarding MGM"[62] before referring him to Linn, a portfolio manager at Farallon. Dondero testified that the rest of the handwritten notes (reflected in lines 2 through 10 of the table) were notes he took contemporaneously with two telephone conversations he had with Linn following his call to Patel, with lines 2-8 referring to Dondero's first call with Linn and lines 9 and 10 referring to his second call with Linn.[63] Dondero testified that the "50-70¢" in line 2 referred to his offer to Linn to pay 70 cents on the dollar to buy Farallon's[64] claims because "[w]e knew that they had – that the claims had traded around 50 cents" and "[w]e wanted to prevent the $5 million-a-month burn" (referring to attorney's fees in the Highland case) and that "not compelling Class 8" in lines 2-3 referred to Linn's response to him that the offer was not compelling.[65] Dondero testified that lines 4-5 referred to him asking Linn what amount would be compelling and to Linn's response that "he had no offer."[66] Dondero testified that lines 6-8 referred to Linn telling Dondero that Farallon bought the claims in the February, March timeframe and that Dondero told Linn that, given that the estate was spending $5 million a month on legal fees, Farallon should want to sell its claims and Linn's alleged response that "Seery told him it was worth a lot more."[67] Lastly, Dondero testified on direct examination

[61] June 8 Hearing Transcript, 134:7-10, 135:13-22.

[62] *Id.*, 139:3-11.

[63] *Id.*, 136:4-138:16.

[64] As noted above, Farallon did not acquire any of the Purchased Claims; rather, Farallon created a special purpose entity, Muck, to acquire the claims.

[65] June 8 Hearing Transcript, 136:4-16.

[66] *Id.*, 136:17-23.

[67] *Id.*, 137:6-138:7.

that the last two lines referred to a second telephone conversation he had with Linn in which Dondero offered 130 percent of cost for the claims and that Linn told him that the offer was not compelling, and he would not give a price at which he would sell.[68]

On cross-examination, Dondero acknowledged that, though he had testified that the handwritten notes were intended to be a written record of the important points from the telephone conversations he had with Patel and Linn, there was no mention in the notes of: (1) MGM: (2) or that Farallon was very optimistic about MGM; (3) the sharing of MNPI; (4) a *quid pro quo;* or (5) Seery's compensation, and that his last note—"Told Discovery coming"—was a reference to Dondero telling Linn (not Linn telling Dondero) that discovery was coming in response to Dondero's own supposition that Farallon must have traded on MNPI.[69] Cross-examination also revealed that Farallon never told Dondero that Seery gave them MNPI, and that Dondero only ***believed*** Seery ***must have*** given Farallon MNPI, because Farallon (Patel and Linn) had told him that the only reason Farallon bought their claims was because of their prior dealings with Seery, which Dondero took to mean that they had conducted no due diligence on their own prior to acquiring the claims. Dondero also testified that he did not have any personal knowledge as to how Seery's compensation package, as CEO of the Reorganized Debtor and Claimant Trustee, was determined because he was "not involved" in the setting of Seery's compensation pursuant to the Claimant Trust[70] and that he never discussed Seery's compensation with Farallon.[71]

As noted earlier, Dondero attempted to obtain discovery from the Claims Purchasers in a Texas state court pursuant to Rule 202 of the Texas Rules of Civil Procedure. The Texas state

[68] *Id.*, 138:8-22.

[69] *Id.*, 190:14-191:25. Dondero testified that he told Linn that discovery "would be coming in the next few weeks" and noted that "this has been a couple years. . . . [w]e've been trying for two years to get . . . discovery in this."

[70] *Id.*, 200:13-201:1.

[71] *Id.*, 208:23-209:8.

court denied the First Rule 202 petition on June 1, 2022, after having considered the amended petition, the responses, the record, applicable authorities and having conducted a hearing on the petition on June 1, 2022.[72]

3. Dondero Unsuccessfully Seeks Discovery and to Have Various Agencies and Courts Outside of the Bankruptcy Court Acknowledge His Insider Trading Theories

Dondero acknowledged at the June 8 Hearing that the verified petition ("First Rule 202 Petition") he signed and filed on July 22, 2021, in the first Texas Rule 202 proceeding—just weeks after his telephone calls with Linn and Patel—was true and accurate. In it, he swore under oath as to what Linn told him in the telephone call concerning Farallon's purchase of the claims, and the only reason he gave for wanting discovery was that Linn told him Farallon bought the claims "sight unseen—relying entirely on Seery's advice solely because of their prior dealings."[73] Dondero acknowledged, as well, that his sworn statement that he filed in support of an amended verified Rule 202 petition filed in the same Texas Rule 202 proceeding, but nearly ten months later (in May 2022), described the same telephone conversation he had with Linn, and it did not mention MGM at all and did not say that Linn told him that Seery gave him MNPI; rather, the sworn statement stated only that "On a telephone call between Petitioner and Michael Lin[n], a representative of Farallon, Mr. Lin[n] informed Petitioner that Farallon had purchased the claims sight unseen and with no due diligence—100% relying on Seery's say-so because they had made so much money in the past when Seery told them to purchase claims" and that Linn did not tell him that Seery gave them MNPI, but he concluded that Seery gave Farallon MNPI based on what Linn did tell him.[74]

[72] Highland Ex. 7.

[73] *Id.*, 193:8-194:16; Highland Ex. 3, *Verified Petition to Take Deposition before Suit and Seek Documents*, ¶ 21. The first Texas Rule 202 proceeding in which Dondero sought discovery regarding the Farallon acquisition of its claims was brought by Dondero, individually, in the 95th Judicial District, Dallas County, Texas.

[74] *Id.*, 195:11-197:17; Highland Ex. 4, *Amended Verified Petition to Take Deposition before Suit and Seek Documents*, ¶ 23.

Nine days later, Dondero filed a declaration in the same proceeding, in which he described the same call with Linn as follows:[75]

> Last year, I called Farallon's Michael Lin[n] about purchasing their claims in the bankruptcy. I offered them 30% more than what they paid. I was told by Michael Lin[n] of Farallon that they purchased the interests without doing any due diligence other than what Mr. James Seery—the CEO of Highland—told them, and that he told them that the interests would be worth far more than what Farallon paid. Given the value of those claims that Seery had testified in court, it made no sense to me that Mr. Lin[n] would think that the claims were worth more than what Seery testified under oath was the value of the bankruptcy claims.

Dondero further stated in his declaration that "I have an interest in ensuring that the claims purchased by [Farallon] are not used as a means to deprive the equity holders of their share of the funds," and that "[i]t has become obvious that despite the fact that the bankruptcy estate has enough money to pay all claimants 100 cents on the dollar, there is plainly a movement afoot to drain the bankrupt estate and deprive equity of their rights. Accordingly, "I commissioned an investigation by counsel who have been in communication with the Office of the United States Trustee."[76] Dondero attached as Exhibit A to his declaration a letter from Douglas Draper ("Draper"), an attorney with the law firm of Heller, Draper & Horn, L.L.C. in New Orleans, to the office of the General Counsel, Executive Office for U.S. Trustees, dated October 5, 2021, in which Draper opens the letter by stating that "[t]he purpose of this letter is to request that your office investigate the circumstances surrounding the sale of claims by members of the [Creditors' Committee] in the bankruptcy of [Highland]," and later noted that he "became involved in Highland's bankruptcy through my representation of [Dugaboy], an irrevocable trust of which Dondero is the primary beneficiary."[77] Mr. Draper laid out the same allegations of insider claims trading, breach of

[75] Highland Ex. 5, ¶ 2.

[76] *Id.*, ¶¶ 3-4.

[77] *Id.*, Ex. A, 1-2.

fiduciary duties, and conspiracy that HMIT seeks to bring in the Proposed Complaint.[78] The U.S. Trustee's office took no action. Dondero made a second and third attempt to get the U.S. Trustee's office to conduct an investigation into the same allegations laid out in Draper's letter, this time in "follow-up" letters to the Office of the U.S. Trustee on November 3, 2021, and six months later, on May 11, 2022, through another lawyer, Davor Rukavina ("Rukavina"), in which Rukavina wrote "to provide additional information regarding the systemic abuses of bankruptcy process occasioned during the [Highland] bankruptcy."[79] Again, the U.S. Trustee's office took no action.

On February 15, 2023, Dondero filed yet another sworn statement about his alleged conversation with Linn, this time in support of a Verified Rule 202 Petition ***filed by HMIT*** ("Second Rule 202 Petition"), filed in a different Texas state court (Texas District Court, 191st Judicial District, Dallas County, Texas), following Dondero's unsuccessful attempts throughout 2021 and 2022 to obtain discovery in the First Rule 202 proceeding and based on the same allegations of misconduct by Seery and Farallon.[80] In this new sworn statement, Dondero describes for the first time the "call" he had with Linn as having been "phone calls" with Patel and Linn and ***mentions MGM*** and Farallon's alleged optimism about the ***expected sale of MGM***:[81]

> In late Spring of 2021, I had phone calls with two principals at Farallon Capital Management, LLC ("Farallon"), Raj Patel and Michael Linn. During these phone calls, Mr. Patel and Mr. Linn informed me that Farallon had a deal in place to purchase the Acis and HarbourVest claims, which I understood to refer to claims that were a part of settlements in the HCM Bankruptcy Proceedings. Mr. Patel and Mr. Linn stated that Farallon agreed to purchase these claims based solely on conversations with Seery because they had made significant profits when Seery told them to purchase other claims in the past. They also stated that they were particularly optimistic because of the expected sale of MGM.

[78] *Id.*, Ex. A, 6-11.

[79] HMIT Ex. 61.

[80] Highland Ex. 9.

[81] *Id.*, ¶ 4.

The Second Rule 202 Petition was also denied by the second Texas state court on March 8, 2023.[82]

HMIT, in an apparent attempt to provide support for its argument that the Proposed Claims are "colorable," stated in its Motion for Leave that "[t]he Court also should be aware that the Texas States [sic] Securities Board ("TSSB") opened an investigation into the subject matter of the insider trades at issue, and this investigation has not been closed. The continuing nature of this investigation underscores HMIT's position that the claims described in the attached Adversary Proceeding are plausible and certainly far more than merely 'colorable.'"[83] But, two days before opposition briefing was due, on May 9, 2023, the TSSB issued a letter ("TSSB Letter") to Highland, informing it that "[t]he staff of the [TSSB] has completed its review of the complaint received by the Staff against [Highland]. The issues raised in the complaint and information provided to our Agency were given full consideration, and a decision was made that no further regulatory action is warranted at this time."[84] HMIT's counsel (frankly, to the astonishment of the court) objected to the admission of the TSSB Letter at the June 8 Hearing "on the grounds of relevance, 403, hearsay, and authenticity . . . [a]nd I also . . . think it's important that the decision by a regulatory body has no bearing on this cause of action or the colorability of this claim, and the Texas State Securities Board will tell you that. This is completely and utterly irrelevant to your inquiry."[85] The court overruled HMIT's objection to the relevance of this exhibit—considering, among other things, that HMIT, in its Motion for Leave, specifically mentioned the allegedly open TSSB "investigation" as relevant evidence the court "should be aware" of in making its determination of whether the Proposed Claims were "colorable."[86]

[82] Highland Ex. 10.
[83] Motion for Leave, ¶ 37.
[84] *See* Highland Ex. 33.
[85] June 8 Hearing Transcript, 323:22-324:3.
[86] *Id.*, 324:4-328:2.

C. Claims Purchasers Purchase Claims and File Notices of Transfers of Claims

To be clear about the time line here, it was after confirmation of the Plan but prior to the Effective Date of the Plan, that the Claims Purchasers: (1) purchased several large unsecured claims that had been allowed following, and as part of, Rule 9019 settlements, each of which were approved by the bankruptcy court, after notice and hearing, prior to the confirmation hearing; and (2) filed notices of the transfers of those claims pursuant to Rule 3001(e)(2) of the Federal Rules of Bankruptcy Procedure. The noticing of the claims transfers began on April 16, 2021, with the notice of transfer of the claim held by Acis Capital Management to Muck, and ended on August 9, 2021, with the notices of transfers of the claims held by UBS Securities to Muck and Jessup:

Claimant(s)	**Date Filed/ Claim No.**	**Asserted Amount**	**Claim Settled/Allowed? If so, Amount**	**Date Filed/ Rule 3001 Notice Dkt. No.**
Acis Capital Management LP and Acis Capital Management, GP LLC (together, "Acis")	12/31/2019 Claim No. 23	$23,000,000	Yes[87] $23,000,000	4/16/2021 Bankr. Dkt. No. 2215 (Muck)
Redeemer Committee of the Highland Crusader Fund (the "Redeemer Committee")	4/3/2020 Claim No. 72	$190,824,557	Yes[88] $137,696,610	4/30/2021 Bankr. Dkt. No. 2261 (Jessup)
HarbourVest 2017 Global Fund, LP, HarbourVest 2017 Global AIF, LP, HarbourVest Partners LP, HarbourVest Dover Street IX Investment LP, HV International VIII Secondary LP, HarbourVest Skew Base AIF LP (the "HarbourVest Parties")	4/8/2020 Claim Nos. 143, 147, 149, 150, 153, 154	Unliquidated	Yes[89] $80,000,000 in aggregate ($45,000,000 General Unsecured Claim, and $35,000,000 subordinated claim)	4/30/2021 Bankr. Dkt. No. 2263 (Muck)

[87] Bankr. Dkt. No. 1302. The Debtor's settlement with Acis was approved over the objection of Dondero. Bankr. Dkt. No. 1121.

[88] Bankr. Dkt. No. 1273.

[89] Bankr. Dkt. No. 1788. The Debtor's settlement with the HarbourVest Parties was approved over the objections of Dondero, Bankr. Dkt. No. 1697, and Dugaboy and the Get Good Trust. Bankr. Dkt. No. 1706.

UBS Securities LLC, UBS AG, London Branch (the "UBS Parties")	6/26/2020 Claim Nos. 190, 191	$1,039,957,799.40	Yes[90] $125,000,000 in aggregate ($65,000,000 General	8/9/2021 Bankr. Dkt. No. 2698 (Muck) and Bankr. Dkt. No. 2697 (Jessup)

HMIT insists that it "made no sense" for the Claims Purchasers to buy the Purchased Claims because "the publicly available information [] did not offer a sufficient potential profit to justify the publicly disclosed risk," and "their investment was projected to yield a small return with virtually no margin for error."[91] Dondero testified that it was ***his*** view that there was insufficient information in the public to justify the claims purchases.[92] But, HMIT's arguments here are contradicted by the information that was publicly available to Farallon and Stonehill at the time of their purchases and by HMIT's own allegations. In advance of Plan confirmation, Highland projected that Class 8 general unsecured creditors would recover 71.32% on their allowed claims. In the Proposed Complaint, HMIT sets forth the amounts the Claims Purchasers purportedly paid for their claims.[93] Taking into account the face amount of the allowed claims, the Claims Purchasers' projected profits (in millions of dollars) were as follows:

Creditor	Class 8	Class 9	Ascribed Value[94]	Purchaser	Purchase Price	Projected Profit
Redeemer	$137.0	$0.0	$97.71	Stonehill	$78.0	$19.71
Acis	$23.0	$0.0	$16.4	Farallon	$8.0	$8.40

[90] Bankr. Dkt. No. 2389. The Debtor's settlement with the UBS Parties was approved over the objections of Dondero, Dkt. No. 2295, and Dugaboy and the Get Good Trust. Bankr. Dkt. Nos. 2268, 2293.

[91] Proposed Complaint, ¶ 3.

[92] June 8 Hearing Transcript, 187:3-7 ("Q: And it's your testimony that there wasn't sufficient information in the public for them to buy – this is your view – that there wasn't sufficient information in the public to justify their purchases. Is that your view? A: Correct.).

[93] *Id.*, ¶ 42.

[94] "Ascribed Value" is derived by multiplying the Class 8 amount by the projected recovery of 71.32% for that class.

HarbourVest	$45.0	$35.0	$32.09	Farallon	$27.0	$5.09
UBS	$65.0	$60.0	$46.39	Stonehill & Farallon	$50.0	($3.61)

As HMIT acknowledges, by the time Dondero spoke with Farallon in the "late spring" of 2021, the Claims Purchasers had acquired the allowed claims previously held by Acis, Redeemer, and HarbourVest.[95] Based on an aggregate purchase price of $113 million for these three claims, the Claims Purchasers would have expected to net over $33 million in profits, or nearly 30% on their investment, had Highland met its projections. The Claims Purchasers would make even more money if Highland beat its projections, because they also purchased the Class 9 claims and would therefore capture any upside. In this context, HMIT's and Dondero's assertions that it did not "make any sense" for the Claims Purchasers to purchase their claims when they did does not pass muster—given the publicly available information about potential recoveries under the Plan. Dondero even acknowledged, on cross-examination, that he was prepared to pay ***30 percent more*** than Farallon had paid, even though he did not think there was sufficient public information available to justify Farallon's purchase of the claims.[96] Dondero essentially testified that he wanted to purchase Farallon's claims because he wanted to be in a position of control to force a settlement or resolution of the bankruptcy case, post-confirmation, under terms acceptable to him. He did not want to try to settle by negotiating with Farallon and Stonehill ***as creditors***, but instead he wanted to purchase the claims because "if we owned all the claims, it would settle the case."[97]

[95] *See* Complaint, ¶ 41 n.12. The UBS claims were not acquired until August 2021, long after the alleged "*quid pro quo*" was supposedly agreed upon and the MGM-Amazon deal was announced in the press in late May 2021. *See*, Highland Ex. 34, *Amazon's $8.45 Billion Deal for MGM is Historic But Feels Mundane* (dated May 26, 2021).

[96] June 8 Hearing Transcript, 187:8-11.

[97] *Id.*, 187:12-189:10.

D. Fifth Circuit's Approval of the Gatekeeper Provision in Plan, Recognition of Res Judicata Effect of the Prior Gatekeeper Orders, and the Bankruptcy Court's Order Approving Highland's Motion to Conform Plan

Harkening back to February 22, 2021, after a robust confirmation hearing, this court entered its order confirming the Plan, over the objections of Dondero and Dondero-Related Parties, specifically questioning the good faith of their objections. The court found, after noting "the remoteness of their economic interests" that "[it] has good reason to believe that [the Dondero Parties] are not objecting to protect economic interests they have in the Debtor but to be disruptors. Dondero wants his company back. This is understandable, but it is not a good faith basis to lob objections to the Plan."[94] The Plan became effective on August 11, 2021.

Of relevance to the Motion for Leave, the confirmed Plan included certain exculpations, releases, and injunctions designed to protect the Debtor and other bankruptcy participants from bad-faith litigation. These participants included: Highland's employees (with certain exceptions); Seery as Highland's CEO and CRO; Strand (after the appointment of the Independent Directors); the Independent Directors; the successor entities; the CTOB and its members; the Committee and its members; professionals retained in the case; and all "Related Persons." The injunction provisions contained a Gatekeeper Provision which is similar to the gatekeeper provisions in the prior Gatekeeper Orders in that it provided that the bankruptcy court will act as a "gatekeeper" to screen and prevent bad-faith litigation against the Protected Parties. The Gatekeeper Provision in the Plan states, in pertinent part:[98]

> 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 . . . 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

[98] Plan, 50-51 (emphasis added).

> authorizing such Enjoined Party to bring such claim or cause of action against such Protected Party.

The Plan defines Protected Parties as,

> 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 [CTOB] (in their official capacities), (xiii) [HCMLP 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); [but excluding Dondero and Okada and various entities including HMIT and Dugaboy].

The court notes that the Gatekeeper Provision in the Plan provides protection to a broader number of persons than the persons protected under the January 2020 Order (addressing the Independent Directors and their agents and advisors) and the July 2020 Order (addressing Seery in his role as CEO and CRO of the Debtor). But, at the same time, it is less restrictive than the gatekeeping provisions under the Gatekeeper Orders, in that the gatekeeping provisions in the prior orders shield the protected parties from any claim that is not both "colorable" ***and*** a claim for "willful misconduct or gross negligence," effectively providing the protected parties under the prior orders with a limited immunity from claims of simple negligence or breach of contract that do not rise to the level of "willful misconduct or gross negligence," whereas the Gatekeeping Provision under the Plan does not act as a release or exculpation of the Protected Parties in any way because it does not prohibit any party from bringing ***any kind of claim*** against a Protected Party, provided the proposed claimant first obtains a finding in the bankruptcy court that its proposed claims are "colorable."[99]

[99] It should be noted that--as discussed further below--there are, separately in the Plan, exculpations as to a smaller universe of persons--*e.g.*, the Debtor, the Committee and its members, and the Independent Directors.

Dondero and some of the entities under his control appealed[100] the Confirmation Order directly to the Fifth Circuit, arguing, among other issues, that the Plan's exculpation, release, and injunction provisions, including the Gatekeeper Provision (collectively, the "Protection Provisions") impermissibly provide certain non-debtor bankruptcy participants with a discharge, purportedly in contravention of the provisions of Bankruptcy Code § 524(e)'s statutory bar on non-debtor discharges. As noted above, the Fifth Circuit, "affirm[ed] the confirmation order in large part" and "reverse[d] ***only insofar as the plan exculpates*** certain non-debtors in violation of 11 U.S.C. § 524(e), strik[ing] those few parties ***from the plan's exculpation***, and affirm[ed] on all remaining grounds."[101] The Fifth Circuit specifically found the "injunction and gatekeeping provisions [to be] sound" and found that it was only "the ***exculpation*** of certain non-debtors" that "exceed[ed] the bankruptcy court's authority," agreeing with the bankruptcy court's conclusions that the Protection Provisions were legal, necessary under the circumstances, and in the best interest of all parties" in part, and only disagreeing to the extent that the ***exculpation*** provision improperly extended to certain bankruptcy participants other than Highland, the Committee and its members, and the Independent Directors and "revers[ing] and strik[ing] the few unlawful parts

[100] On appeal, the appellant funds ("Funds"), whom this court found to be "owned and/or controlled" by Dondero despite their purported independence, also asked the Fifth Circuit to vacate this court's factual finding "because it threatens the Funds' compliance with federal law and damages their reputations and values" and because "[a]ccording to the Funds, the characterization is unfair, as *they* are not litigious like Dondero and are completely independent from him." *NexPoint Advisors, L.P. v. Highland Capital Mgmt., L.P. (In re Highland Capital Mgmt., L.P.)*, 48 F.4th at 434. Applying the "clear error" standard of review, the Fifth Circuit "le[ft] the bankruptcy court's factual finding undisturbed" because "nothing in this record leaves us with a firm and definite conviction that the bankruptcy court made a mistake in finding that the Funds are 'owned and/or controlled by [Dondero]." *Id.* at 434-35.

[101] *See supra* note 4. The Fifth Circuit replaced its initial opinion with its final opinion a few days after certain appellants had filed a short (four-and-one-half pages) motion for rehearing (the "Motion for Rehearing") on September 2, 2022. The movants had asked the Fifth Circuit to "narrowly amend the [initial] Opinion in order to confirm the Court's holding that the impermissibly exculpated parties are similarly struck from the protections of the injunction and gatekeeper provisions of the plan (in other words, that such parties cannot constitute 'Protected Parties')." In the final Fifth Circuit opinion, same as the initial Fifth Circuit opinion, the Fifth Circuit stated that, with regard to the Confirmation Order, the panel would "reverse only insofar as the plan exculpates certain non-debtors in violation of 11 U.S.C. § 524(e), strike those few parties from the plan's exculpation, and affirm on all remaining grounds." *Highland Capital*, 48 F.4th at 424. No findings, discussion, or rulings regarding the injunction and gatekeeper provisions that were in the initial Fifth Circuit opinion were disturbed.

of the Plan's ***exculpation provision***."[102] The Fifth Circuit then remanded to the Bankruptcy Court "for further proceedings in accordance with the opinion."[103]

In the course of analyzing the Protection Provisions under the Plan, the Fifth Circuit noted that the protection provisions in the January and July 2020 Orders appointing the Independent Directors and Seery as CEO and CRO of Highland were *res judicata* and that "*those* orders have the effect of exculpating the Independent Directors and Seery in his executive capacities" such that "[d]espite removal from the exculpation provision in the confirmation order, the Independent Directors' agents, advisors, and employees, as well as Seery in his official capacities are all exculpated to the extent provided in the January and July 2020 Orders."[104]

The Reorganized Debtor filed a motion in the bankruptcy court to conform the plan to the Fifth Circuit's mandate, proposing that only one change was needed to make the Plan compliant with the Fifth Circuit's ruling: narrow the defined term for "Exculpated Parties" to read as follows:

> "Exculpated Parties" means, collectively, (i) the Debtor, (ii) the Independent Directors, (iii) the Committee, and (iv) members of the Committee (in their official capacities).

The Reorganized Debtor proposed that this one simple revision of this defined term removed the exculpations deemed by the Fifth Circuit to violate section 524(e) of the Bankruptcy Code, and that no other changes would be required to conform the Plan and Confirmation Order to the Fifth Circuit's mandate. Some of the Dondero-related entities objected to the motion to conform, arguing that the Fifth Circuit's ruling required more surgery on the Plan than simply narrowing the defined term "Exculpated Parties." On February 27, 2023, this court entered its order granting

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[102] *Id.* at 435.

[103] *Id.* at 440. The Fifth Circuit's docket reflects that it issued its Judgment and mandate on September 12, 2022.

[104] *Highland Capital*, 48 F.4th at 438 n.15. The Fifth Circuit stated, "To the extent Appellants seek to roll back the protections in the bankruptcy court's January 2020 and July 2020 orders (which is not clear from their briefing), such a collateral attack is precluded." *Id.*

Highland's motion to conform the Plan, ordering that one change be made to the Plan – revising the definition of "Exculpated Parties" – and no more.[105] The objecting parties' direct appeal of this order has been certified to the Fifth Circuit and is one of the numerous currently active appeals by Dondero-related parties pending in the Fifth Circuit.

E. HMIT's Motion for Leave

HMIT filed its emergency Motion for Leave on March 28, 2023, which, with attachments, as first filed, was 387 pages in length, including an initial proposed complaint ("Initial Proposed Complaint") and two sworn declarations of Dondero that were attached as "objective evidence" in "support[ ]" of the Motion for Leave,[106] and with it, an application for an emergency setting on the hearing on the Motion to Leave. On April 23, 2023, HMIT filed a pleading entitled a "supplement" to its Motion to Leave ("Supplement"),[107] to which it attached a revised proposed verified complaint ("Proposed Complaint")[108] as Exhibit 1-A to the Motion for Leave and stated that "[t]he Supplement is not intended to amend or supersede the [Motion for Leave]; rather, it is intended as a supplement to address procedural matters and to bring forth additional facts that further confirm the appropriateness of the derivative action."[109] The HMIT Motion for Leave was later amended to eliminate the Dondero Declarations and references to the same (but not the underlying allegations that were supposedly supported by the Dondero Declarations).[110]

[105] Bankr. Dkt. No. 3672.

[106] Bankr. Dkt. No. 3699.

[107] Bankr. Dkt. No. 3760.

[108] *See supra* note 5.

[109] Supplement ¶ 1.

[110] Bankr. Dkt. Nos. 3815 and 3816. Both of these filings had the Initial Proposed Complaint attached as Exhibit 1 to the Motion for Leave.

As earlier noted, HMIT desires leave to sue the Proposed Defendants regarding ***the post-confirmation, pre-Effective Date purchase of allowed unsecured claims***. The Proposed Defendants would be:

> **Seery,** who was a stranger to Highland until approximately four months following the Petition Date when he was brought in as one of the three Independent Directors, and now serves as the CEO of the Reorganized Debtor and the Trustee of the Claimant Trust (and also was previously Highland's CRO during the case, then CEO, and, also, an Independent Board Member of Highland's general partner during the Highland case). Seery is best understood as the man who took Dondero's place running Highland—per the request of the Committee.
>
> **Claims Purchasers,** who were strangers to Highland until the end of the bankruptcy case. They are identified as Farallon Capital Management, LLC ("Farallon"); Muck Holdings, LLC ("Muck"), which was a special purpose entity created by Farallon to purchase unsecured claims against Highland; Stonehill Capital Management, LLC ("Stonehill"); and Jessup Holdings, LLC ("Jessup"), which was a special purpose entity created by Stonehill to purchase unsecured claims against Highland (collectively, the "Claims Purchasers"). The Claims Purchasers purchased $240 million face value of already-allowed unsecured claims post-confirmation and pre-Effective Date in the spring of 2021 and another $125 million face value of already-allowed unsecured claims in August 2021. Bankruptcy Rule 3001(e) notices—giving notice of same—were filed on the bankruptcy clerk's docket regarding these purchases. The claims had previously been held by the creditors known as the Crusader Redeemer Committee, Acis Capital, HarbourVest, and UBS (three of these four creditors formerly served on the Committee during the Highland bankruptcy case).
>
> **John Doe Defendants Nos. 1-10**, which are described to be "currently unknown individuals or business entities who may be identified in discovery as involved in the wrongful transactions at issue."
>
> **Highland,** as a nominal defendant. HMIT added Highland as a nominal defendant in the Revised Proposed Complaint attached to the Supplement.
>
> **Claimant Trust**, as a nominal defendant. HMIT added the Claimant Trust as a nominal defendant in the Revised Proposed Complaint attached to the Supplement.

The proposed plaintiffs would be:

> **HMIT,** which, again, was the largest equity holder in Highland and held a 99.5% limited partnership interest (specifically, Class B/C limited partnership interests). HMIT is the holder of a Class 10 interest under the Plan, pursuant to which HMIT's limited partnership interest in Highland was extinguished as of the Effective Date in exchange for a pro rata share of a contingent interest in the Claimant Trust.

Highland, as a nominal party. HMIT wishes to bring its complaint on behalf of itself and derivatively on behalf of the Reorganized Debtor.

Claimant Trust, as a nominal party. HMIT wishes to bring its complaint on behalf of itself and derivatively on behalf of the Claimant Trust.

In the Proposed Complaint, HMIT asserts the following six counts: Count I (against Seery) for breach of fiduciary duties; Count II (against the Claims Purchasers and John Doe Defendants) for knowing participation in breach of fiduciary duties; Count III (against all Proposed Defendants) for conspiracy; Count IV (against Muck and Jessup) for equitable disallowance of their claims; Count V (against all Proposed Defendants) for unjust enrichment and constructive trust; and Count VI (against all Proposed Defendants) for declaratory relief.[111] The gist of the Proposed Complaint is as follows. HMIT asserts that something seems amiss regarding the post-confirmation/pre-Effective Date purchase of claims by the Claims Purchasers. Actually, more bluntly, HMIT asserts that "wrongful conduct occurred" and "improper trades" were made.[112] HMIT believes the Claims Purchasers paid around $160 million for the $365 million face amount of claims they purchased. HMIT believes that this amount was too high for any rational claim purchaser (particularly hedge funds who expect high returns) to have paid for the claims—based on Highland's Disclosure Statement and Plan projections regarding the projected distributions under the Plan to holders of allowed unsecured claims. And, of course, Dondero purports to have concluded from the three phone conversations he had with representatives of one of the Claims Purchasers that they did no due diligence before purchasing the claims. Therefore, HMIT surmises, Seery must have given these Claims Purchasers MNPI regarding Highland that convinced them that it was to their economic advantage to purchase the claims. In particular, HMIT surmises Seery must have shared

[111] In the Initial Proposed Complaint, HMIT proposed to bring claims against the various Proposed Defendants in seven counts, including a count for fraud by misrepresentation and material nondisclosure against all Proposed Defendants. In the Proposed Complaint, HMIT abandons its claim for fraud by misrepresentation and material nondisclosure.

[112] Motion for Leave, 7.

MNPI regarding the likely imminent sale of MGM, in which Highland had, directly and indirectly, substantial holdings. As noted earlier, MGM was ultimately purchased by Amazon after a sale process that had been quite publicly discussed in media reports for several months and that was officially announced to the public in late May 2021 (just a few weeks after the Claims Purchasers purchased some of their claims, but a few months ***before*** certain of their claims—the UBS claims—were purchased).[113] In summary, while the Proposed Complaint is lengthy and at times hard to follow, it boils down to allegations that: (a) Seery filed (or caused to be filed) deflated, pessimistic, misleading projections regarding the value of the Debtor's estate in connection with the Plan, (b) then induced very sophisticated unsecured creditors to discount and sell their claims to the likewise very sophisticated Claims Purchasers, (c) which Claims Purchasers are allegedly friendly with Seery, and are now happily approving Seery's allegedly excessive compensation demands post-Effective Date (resulting in less money in the pot to pay off the creditor body in full, and, thus, a diminished likelihood that HMIT will realize any recovery on its contingent Class 10 interest). HMIT argues that Seery should be required to disgorge his compensation. It appears that HMIT also seeks other damages in the form of equitable disallowance of the Claims Purchasers' claims and disgorgement of distributions on account of those claims, the imposition of a constructive trust over all disgorged funds, and declaratory relief.

HMIT claims that, in seeking to file the Proposed Complaint, it is seeking to protect the rights and interests of the Reorganized Debtor, the Claimant Trust, and "innocent stakeholders" who were allegedly injured by Seery's and the Claims Purchasers' alleged conspiratorial and

[113] The MGM-Amazon deal was ultimately consummated in March 2022 for approximately $6.1 billion, net of cash acquired, plus approximately $2.5 billion in debt that Amazon assumed and immediately repaid. Credible testimony from Seery at the June 8 Hearing revealed that Highland and entities it controlled tendered their MGM holdings in connection with the Amazon transaction (they did not sell their holdings while the MGM-Amazon deal was under discussion and/or not made public).

fraudulent scheme to line Seery's pockets with excessive compensation for his role as Claimant Trustee. In its Motion for Leave, HMIT states that "[t]he attached Adversary Proceeding alleges claims which are substantially more than 'colorable' based upon plausible allegations that the Proposed Defendants, acting in concert, perpetrated a fraud, including a fraud upon innocent stakeholders, as well as breaches of fiduciary duties and knowing participation in (or aiding or abetting) breaches of fiduciary duty."[114]

F. Is HMIT Really Dondero by Another Name?

The Proposed Defendants argue that HMIT's Motion for Leave is nothing more than a continuation of the harassing and bad-faith litigation by Dondero and his related entities that the Gatekeeper Provisions were intended to prevent and, thus, this is one of multiple reasons that the Motion for Leave should be denied.

To be clear, HMIT asserts that it is controlled by Mark Patrick ("Patrick"), who has been HMIT's administrator since August 2022. Patrick asserts that he is not influenced or controlled by Dondero, in general, and specifically not in its efforts to pursue the Proposed Claims against Seery and the Claims Purchasers. However, the testimony elicited at the June 8 Hearing—the hearing at which HMIT had the burden of showing the court that its Proposed Claims were "colorable" such that it should be allowed to pursue them through the filing of the Proposed Complaint—paints a different picture. Somewhat tellingly, HMIT chose not to call Patrick—allegedly HMIT's only representative and control person—as a witness in support of its Motion for Leave. Rather, Dondero was HMIT's first witness called in support of its motion, and the first

[114] *See* Motion for Leave (Bankr. Dkt. No. 3816) ¶ 3. HMIT notes, in a footnote 6, that "Neither this Motion nor the proposed Adversary Complaint seeks to challenge the Court's Orders or the Plan. In addition, neither this Motion nor the proposed Adversary Complaint seeks to redistribute the assets of the Claimant Trust in a manner that would adversely impact innocent creditors. Rather, the proposed Adversary Proceeding seeks to benefit all innocent stakeholders while working within the terms and provisions of the Plan, as well as the Claimant Trust Agreement."

questions on direct from HMIT's counsel were aimed at establishing that Dondero was not behind the filing of the Motion for Leave and the pursuit of the Proposed Claims.[115] Dondero testified that he did not (i) "have any current official position" with HMIT, (ii) "attempt to exercise [control] on the business affairs of [HMIT]," (iii) "have any official legal relationship with [HMIT] where [he] can attempt to exercise either direct or indirect control over [HMIT]," or (iv) "participate in the decision of whether or not to file the proceedings that are currently pending before Judge Jernigan."[116] After HMIT rested, Highland and the Claimant Trust called Patrick as a witness, and he testified that he was the administrator of HMIT, that HMIT does not have any employees, operations, or revenues, and, when asked if HMIT owned any assets, Patrick testified, with not a great deal of certainty, that "it's my understanding it has a contingent beneficiary interest in the Claimants [sic] Trust" and that is the only asset HMIT has.[117] Patrick testified that HMIT did not owe any money to Dondero personally, but acknowledged that in 2015, HMIT had issued a secured promissory note in favor of Dondero's family trust, Dugaboy, in the amount of approximately $62.6 million (the "Dugaboy Note") in exchange for Dugaboy transferring a portion of its limited partner interests in Highland to HMIT; the Dugaboy Note was secured in part by the Highland limited partnership interests purchased from Dugaboy.[118] Patrick admitted that, if HMIT's Class 10 interest has no value, HMIT would have no ability to pay the Dugaboy Note.[119] He further testified that neither he nor any representative of HMIT had ever spoken with any representative of Farallon or Stonehill, that he had no personal knowledge about any *quid pro quo*, the amount of due diligence Farallon or Stonehill conducted prior to buying their claims, or the terms of

[115] *See* June 8 Hearing Transcript, 113:10-25.

[116] *Id.*

[117] June 8 Hearing Transcript, 307:7-308:2.

[118] *Id.*, 303:11-305:1; Highland Ex. 51, HMIT's $62,657,647.27 *Secured Promissory Note* dated December 24, 2015, in favor of Dugaboy.

[119] *Id.*, 308:3-16.

Seery's compensation package (until the terms were disclosed to them in opposition to the Motion for Leave).[120] Patrick admitted that Dugaboy was paying HMIT's attorneys' fees pursuant to a settlement agreement between HMIT and Dugaboy.[121]

On cross-examination by HMIT's counsel, Patrick further testified that HMIT has not filed any litigation, as plaintiff, other than its efforts to be a plaintiff in the Motion for Leave and its action as a petitioner in the Texas Rule 202 proceeding filed earlier in 2023 in the Texas state court.[122] HMIT's counsel argued that the point of this questioning was that "they're just trying to draw Dondero into this and – this vexatious litigant argument, and we're just developing the fact that obviously Hunter Mountain has only filed – attempting to file this action and a Rule 202 proceeding.[123] But, Dondero and HMIT's counsel referred during the June 8 Hearing to the First Rule 202 Petition (where Dondero was the petitioner) and the Second Rule 202 Petition (where HMIT was the petitioner) as "our" Rule 202 petitions, and also to the numerous attempts at getting the discovery (that Dondero had warned Linn was coming) in the collective. For example, in objecting to the admission of Highland's Exhibit 10 – the Texas state court order denying and dismissing the Second Rule 202 Petition – on the basis of relevance, HMIT's counsel referred to the order as "an order denying ***our second"*** Rule 202 Petition.[124] And, Dondero testified that his warning to Linn in May 2021 that "discovery was coming" was "my response to I knew they had traded on material nonpublic information" and that "I thought it would be a lot easier to get

[120] *Id.*, 308:18-312:12. This testimony from Patrick came after HMIT's counsel objection to counsel's line of questioning regarding Patrick's personal knowledge of the facts supporting the allegations in the Proposed Complaint on the basis that he was invading the attorney work product privilege, which was overruled by this court; HMIT's counsel argued (311:4-19) that the line of questioning was an "invasion of attorney work product . . . [b]ecause they might – he would have knowledge from the efforts and investigation through attorneys in the case."

[121] *Id.*, 312:24-313:18.

[122] *Id.*, 315:3-9.

[123] *Id.*, 316:6-11.

[124] *Id.*, 58:11-13. The court overruled HMIT's relevance objection and admitted Highland's Exhibit 10 into evidence. *Id.*, 58:14-15.

discovery on a situation like this than it has been for the last two years" and that "***we've*** been trying for two years to get . . . discovery."[125]

Dondero's use of an entity over which he exerts influence and control to pursue his own agenda in the bankruptcy case is not new. Rather, this has been part of Dondero's *modus operandi* since the "nasty breakup" between Dondero and Highland that culminated with Dondero's ouster in October 2020, whereby Dondero, after not getting his way in the bankruptcy court, continued to lob objections and create obstacles to Highland's implementation of the Plan through entities he owns or controls. As noted above, the Fifth Circuit specifically upheld this court's finding in the Confirmation Order that Dondero owned or controlled the various entities that had objected to confirmation of the Plan and appealed the Confirmation Order, where the Dondero-related appellants made similar protestations that they are not owned or controlled by Dondero and asked the Fifth Circuit to vacate this court's factual finding because, among other reasons, "[a]ccording to the Funds, the characterization is unfair, as *they* are not litigious like Dondero and are completely independent from him."[126] Based on the totality of the evidence in this proceeding, the court finds that, contrary to the protestations of HMIT's counsel and Patrick otherwise, Dondero is the driving force behind HMIT's Motion for Leave and the Proposed Complaint. The Motion for Leave is just one more attempt by Dondero to press his conspiracy theory that he has pressed for over two years now, unsuccessfully, in Texas state court through Rule 202 proceedings, with the Texas State Securities Board, and with the United States Trustee's office.

[125] *Id.*, 191:5-25.

[126] *Highland Capital*, 48 F.4th at 434-435.

G. Opposition to Motion for Leave: Arguing No Standing and No "Colorable" Claims

Highland, the Claimant Trust, and Seery (together, the "Highland Parties") filed a joint opposition ("Joint Opposition") to HMIT's Motion for Leave on May 11, 2023.[127] The Claims Purchasers filed a separate objection ("Claims Purchasers' Objection") to the Motion for Leave on May 11, 2023, as well.[128] In the Joint Opposition, the Highland Parties urge the court to deny HMIT leave to pursue the Proposed Claims because, as a threshold matter, HMIT does not have standing to bring them, directly or derivatively against the Proposed Defendants. They argue, in the alternative, that the Motion for Leave should be denied even if HMIT had standing to pursue the Proposed Claims because none of the Proposed Claims are "colorable" claims as that term is used in the Gatekeeper Provision of the Plan (and Gatekeeper Orders).[129]

The Claims Purchasers likewise argue that HMIT lacks standing to complain about claims trading in the bankruptcy which occurred between sophisticated Claims Purchasers and sophisticated sellers ("Claims Sellers"), represented by skilled bankruptcy and transactional counsel. Moreover, they argue HMIT cannot show that it or the Reorganized Debtor or the Claimant Trust were injured by the claims trading at issue because the Purchased Claims had already been adjudicated as allowed claims in the bankruptcy case—thus, distributions under the Plan on account of the Purchased Claims remain the same, the only difference being who holds the claims. Moreover, even if HMIT could succeed in equitably subordinating the validly transferred ***allowed*** claims, HMIT would still be in the same position it is today: the holder of a

[127] Bankr. Dkt. Nos. 3783. Highland, the Claimant Trust, and Seery also filed on May 11 a *Declaration of John A. Morris in Support of Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery, Jr.'s Joint Opposition to Hunter Mountain Investment Trust's Motion for Leave to File Verified Adversary Proceeding* ("Morris Declaration") that attached 44 Exhibits in support of the Joint Opposition. Bankr. Dkt. No. 3784.

[128] Bankr. Dkt. No. 3780.

[129] *See* Joint Opposition ¶ 139 ("Because HMIT lacks standing, this Court need not reach the merits of HMIT's proposed Adversary Complaint. As a matter of judicial economy, however, the Highland Parties respectfully request that this Court address the lack of merit as an alternative basis to deny the Motion.").

contingent, speculative Class 10 interest that would only be paid after payment, in full, with interest, of all creditors under the Plan. The Claims Purchasers argue in the alternative that the Proposed Claims are not "colorable."

Finally, the Proposed Defendants argue that the standard of review for assessing whether the Proposed Claims are "colorable" (as such term is used in the Gatekeeper Provision and Gatekeeping Orders) is a standard that is a higher than the "plausibility" standard applied to Rule 12(b)(6). They argue that HMIT should be required to meet a higher bar with respect to colorability that includes making a *prima facie* showing that the Proposed Claims have merit (and/or are not without foundation) which requires HMIT to do more than meet the liberal notice-pleading standards.

H. HMIT's Reply to the Proposed Defendants' Opposition to the Motion for Leave

In its reply brief ("Reply"), filed by HMIT on May 18, 2023,[130] it argues that it has constitutional standing as an "aggrieved party" to bring the Proposed Claims on behalf of itself.[131] HMIT also argues that it has standing under Delaware Trust law to bring a derivative action on behalf of the Claimant Trust and that it not only has standing to bring the Proposed Claims derivatively on behalf of the Reorganized Debtor under the Plan, but it is the best party to bring the claims.[132] Finally, HMIT maintains that the standard of review that the bankruptcy court should apply in assessing the "colorability" of the Proposed Claims is no greater than the standard of review applied to motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), which would require the bankruptcy court to look only to the "four corners" of the Proposed Complaint

[130] Bankr. Dkt. No. 3785.

[131] *See* Reply ¶ 7.

[132] See, Reply ¶ 23 n.5, where HMIT argues "The nature of this injury, in addition to Seery's influence over the Claimant Trust, and the lack of prior action by the Claimant Trust to pursue the claims HMIT seeks to pursue derivatively, among other things, demonstrate that HMIT is not only a proper party to assert its derivative claims – but the best party to do so."

and "not weigh extraneous evidence,"[133] take all allegations as true, and view all allegations and inferences in a light most favorable to HMIT. As discussed in greater length below, HMIT argues that, under this standard, the bankruptcy court should not consider evidence in making its determination as to whether the Proposed Complaint presents "colorable" claims.

I. Litigation within the Litigation: The Pre- June 8 Hearing Skirmishes

Suffice it to say there was significant activity before the Motion for Leave actually was presented at the June 8 hearing. HMIT sought an emergency hearing on its Motion for Leave (wanting a hearing on three days' notice). When the bankruptcy court denied an emergency hearing, HMIT unsuccessfully pursued an interlocutory appeal of the denial of an emergency hearing to the district court. HMIT then petitioned for a writ of mandamus at the Fifth Circuit regarding the emergency hearing denial, which was denied by the Fifth Circuit on April 12, 2023.

Next, there were multiple pleadings and hearings regarding ***what kind of hearing*** the bankruptcy court should or should not hold on the Motion for Leave—particularly focusing on whether or not it would be an evidentiary hearing.[134] The resolution of this issue turned on what standard of review the court should apply in exercising its gatekeeping function and determining the colorability of the Proposed Claims. HMIT (although it had submitted two declarations of Dondero with its original Motion for Leave and approximately 350 pages of total evidentiary support) was adamant that there should be no evidence presented at the hearing on the Motion for Leave, arguing that the standard for review should be the plausibility standard under Rule 12(b)(6)

[133] *See* Reply ¶ 47.

[134] Highland, joined by Seery and the Claims Purchasers, had filed a motion asking the bankruptcy court to set a briefing schedule on the Motion for Leave and to schedule a status conference, indicating that Highland's proposed timetable for same was opposed by HMIT. HMIT subsequently filed a response unopposed to a briefing schedule and status conference, but, before the status conference, HMIT filed a brief, stating it was opposed to there being any evidence at the ultimate hearing on the HMIT Motion for Leave—arguing the bankruptcy court did not need evidence to exercise its gatekeeping function and determine if HMIT has a "colorable" claim. Rather, the court need only engage in a Rule 12(b)(6)-type plausibility analysis.

motions to dismiss such that "the threshold inquiry is very, very low. Evidence is not allowed. . . . [S]imilar to a 12(b)(6) inquiry, [the court] is limited to the four corners of the principal pleading – in this case, the complaint, or now the revised complaint."[135] Counsel for the Proposed Defendants argued that the standard of review for colorability here, in the specific context of the court exercising its gatekeeping function under the Plan, is more akin to the standards applied under the Supreme Court's *Barton Doctrine*[136] pursuant to which that the bankruptcy court must apply a higher standard than the 12(b)(6) standard, including the consideration of evidence at the hearing on the motion for leave; if the standard of review presents no greater hurdle to the movant than the 12(b)(6) standard applied to every plaintiff in every case, then the gatekeeping provisions mean nothing and do nothing to protect the parties from the harassing, bad-faith litigation they were put in place to prevent.[137] On May 22, 2023, after receipt of post-hearing briefing on the issue, the court entered an order stating that "the court has determined that there may be mixed questions of fact and law implicated by the Motion for Leave" and "[t]herefore, the parties will be permitted to present evidence (including witness testimony) at the June 8, 2023 hearing [on the Motion to Leave] if they so choose."

Two days later, HMIT filed an emergency motion for expedited discovery or alternatively for continuance of the June 8, 2023 hearing, seeking expedited depositions of corporate

[135] Transcript of April 24, 2023 Status Conference, Bankr. Dkt. No. 3765 ("April 24 Transcript"), 14:6-11.

[136] The *Barton Doctrine* was established in the 19th century Supreme Court case of *Barton v. Barbour*, 104 U.S. 126 (1881), and states that a party wishing to sue a court-appointed trustee or receiver must first obtain leave of the appointing court by making a *prima facie* case that the claim it wishes to bring is not without foundation.

[137] *See* April 24 Transcript, 36:24-37:4 ("[W]e're exactly today where the Court had predicted in entering [the Confirmation Order], that the costs and distraction of this litigation are substantial. And if all we're doing is replicating a 12(b)(6) hearing on a motion for leave, we're actually not doing anything to reduce, as the Court made clear, the burdens, distractions, of litigation."); 37:5-13 ("The Fifth Circuit likewise cited *Barton* in its order affirming the confirmation order. Specifically, it also explained that the provisions, these gatekeeper provisions requiring advance approval were meant to 'screen and prevent bad-faith litigation.' Well that – if that means only what the Plaintiff[ ] say[s] it does, then it really doesn't do anything at all to screen. There's no gatekeeping because their version of what that means is always policed under 12(b)(6) standards.").

representatives of the Claims Purchasers and of Seery and production of documents pursuant to deposition notices and subpoenas duces tecum that HMIT had attached to the motion. On May 26, 2023, this court held yet another status conference. Following the status conference, the court granted in part and denied in part HMIT's request for expedited discovery by ordering only Seery and Dondero to be made available for depositions prior to the June 8 Hearing. The court reached what seemed like appropriate middle ground by allowing the deposition of Seery and allowing the other parties to depose Dondero (for whom sworn declarations had been submitted), but the court was not going to allow any more discovery (i.e., of the Claims Purchasers) at so late an hour. The court was aware that HMIT and Dondero had been seeking discovery relating to the very claims trades that are the subject of the Revised Proposed Complaint from the Claims Purchasers in Texas state court "Rule 202" proceedings for approximately two years, where their attempts were rebuffed.

Approximately 60 hours before the June 8 Hearing, HMIT filed its Witness and Exhibit List disclosing for the first time two potential expert witnesses (along with biographical information and a disclosure regarding the subject matter of their likely testimony). Highland, the Claimant Trust, and Seery filed a joint motion to exclude the expert testimony and documents ("Motion to Exclude"), which the court ultimately granted in a separate order.

During the full-day June 8 Hearing on the Motion to Leave, the court admitted over 50 HMIT exhibits and over 30 Highland/Claimant Trust exhibits. The court heard testimony from HMIT's witnesses Dondero and Seery (as an adverse witness) and from the Highland Parties' witness Mark Patrick, the administrator of HMIT since August 2022 (as an adverse witness). The bankruptcy court allowed HMIT to make a running objection to all evidence—as it continued to argue that evidence was not appropriate.

III. LEGAL ANALYSIS

In determining whether HMIT should be granted leave, pursuant to the Gatekeeper Provision of the Plan and the court's prior Gatekeeper Orders, to pursue the Proposed Claims, the court must address the issue of whether HMIT would have ***standing*** to bring the Proposed Claims in the first instance. If so, the next question is whether the Proposed Claims are "***colorable***." But prior to getting into the weeds on ***standing*** and "***colorability,***" some general discussion regarding the topic of claims trading in the bankruptcy world seems appropriate, given that HMIT's Proposed Claims are based, in large part, on allegations of ***improper*** claims trading.

A. Claims Trading in the Context of Bankruptcy Cases—Can It Be Tortious or Otherwise Actionable?

As noted, at the crux of HMIT's desired lawsuit is what this court will refer to as "claims trading activity" that occurred shortly after the Plan was confirmed, but before the Plan went effective. HMIT believes that the claims trading activity gave rise to various torts: breach of fiduciary duty on the part of Seery; knowing participation in breach of fiduciary duty by the other Proposed Defendants; and conspiracy by all Defendants. HMIT also believes that the following remedies should be imposed: equitable disallowance of the Purchased Claims; disgorgement of the alleged profits the Claims Purchasers made on their purchases; and disgorgement of all Seery's compensation received since the beginning of his "collusion" with the other Defendants. Without a doubt, the Motion for Leave and Proposed Complaint revolve almost entirely around the claims trading activity.

This begs the question: ***When (or under what circumstances) might claims trading activity during a bankruptcy case give rise to a cause of action that either the bankruptcy estate or an economic stakeholder in the case might have standing to bring?*** Here, the claims trading

wasn't even "during a bankruptcy case" really—it was post-confirmation and pre-effective date, and it happened to be: (a) after mediation of the claims, (b) after Rule 9019 settlement motions, (c) after objections by Dondero and certain of his family trusts were lodged, (d) after evidentiary hearings, and (e) after orders were ultimately entered ***allowing*** the claims (and in most cases, such orders were appealed). The further crux of HMIT's desired lawsuit is that Seery allegedly "wrongfully facilitated and promoted the sale of large unsecured creditor claims to his close business allies and friends" by sharing ***material non-public information*** to them regarding the potential value of the claims (i.e., the potential value of the bankruptcy estate), and this is what made the claims trading activity particularly pernicious. The alleged sharing of MNPI allegedly caused the Claims Purchasers to purchase their claims without doing any due diligence and with knowledge that the claims would be worth much more than the Plan's "pessimistic" projections might have suggested, and also allowed Seery to plant friendly allies into the creditor constituency (and on the post-confirmation CTOB) that would "rubber stamp" his generous compensation. This is all referred to as "not arm's-length" and "collusive." Notably, the MNPI mostly pertained to a likely future acquisition of MGM by Amazon (which transaction, indeed, occurred in 2022, after being publicly announced in Spring of 2021); as noted earlier, Highland owned, directly and indirectly, common stock in MGM. Also notably, there had been rumors and media attention regarding a potential sale of MGM for many months.[138] In summary, to be clear, HMIT's desired lawsuit is laced with a theme of "insider trading"—although this isn't a situation of securities trading *per se* (i.e., the unsecured Purchased Claims were not securities), and, as noted earlier, the Texas State Securities Board has not seen fit to investigate the claims trading activity.

So, preliminarily, is claims trading in bankruptcy sinister *per se*? The answer is no.

[138] *E.g.*, Benjamin Mullin, *MGM Holdings, Studio Behind 'James Bond,' Explores a Sale*, THE WALL STREET JOURNAL (Dec. 21, 2020, 6:38 p.m.).

The activity of investing in distressed debt (which frequently occurs during a bankruptcy case—sometimes referred to as "claims trading") is ubiquitous and, indeed, has been so for a very long time. As noted by one scholar:

> The creation of a market in bankruptcy claims is the single most important development in the bankruptcy world since the Bankruptcy Code's enactment in 1978. [Citations omitted.] Claims trading has revolutionized bankruptcy by making it a much more market-driven process. [Citations omitted.] . . . The development of a robust market for all types of claims against debtors has changed the cast of characters involved in bankruptcies. In addition to long-standing relational creditors, like trade creditors or a single senior secured bank or bank group, bankruptcy cases now involve professional distressed debt investors, whose interests and behavior are often quite different than traditional relational counterparty creditors.

Adam J. Levitin, *Bankruptcy* Markets*: Making Sense of Claims Trading*, 4 BROOK. J. CORP. FIN. & COM. L. 64, 65 (2010) (hereinafter "*Bankruptcy Markets*").[139]

As a pure policy matter, some practitioners have bemoaned this claims trading phenomenon, suggesting that "distressed debt traders may sacrifice the long-term viability of a debtor for the ability to realize substantial and quick returns on their investments."[140] Others suggest that claims trading in bankruptcy is beneficial, in that it allows creditors of a debtor an early exit from a potentially long bankruptcy case, enabling them to save expense and administrative hassles, realize immediate liquidity on their claims (albeit discounted), and may

[139] *See also* Aaron Hammer & Michael Brandess, *Claims Trading: The Wild West of Chapter 11s*, AM. BANKR. INST. JOURNAL 62 (Jul./Aug. 2010); Chaim Fortgang & Thomas Mayer, *Trading Claims and Taking Control of Corporations in Chapter 11*, 12 CARDOZO L. REV. 1, 25 (1990) (noting that "the first recorded instance of American fiduciaries trading claims against insolvent debtors predates all federal bankruptcy laws and goes back to 1790" when the original 13 colonies were insolvent, owing tremendous amounts of debt to various parties in connection with the Revolutionary War; early American investors purchased these debts for approximately 25% of their par value, hoping the claims would be paid at face value by the American government).

[140] Harvey R. Miller, *Chapter 11 Reorganization Cases and the Delaware Myth*, 55 VAND. L. REV. 1987, 2016 (2002). *See also* Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?*, 78 AM. BANKR. L.J. 153 (2004); Harvey R. Miller & Shai Y. Waisman, *Is Chapter 11 Bankrupt?*, 47 B.C. L. REV. 129 (2005).

even permit them to take advantage of a tax loss on their own desired timetable.[141] On the flipside, "[c]aims trading permits an entrance to the bankruptcy process for those investors who want to take the time and effort to monitor the debtor and contribute expertise to the reorganization process."[142]

So, what are the "rules of the road" here? What does the Bankruptcy Code dictate regarding claims trading? The answer is nothing. The Bankruptcy Code itself has no provisions whatsoever regarding claims trading. The only thing resembling any regulation of claims trading during a bankruptcy case is found at Federal Rule of Bankruptcy Procedure 3001(e)—the current version of which went into effect in 1991—and it imposes extremely light regulation—if it could even be called that. This rule requires, in pertinent part (at subsection (2)), that "[i]f a claim other than one based on a publicly traded note, bond, or debenture" is traded during the case after a proof of claim is filed, notice/evidence of that trade must be filed with the bankruptcy clerk by the transferee. The transferor shall then be notified and given 21 days to object. If there is an objection, the bankruptcy court will hold a hearing regarding whether a transfer, in fact, took place. If there is no objection, nothing further needs to happen, and the transferee will be considered substituted for the transferor.

There are several things noteworthy about Rule 3001(e)(2). First, the only party given the opportunity to object is the ***transferor*** of the claim (presumably, in the situation of a dispute regarding whether there was truly an agreement regarding the transfer of the claim). Second, there is no need for a bankruptcy court order approving the transfer (except in the event of an objection

[141] *See Bankruptcy Markets*, at 70. *See also In re Kreisler*, 546 F.3d 863, 864 (7th Cir. 2008) ("Claims trading allows creditors to opt out of the bankruptcy system, trading an uncertain future payment for an immediate one, so long as they can find a purchaser.").

[142] *Bankruptcy Markets* at 70 (citing, among other authorities, Edith S. Hotchkiss & Robert M. Mooradian, *Vulture Investors and the Market for Control of Distressed Firms*, 43 J. FIN. ECON. 401, 401 (1997) (finding that "vulture investors add value by disciplining managers of distressed firms").

by the alleged transferor). Third, the ***economic consideration paid need not be disclosed to the court or anyone***. Fourth, there is no requirement or definition of timeliness. Finally, it explicitly does not apply with regard to publicly traded debt. This, alone, means that many claims trades are not even reported in a bankruptcy case. But it is not just publicly traded debt that will not be reflected with a Rule 3001(e) filing. For example, bank debt, in modern times, is often syndicated (i.e., fragmented into many beneficial holders of portions of the debt) and only the administrative agent for the syndicate (or the "lead bank") will file a proof of claim in the bankruptcy—thus, as the syndicated interests (participations) change hands, and they frequently do, there typically will not be a Rule 3001(e) notice filed.[143] To be clear here, this syndication-of-bank-debt fact, along with the fact that there are financial products whereby bank debt might be carved up into economic interests separate and apart from legal title to the loan, means there are many situations in which trading of claims during a bankruptcy case is not necessarily transparent or, for that matter, policed by the bankruptcy court. This is the world of modern bankruptcy. Most of the claims trading that gets reported through a Rule 3001(e) notice is the trading of small vendor claims. And this is all regarded as private sale transactions for the most part.[144]

Suffice it to say that there is not a wealth of case law dealing with claims trading in a bankruptcy context. Perhaps this is not surprising, since it is not prohibited and ***is mostly a matter of private contract between buyer and seller***. The case law that does exist seems to arise in situations of perceived bad faith of a purchaser—for example, when there was an attempt to control voting and/or ultimate control of the debtor through the plan process (not always problematic, but

[143] Anne Marrs Huber & Thomas H. Young, *The Trading of Bank Debt in and Out of Chapter 11*, 15 J. BANKR. L. & PRAC. 1, 1, 3 (2006).

[144] Note that Bankruptcy Rule 3001(e) was very different before 1991. Between 1983-1991, the rule required that parties transferring claims inform the court that a transfer of claims was taking place and also disclose the consideration paid for the transferred claims. A hearing would take place prior to the execution of a trade. Judicial involvement was required and resulted in judicial scrutiny of transactions—something that simply does not exist today.

there are outlier cases where this was found to cross a line and result in consequences such as disallowing votes on a plan or even equitable subordination of a claim).[145] Another type of case that has generated case law is where the purchaser of claims occupied a fiduciary status with the debtor.[146] Still another type of case that has generated case law is where there is an attempt to cleanse claims that might have risks because of a seller's malfeasance, by trading the claim to a new claim holder.[147]

The following is a potpourri of the more notable cases that have addressed claims trading in different contexts. Most of them imposed no adverse consequences on claims traders: *In re Kreisler*, 546 F.3d 863, 864 (7th Cir. 2008) (where a corporation named Garlin, that was owned by the individual chapter 7 debtors' sister and close friend, purchased a $900,000 bank claim for $16,500, and there was no disclosure of Garlin's connections to debtors and no Rule 3001(e)(2) notice was filed, the Seventh Circuit reversed the bankruptcy court's invocation of the doctrine of equitable subordination to the claim, stating: "Equitable subordination is generally appropriate only if a creditor is guilty of misconduct that causes injury to the interests of other creditors;" the Seventh Circuit further stated that it could "put to one side whether the court's finding of inequitable conduct was correct" because even if there was misconduct, it did not harm the other creditors, who were in the same position whether the original creditor or Garlin happened to own the claim; the Seventh Circuit did note that Garlin's decision to purchase the original bank

[145] *In re Applegate Prop. Ltd.*, 133 B.R. 827, 836 (Bankr. W.D. Tex. 1991) (designating votes of an affiliate of the debtor that purchased a blocking position to thwart a creditor's plan because it was done in bad faith); *In re Allegheny Int'l, Inc.*, 118 B.R. 282, 289–90 (Bankr. W.D. Pa. 1990) (because of bad faith activities, the court designated votes of a claims purchaser who purchased to get a blocking position on a plan). *But see In re First Humanics Corp.*, 124 B.R. 87, 92 (Bankr. W.D. Mo. 1991) (claims purchased by debtor's former management company to gain standing to file a plan to protect interest of the debtor was in good faith).

[146] *See In re Exec. Office Ctrs., Inc.*, 96 B.R. 642, 649-650 (Bankr. E.D. La. 1988) (and numerous old cites therein).

[147] *Enron Corp. v. Ave. Special Situations Fund II, LP (In re Enron Corp.)*, 340 B.R. 180 (Bankr. S.D.N.Y. 2006), *vacated, Enron Corp. v. Springfield Assocs., L.L.C. (In re Enron Corp.)*, 379 B.R. 425 (S.D.N.Y 2007); *Enron Corp. v. Ave. Special Situations Fund II, LP (In re Enron Corp.)*, 333 B.R. 205, 211 (Bankr. S.D.N.Y. 2005).

creditor's claim might have disadvantaged the other creditors if it interfered with the trustee's own potential settlement with the original bank creditor (note that the trustee argued that she had been negotiating a deal with bank under which bank might have reduced its claims); however, the trustee presented no evidence that any deal with the bank was imminent or even likely; thus, whether such a deal could have been reached was speculation; equitable subordination was therefore improper."); *Viking Assocs., L.L.C. v. Drewes (In re Olson),* 120 F.3d 98, 102 (8th Cir. 1997) (case involved the actions of an entity known as Viking in purchasing all of the unsecured claims against the bankruptcy estate of two chapter 7 debtors, Hugo and Jeraldine Olson; Viking was a related entity, owned by the debtors' children, and purchased $525,000 of unsecured claims for $67,000; while the bankruptcy court had discounted the claims down to the purchase amount and subordinated Viking's discounted claims to the claims of the other unsecured creditors, relying on section 105 of the Bankruptcy Code, the Eighth Circuit held that the bankruptcy court lacked the authority to do this, and, thus, reversed and remanded; the Eighth Circuit noted that in 1991, Bankruptcy Rule 3001(e)(2) was amended "to restrict the bankruptcy court's power to inspect the terms of" claims transfers. *Id.* at 101 (citing *In re SPM Mfg. Corp.*, 984 F.2d 1305, 1314 n. 9 (1st Cir. 1993)); the text of the rule makes clear that the existence of a "dispute" depends upon an objection by the ***transferor***; where there is no objection by the ***transferor***, there is no longer any role for the court); *Citicorp. Venture Capital, Ltd. v. Official Committee of Unsecured Creditors (In re Papercraft Corp.),* 160 F.3d 982 (3d Cir. 1998) (large investor who held seat on board of directors of debtor and debtor's parent, and who also had nonpublic information regarding the debtor's value, anonymously purchased 40% of the unsecured claims at a steep discount during the chapter 11 case, and then, having obtained a blocking position for plan voting purposes, proposed a plan to acquire debtor; the claims purchaser's claims were equitably reduced to amount

paid for the claims since investor was a fiduciary who was deemed to have engaged in inequitable conduct); *Figter Ltd. v. Teachers Ins. & Annuity Ass'n of Am. (In re Figter)*, 118 F.3d 635 (9th Cir. 1997) (Ninth Circuit affirmed bankruptcy court's ruling that a secured creditor's purchase of 21 out of 34 unsecured claims in the case was in good faith and it would not be prohibited from voting such claims on the debtor's plan, pursuant to Bankruptcy Code section 1126(e)); *In re Lorraine Castle Apartments Bldg. Corp.*, 145 F.2d 55, 57 & 58 (7th Cir. 1945) (in a case under the old Bankruptcy Act, in which there were more restrictions on claims trading, a debtor and two of its stockholders argued that the claims of purchasers of bonds should be limited to the amounts they paid for them; bankruptcy court special master found, "that, though he did not approve generally the ethics reflected by speculation in such bonds," there was no cause for limitation of the amounts of their claims, pointing out that the persons who had dealt in the bonds were not officials, directors, or stockholders of the corporation and owed no fiduciary duty to the estate or its beneficiaries—rather they were investors or speculators who thought the bonds were selling too cheaply and that they might make a legitimate profit upon them; the district court agreed, as did the Seventh Circuit, noting that "[t]o reduce the participation to the amount paid for securities, in the absence of exceptional circumstances which are not present here, would reduce the value of such bonds to those who have them and want to sell them. This would result in unearned, undeserved profit for the debtor, destroy or impair the sales value of securities by abolishing the profit motive, which inspires purchasers."); *In re Washington Mutual, Inc.*, 461 B.R. 200 (Bankr. Del. 2011), *vacated in part*, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012) (discussion of an equity committee's potential standing to pursue equitable subordination or equitable disallowance of the claims of certain noteholders who had allegedly traded their claims during the chapter 11

case while having material non-public information; while bankruptcy court originally indicating these were viable tools, court later vacated its ruling on this after a settlement was reached).

Suffice it to say that the courts have, more often than not, been unwilling to impose legal consequences, for an actor's involvement with claims trading. At most, in outlier-type situations during a case, courts have taken steps to disallow claims for voting purposes or to subordinate claims to other unsecured creditors for distribution purposes.[148] But the case at bar does not present facts that are typical of any of the situations in reported cases.

For one thing, unlike in the reported cases this court has located, there ***seems to have been complete symmetry of sophistication among the claim sellers and claim purchasers here—and complete symmetry with HMIT for that matter***. All persons involved are highly sophisticated financial institutions, hedge funds, or private equity funds. No one was a "mom-and-pop" type business or vendor that might be vulnerable to chicanery. The claims ranged from being worth $10's of millions of dollars to $100's of millions of dollars in face value. And, of course, the sellers/transferors of the claims have never shown up, subsequent to the claims trading

[148] Note that, while some cases suggest that outright disallowance of an unsecured claim, in the case of "inequitable conduct" might be permitted (not merely equitable subordination to unsecured creditors)—usually citing to *Pepper v. Litton*, 308 U.S. 295 (1939)—the Fifth Circuit has suggested otherwise. *In re Mobile Steel Co., Inc.*, 563 F.2d 692, 699-700 (5th Cir. 1977) (cleaned up) (noting that "equitable considerations can justify only the subordination of claims, not their disallowance" and also noting that "three conditions must be satisfied before exercise of the power of equitable subordination is appropriate[:] (i) The claimant must have engaged in some type of inequitable conduct[;] (ii) The misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant[; and] (iii) Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act." In *Mobile Steel*, the Fifth Circuit held that the bankruptcy judge exceeded the bounds of his equitable jurisdiction by disallowing a group of claims and also reversed the subordination of certain claims, on the grounds that the bankruptcy court had made clearly erroneous findings regarding alleged inequitable conduct and other necessary facts. *Contrast In re Lothian Oil Inc.*, 650 F.3d 539 (5th Cir. 2011) (involving the question of whether a bankruptcy court may ***recharacterize*** a claim as equity rather than debt; the court held yes, but it has nothing to do with inequitable conduct *per se*; rather section 502(b)'s language that a claim should be allowed unless it is "unenforceable against the debtor and property of the debtor, under any agreement or applicable law...." is the relevant authority; unlike equitable subordination, recharacterization is about looking at the true substance of a transaction not the conduct of a party (if it looks like a duck and quacks like a duck, it's a duck—i.e., equity); the court indicated that section 105 is not a basis to recharacterize debt as equity; it's a matter of looking at state law to determine if there is any basis and looking at the nature of the underlying transaction—as either a lending arrangement or equity infusion.

transactions, to complain about anything. Everyone involved here is, essentially, a behemoth and there is literally no sign of innocent creditors getting harmed. Second, the case at bar is unique in that the claims traded here ***had all been allowed after objections, mediation, and Rule 9019 settlements during the bankruptcy case***. Thus, the amounts that would be paid on them were "locked in," so to speak. There was no risk to a hypothetical claims-purchaser of disallowance, offset, or any "claw-back" litigation (or—one might have reasonably assumed—any type of litigation). Third, the terms for distributions on unsecured claims had been established in a confirmed plan (although the claims were purchased before the effective date of the Plan). Thus, there was a degree of certainty regarding return on investment for the Claims Purchasers here that was much higher than if the claims had been purchased early, during, or mid-way through the case.[149] ***This was post-confirmation, pre-effective date claims purchasing.*** Interestingly, all three of these facts might suggest that little due diligence would be undertaken by any hypothetical purchaser. The rules of the road had been set. The court makes this observation because HMIT has suggested there is something highly suspicious about the fact that Farallon allegedly told Dondero that it did no due diligence before purchasing its claims (leading him to conclude that the Claims Purchasers must have purchased their claims based on receiving MNPI from Seery). Not only has there been no colorable evidence suggesting that insider information was shared, but the lack of due diligence in this context does not reasonably seem suspicious. The claims purchases

[149] *See discussion* in BANKRUPTCY MARKETS, at 91:

> Some claims purchasers buy before the bankruptcy petition is filed, some at the beginning of the case, and some towards the end. For example, there are investors who look to purchase at low prices either when a business is failing or early in the bankruptcy and ride through the case until payouts are fairly certain. [Citations omitted.] These investors might be hoping to buy at 30 cents on the dollar and get a payout at 70 cents on the dollar. Perhaps if they waited another six months, the payout would be 74 cents on the dollar, but the additional 4 cents on the dollar for six months might not be a worthwhile return for the time value of the investment. Other investors might not want to assume the risk that exists in the early days of a case when the fate of the debtor is much less certain, but they would gladly purchase at 70 cents on the dollar at the end of the case to get a payout of 74 cents on the dollar six months later.

were almost like passive investments, at this point—there was no risk of a claim objection and there was a confirmed plan, with a lengthy disclosure statement that described not only plan payment terms and projections, but essentially anything that any investor might want to know.

To reiterate, here, HMIT seeks leave to assert the following causes of action:

I. Breach of Fiduciary Duties (Seery)

II. Knowing Participation in Breach of Fiduciary Duties (Claims Purchasers)

III. Conspiracy (all Proposed Defendants)

IV. Equitable Disallowance (Claims Purchasers)

V. Unjust Enrichment and Constructive Trust (all Proposed Defendants)

VI. Declaratory Judgment (all Proposed Defendants)

The court struggles to fathom how any of these proposed causes of action or remedies can be applied in the context of: (a) post-confirmation claims trading; (b) where the claims have all been litigated and allowed.

In reflecting on the case law and various Bankruptcy Code provisions, the court can fathom the following hypotheticals in which claims trading during a bankruptcy case might be somehow actionable:

> **Hypothetical #1**: The most obvious situation would be if a purchaser of a claim files a Rule 3001(e) Notice, and the seller/transferor then files an objection thereto. There would then be a contested hearing between purchaser and seller regarding the validity of the transfer with the bankruptcy court issuing an appropriate order after the hearing on the objection. ***As noted, there was no objection to the Rule 3001(e) notices here***.
>
> **Hypothetical #2:** Alternatively, there could be a breach of contract suit between purchaser and seller if one thinks the other breached the purchase-sale agreement somehow. Perhaps torts might also be alleged in such litigation. ***As noted, there is no dispute between purchasers and sellers here.***
>
> **Hypothetical #3:** If there is believed to be fraud in connection with a plan, a party in interest might, pursuant to section 1144 of the Bankruptcy Code, move for

revocation of the plan "at any time before 180 days after the date of entry of the order for confirmation" and the court "may revoke such order if and only if such order was procured by fraud." ***As noted, here HMIT has suggested that the "pessimistic" plan projections may have been fraudulent or misrepresentations somehow. The time elapsed long ago to seek revocation of the Plan.***

Hypothetical #4: As discussed above, in rare situations (bad faith), during a Chapter 11 case, before a plan is confirmed, a claims purchaser's claim might not be allowed for voting purposes. *See* Sections 1126(e) of the Bankruptcy Code ("the court may designate any entity whose acceptance or rejection of such plan was not in good faith"). ***Obviously, in this case, this is not applicable—the claims were purchased post-confirmation.***

Hypothetical #5: As discussed above, in rare situations (inequitable conduct), a court might equitably subordinate ***claims*** to ***other claims***. *See* Section 510(c) of the Bankruptcy Code. But here**,** HMIT is seeking either: (a) equitable subordination of the ***claims*** of the Claims Purchaser to HMIT's ***Class 10 former equity interest*** (in contravention of the explicit terms of section 510(c)) or, (b) ***equitable disallowance*** of the claims of the Claims Purchasers (in contravention of *Mobile Steel*).

Hypothetical #6: Bankruptcy Code section 502(b)(1) and the Fifth Circuit's *Lothian Oil* case may permit "recharacterization" of a claim from debt to equity in certain circumstances, but not in circumstances like the ones in this case. Here, the claims have already been adjudicated and allowed (some after mediation, and all after Rule 9019 settlement orders). The only way to reconsider a claim in a bankruptcy case that has already been allowed is through Bankruptcy Code section 502(j) ("A claim that has been allowed or disallowed may be reconsidered for cause. . . according to the equities of the case."). The problem here is that Bankruptcy Rule 9024 provides that a motion for "reconsideration of an order allowing or disallowing a claim against the estate ***entered without a contest*** is not subject to the one year limitation prescribed in Rule 60(c)" (emphasis added). Here there was most definitely "a contest" with regard to all of these purchased claims. ***Thus, it would appear that any effort to have a court reconsider these claims pursuant to section 502(j) is untimely—as it has been well beyond a year since they were allowed.***

Hypothetical #7: If a party believes "insider trading" occurred there are governmental agencies that investigate and police that. ***Here, the purchased claims (which were not based on bonds or certificated equity interests) would not be securities so as to fall under the SEC's purview. Moreover, there was evidence that HMIT or Dondero-Related entities requested that the Texas State Securities Board investigate the claims trading and the board did not find a basis to pursue anyone for wrongdoing***.

Hypothetical #8: The United States Trustee can investigate wrongdoing by a debtor or unsecured creditors committee. While the United States Trustee would naturally have concerns about members of an unsecured creditors committee (or an officer of a debtor-in-possession) adhering to fiduciary duties and not putting their

> own interests above those of the estate, here, there are a couple of points that seem noteworthy. One, the claims trading activity was post-confirmation so—while certain of the claim-sellers may have still been on the unsecured creditors committee, as the effective date of the plan had not yet occurred—the circumstances are very different than if this had all happened during the early, contentious stages of the case. It seems inconceivable that there was somehow a disparity of information that might be troubling—the Plan had been confirmed and it was available for the world to see. The whole notion of "insider information" (just after confirmation here) feels a bit off-point. Bankruptcy practitioners and judges sometimes call bankruptcy a fishbowl or use the "open kimono" metaphor for good reason. It is generally a very open process. And information-sharing on the part of a debtor-in-possession or unsecured creditors committee is intended to be robust. *See, e.g.*, Bankruptcy Code sections 521 and 1102(b)(3). In a way, HMIT here seems to be complaining about this very situation that the Code and Rules have designed.

In summary, claims trading is a highly ***unregulated*** activity in the bankruptcy world. ***HMIT is attempting to pursue causes of action here that, to this court's knowledge, have never been allowed in a context like this***.

B. Back to Standing—Would HMIT Have Standing to Bring the Proposed Claims?

The Proposed Defendants argue that HMIT lacks standing to bring the Proposed Claims, either: (a) derivatively on behalf of the Reorganized Debtor and Claimant Trust, or (b) directly on behalf of itself. Thus, they argue that this is one reason that the Motion for Leave should be denied.

In making their specific standing arguments, the parties analyze things slightly differently:

The Claims Purchasers focus primarily on HMIT's lack of ***constitutional*** standing but also argue that HMIT does not have ***prudential*** standing under Delaware trust law to bring the Proposed Claims either individually or derivatively. Why do they mention Delaware trust law? Because the Claimant Trust is a Delaware statutory trust governed by the Delaware Statutory Trust Act, 12 Del. C. §§ 3801–29.[150]

The Highland Parties' standing arguments focus almost entirely on HMIT's lack of ***prudential*** standing under Delaware trust law to bring the Proposed Claims.

HMIT argues that the Proposed Defendants "play fast and loose with standing arguments" and that HMIT has ***constitutional*** standing as a "party aggrieved"[151] to bring the Proposed Claims on behalf of itself. HMIT also argues that it has standing under Delaware trust law to bring a

[150] *See* Proposed Complaint, ¶ 26.

[151] Proposed Complaint, ¶7.

derivative action on behalf of the Claimant Trust, and that it not only has standing to bring the Proposed Claims derivatively on behalf of the Reorganized Debtor under the Plan, but it is the best party to do so.

1. The Different Types of Standing: Constitutional Versus Prudential

The parties are addressing two concepts of standing that can sometimes be confused and misapplied by both attorneys and judges: ***constitutional Article III standing***, which implicates federal court subject matter jurisdiction,[152] and the narrower standing concept of ***prudential standing***, which does not implicate subject matter jurisdiction but nevertheless might prevent a party from having capacity to sue, pursuant to limitations set by courts, statutes or other law.

Article III constitutional standing works as follows: a plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing three elements: (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent—not conjectural or hypothetical, (2) that there is a causal connection between the injury and the conduct complained of, and (3) it must be likely, not speculative, that the injury will be redressed by a favorable decision.[153] "If the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve."[154] These elements ensure that a plaintiff has "'such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[155]

[152] Article III, Section 2 of the U.S. Constitution gives federal courts jurisdiction over enumerated cases and controversies.

[153] *See Thole v. U.S. Bank, N.A.*, 140 S.Ct. 1615, 1618 (2020)(citing the Supreme Court's seminal case on the tripartite test for Article III constitutional standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), where the Supreme Court stated that "the irreducible constitutional minimum of standing contains [the] three elements"); *see also Spokeo*, 578 U.S. at 338; *Abraugh v. Altimus*, 26 F.4th 298, 302 (5th Cir. 2022) (citing *id.*).

[154] *Transunion LLC v. Ramirez*, 141 S.Ct. 2190, 2203 (2021)(cleaned up).

[155] *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

Apart from this minimal constitutional mandate, courts and statutes have set other limits on the class of persons who may seek judicial remedies—and this is the concept of prudential standing. In its recent opinion in *Abraugh v. Altimus*,[156] the Fifth Circuit set forth a detailed analysis of the two types of "standing," noting that the term "standing" is often "misused" in our legal system, which has led to confusion for both attorneys and judges.[157] The constitutional standing that is necessary for a court to exercise subject matter jurisdiction is broader than prudential standing and is only the first hurdle a party must clear before pursuing a claim in federal court.

The Fifth Circuit explained that ***in addition to*** Article III constitutional standing, "courts have occasionally articulated other 'standing' requirements that plaintiffs must satisfy under certain conditions, ***beyond those imposed by Article III***,"[158] such as the "standing" requirement that might be imposed by a statute or by jurisprudence. The *Abraugh* case was a perfect example of the latter.

Abraugh involved the civil rights statutes that provide, among other things, that "a party must have standing under the state wrongful death or survival statutes to bring [a § 1983 cause of action]" and noted that these statutes impose additional "standing" requirements that are a matter of prudential standing, not constitutional standing.[159] In *Abraugh*, the Fifth Circuit reversed and remanded a district court's dismissal of a § 1983 civil rights cause of action—noting that the district court had stated that it was dismissing based on a "lack of subject matter jurisdiction" because the plaintiff in that action lacked standing.[160] The plaintiff was the mother of a prisoner

[156] 26 F.4th 298.
[157] *Id.* at 303.
[158] *Id.* at 302 (emphasis added).
[159] *Id.* at 302-303.
[160] *Id.* at 301.

who died by suicide while in custody who brought a § 1983 action against Louisiana correctional officers and officials. After finding that the plaintiff/mother lacked standing under Louisiana's wrongful death and survival statutes (because there had been a surviving child and wife of the prisoner who were the proper parties with capacity to sue), the district court held that it was dismissing for lack of subject matter jurisdiction. The Fifth Circuit pointed out that the plaintiff/mother may have lacked standing under Louisiana's wrongful death and survival statutes to bring the claim under § 1983, but that type of standing was matter of ***prudential*** standing, and the plaintiff/mother actually ***did*** have ***Article III*** constitutional standing ("a constitutionally cognizable interest in the life of her son").[161] Thus, the district court's error was ***not*** in finding that the plaintiff/mother lacked prudential standing but in improperly conflating the two standing concepts when it held that it had lacked ***subject matter jurisdiction*** to consider any of the plaintiff's/mother's amended complaints.[162] The Fifth Circuit noted specifically that[163]

> prudential standing does not present a jurisdictional question, but "a merits question: who, according to the governing substantive law, is entitled to enforce the right?" As the Federal Rules of Civil Procedure make clear, "an action must be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a)(1). And a violation of this rule is a failure of "prudential" standing. "Not one of our precedents holds that the inquiry is jurisdictional." It goes only to the validity of the cause of action. And "the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction."

Somewhat relevant to this prudential standing discussion is the fact that, in this bankruptcy case, there have been dozens of appeals of bankruptcy court orders by Dondero and Dondero-related entities. In connection therewith, both the district court and the Fifth Circuit, in evaluating the ***appellate standing*** of the appellants, have taken pains to distinguish between the concepts of:

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[161] *Id.*

[162] *Id.* at 301, 303-304. The Fifth Circuit opined that "the district court did not err in describing [the mother's] inability to sue under Louisiana law as a defect of 'standing[, b]ut it is a defect of prudential standing, not Article III standing" thus technically not implicating the federal court's subject matter jurisdiction. *Id.* at 303.

[163] *Id.* at 304 (cleaned up).

(a) traditional, constitutional standing, and (b) a type of prudential standing known as the "person aggrieved" test, which is applied in the Fifth Circuit in determining whether a party has ***standing to appeal a bankruptcy court order***—which it describes as a narrower and "more exacting" standard than constitutional standing. As explained in a Fifth Circuit opinion addressing the standing of a Dondero-related entity called NexPoint to appeal bankruptcy court orders allowing professional fees, the "person aggrieved" standard that is typically applied to ascertain bankruptcy ***appellate*** standing originated in a statute in the Bankruptcy Act. The Fifth Circuit continued to apply it after Congress removed the provision when it enacted the Bankruptcy Code in 1978.[164] Because it is narrower and "more exacting" than the test for Article III constitutional standing, it involves application of prudential standing considerations.[165] The Fifth Circuit describes the "person aggrieved" test for bankruptcy appellant standing as requiring that an appellant show that it was "*directly and adversely affected pecuniarily* by the order of the bankruptcy court," requiring "a higher causal nexus between act and injury than traditional standing . . . that best deals with the unique posture of bankruptcy actions."[166] In affirming the district court's dismissal of NexPoint's appeal of the bankruptcy court's fee orders, due to NexPoint's lack of prudential standing under the "person aggrieved" test, the court rejected NexPoint's argument that it had standing to appeal

[164] *NexPoint Advisors, L.P. v. Pachulski Stang Ziehl & Jones, L.L.P. (In re Highland Capital Management, L.P.)*, No. 22-10575, 2023 WL 4621466, *2 (5th Cir. July 19, 2023)(citing *In re Coho Energy Inc.*, 395 F.3d 198, 202 (5th Cir. 2004)(cleaned up)).

[165] *Id.* at *1, **4-6 (where the Fifth Circuit repeatedly throughout its opinion refers to the "person aggrieved" test for standing in bankruptcy actions as a test for "prudential standing."); *see also Dondero v. Highland Capital Mgt., L.P.*, Civ. Act. No. 3:20-cv-3390-X, 2002 WL 837208 (N.D. Tex. Mar. 18, 2022)(where the district court, in addressing Dondero's standing to appeal a bankruptcy court order approving a Rule 9019 settlement (between Highland and Acis Capital Management GP LLC), notes that "[i]t is substantially more difficult to have standing to appeal a bankruptcy court's order than it is to pursue a typical complaint under Article III of the U.S. Constitution" and that "the Fifth Circuit has long recognized that bankruptcy cases' wide-reaching scope calls for a more stringent standing test.").

[166] *See id.* at *3 (cleaned up). The court quotes its 2018 opinion in *Matter of Technicool Sys., Inc. (In re Technicool)*, 896 F.3d 382, 385 (5th Cir. 2018), which explains why the "person aggrieved" prudential standing standard is applied in bankruptcy actions: "Bankruptcy cases often involve numerous parties with conflicting and overlapping interests. Allowing each and every party to appeal each and every order would clog up the system and bog down the courts. Given the specter of such sclerotic litigation, standing to appeal a bankruptcy court order is, of necessity, *quite limited*." *Id.* (cleaned up).

because "it meets traditional Article III standing requirements [and that the more exacting] prudential standing considerations such as the 'person aggrieved' standard" did not survive the Supreme Court's 2014 *Lexmark*[167] opinion,[168] which addressed standing issues in the context of false advertising claims under the Lanham Act and reminded that courts may not "limit a cause of action that Congress has created merely because 'prudence' dictates."[169] The Fifth Circuit held that the Supreme Court's reminder in *Lexmark* did not nullify the "person aggrieved" test for prudential standing in bankruptcy appeals, citing its own decision in *Superior MRI Services Inc. v. Alliance Healthcare Services, Inc.*[170] (rendered a year after *Lexmark* was decided), in which it held that *Lexmark* applied only to the circumstances of that case, "rather than broadly modifying—or undermining—*all* prudential standing concerns, such as the one animating the 'person aggrieved' standard in bankruptcy appeals."[171]

Similarly, in yet another appeal in this bankruptcy case involving three Dondero-related entities as appellants (NexPoint, Dugaboy, and HCMFA)—this one an appeal of a bankruptcy court order authorizing the creation of an indemnity subtrust and entry into an indemnity trust agreement—the district court noted the parties' confusion about the standing issue, as exemplified in the parties' reference to constitutional standing when they were actually arguing that they had prudential standing under the "person aggrieved" test: "Although the parties frame this issue as one of constitutional standing . . . they cite case law and present arguments about the prudential

[167] *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

[168] *Id.* at *2.

[169] *See id.* at *4 (cleaned up).

[170] 778 F.3d 502 (5th Cir. 2015).

[171] *NexPoint*, 2023 WL 4621466 at *4 (cleaned up). The Fifth Circuit explicitly stated that "*Lexmark* does not expressly reach prudential concerns in bankruptcy appeals and brought no change relevant here." *Id.* at *5 (cleaned up).

standing requirement embodied in the 'person aggrieved' test."[172] The district court noted that it had an "independent obligation to consider constitutional standing before reaching its prudential aspects."[173] The district court dismissed the appeal as to Dugaboy and HCMFA for lack of standing but, upon concluding that NexPoint did have standing, dismissed the appeal as to it on the merits. The Fifth Circuit affirmed.[174] Interestingly, the court noted that, while the parties did not contest the district court's determination that NexPoint had standing to pursue the appeal, it "may consider prudential standing issues *sua sponte*."[175] In doing so, the Fifth Circuit recognized the distinction between constitutional standing and the prudential "person aggrieved" test applied to bankruptcy appeals, which "is, of necessity, quite limited" and "an even more exacting standard than traditional constitutional standing," as it requires an appellant to show that it is "directly, adversely, and financially impacted by a bankruptcy order."[176]

In summary, in analyzing whether HMIT would have standing to bring the Proposed Claims, this court must ***first*** determine whether HMIT would have constitutional standing under Article III (which is a subject matter jurisdiction hurdle) and, assuming it does, then ***additionally*** address whether HMIT would also have prudential standing (i.e., capacity to sue) pursuant to any applicable statutes (e.g., Delaware statutes), jurisprudence, or other substantive law that might ***limit*** who may sue. Notwithstanding HMIT's argument that it has standing under the "person

[172] *Highland Capital Mgt. Fund Advisors, L.P. v. Highland Capital Mgt., L.P. (In re Highland Capital Mgt., L.P.)*, Civ. Act. No. 3:21-cv-1895-D, 2002 WL 270862, *1 (N.D. Tex. Jan. 18, 2022)(cleaned up). The district court dismissed the appeals of two of the appellants, Dugaboy and HCMFA, finding that they lacked both constitutional standing and prudential standing under the "person aggrieved" test and affirmed the bankruptcy court's order after finding the third appellant, NexPoint, to have prudential standing under the "person aggrieved" test. *Id.* at **1-3 and *4.

[173] *Id.* at *1 n.2.

[174] *Highland Capital Mgt. Fund, L.P. v. Highland Capital Mgt., L.P. (In re Highland Capital Mgt., L.P.)*, 57 F.4th 494 (5th Cir. 2023).

[175] *Id.* at 501 (cleaned up).

[176] *Id.*

aggrieved" test[177]—which, as discussed above, is a matter of prudential standing—this is applied only in the context of bankruptcy ***appellate*** matters.[178] As noted in its most recent opinion discussing standing in an appeal from the Highland bankruptcy case, the Fifth Circuit reiterated that the "person aggrieved" test is a test for bankruptcy ***appellate*** standing, which is narrower than a party in interest's right to be heard in bankruptcy cases in general.[179] The court rejected an argument that Bankruptcy Code § 1109, which provides that "[a] party in interest . . . may raise and may appear and be heard on any issue in a case under this chapter" confers ***appellate*** standing, noting that "one's standing to appear and be heard before the bankruptcy court [is] a concept distinct from standing to appeal the merits of a decision" and that the "person aggrieved" test for bankruptcy appellate standing is narrower than the test for determining one's standing to appear and be heard in a bankruptcy proceeding.[180]

Thus, the court will now analyze whether HMIT would, at a minimum, have constitutional standing to bring the Proposed Claims.

2. HMIT Would Lack Article III Constitutional Standing to Bring the Proposed Claims.

As noted above, the Supreme Court and the Fifth Circuit have made clear that constitutional standing is necessary for a court to exercise subject matter jurisdiction. It is only the first hurdle a party must clear before pursuing a claim in federal court. HMIT, as plaintiff, would bear the

[177] HMIT insists that it has constitutional standing to bring claims on its individual behalf "as an aggrieved party." *See* Reply, ¶ 7.

[178] HMIT's argument in this matter that it has constitutional standing because it is a "party aggrieved" incorrectly conflates the prudential bankruptcy appellate "person aggrieved" test with the broader test that is applied to constitutional standing. The court is not being critical of this mistake. As noted at *supra* note 149, the Fifth Circuit in *Abraugh* pointed out that courts and attorneys alike have created confusion by misusing the term "standing" when they equate a lack of "standing," in all instances, with a lack of subject matter jurisdiction, even when the party is found to lack only prudential standing. Thus, HMIT is not alone in its confusion over the two different concepts of standing.

[179] *See NexPoint*, 2023 WL 4621466 at *6.

[180] *Id.* at *6 (cleaned up)("Because Section 1109(b) expands the right to be heard [in a bankruptcy proceeding] to a wider class than those who qualify under the 'person aggrieved' standard, courts considering the issue have concluded that merely being a party in interest is insufficient to confer ***appellate*** standing.")(emphasis added).

burden of establishing: (1) that it suffered an injury in fact that is concrete, particularized, and actual or imminent—not conjectural or hypothetical, (2) that there is a causal connection between the injury and the conduct complained of, and (3) it must be likely, not speculative, that the injury will be redressed by a favorable decision.[181]

Concrete and Particularized; Actual or Imminent. As the Supreme Court made clear in the *Lujan* case, the injury in fact element requires a showing that the injury was "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."[182] The Supreme Court in the *Spokeo* case expounded on the "concrete and particularized" requirements of the "injury in fact" element. Particularization requires a showing that the injury "must affect the plaintiff in a personal and individual way," but while particularization is necessary, it alone is "not sufficient," because an injury in fact must also be "concrete."[183] And, concreteness is "quite different from particularization."[184] A "concrete" injury must be "real," and "not abstract," though it does not mean that the injury must be "tangible," as the injury can be intangible and nevertheless be concrete.[185] In addition to the concreteness and particularization requirements, an injury in fact must be "actual or imminent" such that "allegations of injury that is merely conjectural or hypothetical do not suffice to confer standing."[186] "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly*

[181] *See supra* note 153.
[182] *Lujan*, 504 U.S. at 560 (cleaned up).
[183] *Spokeo*, 578 U.S. at 339.
[184] *Id.* at 340.
[185] *Id.*
[186] *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009).

impending"; "allegations of *possible* future injury are not sufficient."[187]

Traceability - Causal Connection. As to the second element—that the injury was caused by the defendant—the Supreme Court in *Lujan* further described it as requiring a showing that "the injury has to be fairly traceable to the challenged action of the defendant."[188] The "fairly traceable" test requires an examination of "the causal connection between the assertedly unlawful conduct and the alleged injury."[189]

Redressability. The third element—redressability—requires the court to examine the connection "between the alleged injury and the judicial relief requested."[190] "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court."[191] "[A] court must determine that there is an available remedy which will have a 'substantial probability' of redressing the plaintiff's injury."[192]

The Claims Purchasers argue that HMIT lacks constitutional standing to pursue the claims asserted in the Proposed Complaint because: (i) neither HMIT nor the Bankruptcy Estate was injured by the Claim Purchasers' acquisition of the claims; and (ii) the Proposed Complaint lacks a theory of cognizable damages to the Reorganized Debtor, the Claimant Trust, and/or the beneficiaries of the Claimant Trust.[193]

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[187] *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013)(cleaned up); *see also Abdullah v. Paxton*, 65 F.4th 204, 208 (5th Cir. 2023)("[Injury] cannot be speculative, conjectural, or hypothetical [and] [a]llegations of only a 'possible' future injury similarly will not suffice.")(cleaned up).

[188] *Lujan*, 504 U.S. at 560-61 (cleaned up).

[189] *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984).

[190] *Id.* (noting "it is important to keep the ['fairly traceable' and 'redressability'] inquiries separate if the 'redressability' component is to focus on the requested relief.").

[191] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

[192] *City of Los Angeles v. Lyons*, 461 U.S. 95, 129 n.20 (1983)(Marshall, J., dissenting)(cleaned up); *see also Ondrusek v. U.S. Army Corps of Engineers*, Civ. Act. No. 3:22-cv-1874-N, 2023 WL 2169908, at *5 ("Plaintiffs have not demonstrated that any available remedy would be sufficiently likely to relieve their alleged economic losses. Without a showing of redressability, those harms also cannot support Plaintiff's Article III standing.").

[193] As noted earlier, certain of the Proposed Defendants—the Highland Parties—do not focus on HMIT's lack of constitutional standing to pursue the Proposed Claims against them, but on its lack of prudential standing under

The court agrees with the Claims Purchasers' argument here. What is HMIT's concrete and particularized injury—that is "real" and is not abstract? That is not conjectural or hypothetical? That is actual or imminent?

Recall that, under the Plan, HMIT holds a Class 10 contingent interest in the Claimant Trust that only realizes value if all creditors are paid in full with interest. HMIT alleges the following injury: it has suffered a devaluation of its unvested Contingent Claimant Trust Interest by virtue of the alleged over-compensation of Seery as the Claimant Trustee—Seery's alleged over-compensation depletes the assets in the Claimant Trust available for distribution to creditors under the Plan, such that there is less likely a chance that HMIT ultimately receives any distributions on account of its Class 10 Contingent Claimant Trust Interest.[194] Yet, HMIT testified, through both witnesses Dondero and Patrick, that it had no personal knowledge of what Seery's actual compensation is under the CTA at the time HMIT filed its Motion for Leave. It was clear that HMIT's allegations regarding Seery's "excessive" compensation were based entirely on Dondero's pure speculation. In reality, Seery's base salary is exactly what the bankruptcy court approved during the bankruptcy case by a court order (after negotiations between Seery and the Committee). The CTA now further governs his compensation. The CTA, which was publicly filed ***in advance of*** the Plan confirmation hearing and approved by this court as part of the Plan

applicable law. Because constitutional standing is a matter of subject matter jurisdiction, the court has an independent duty to determine whether HMIT would have constitutional standing to pursue the Proposed Claims in federal court. The issue cannot be forfeited or waived by a party. *See Abraugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Moreover, courts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.")(cleaned up); *Abraugh*, 26 F.4th at 304 ("It is our constitutional duty, of course, to decline subject matter jurisdiction where it does not exist—and that is so whether the parties challenge Article III standing or not.")(cleaned up).

[194] At the June 8 Hearing, HMIT's counsel was unable to identify any other injury HMIT has alleged to have suffered. HMIT's counsel acknowledged that claims trades, in and of themselves, would not "involve injury to the Reorganized Debtor and to the Claimant Trust" and that claims trades are "normally outside the purview of the bankruptcy court" but that "[h]ere, we have alleged . . . . injury [that] takes the form of unearned excessive fees that Mr. Seery has garnered as a result of his relationship and arrangements, as we have alleged, with the Claims Purchasers." June 8 Hearing Transcript, 67:16-68:8. HMIT can only point to Seery's excess compensation as injury.

(which has been affirmed by the Fifth Circuit), specifically provides that Seery's post-Effective Date compensation would include a "Base Salary" (again, same as during the bankruptcy case), a "success fee," and "severance."[195] The CTA discussed the role of the Committee and then the CTOB in setting the success fee and severance and the like. A fully executed copy of the CTA was admitted into evidence at the June 8 Hearing. HMIT is essentially arguing that its injury (i.e., diminished likelihood of realizing value on its Contingent Claimant Trust Interest) stems from a court-sanctioned and creditor-approved process for approving compensation to Seery. Moreover, HMIT has failed to plead facts sufficient to show that, even if Seery received excessive compensation and that compensation is ordered to be returned, HMIT's Contingent Claimant Trust Interest will ever vest. The district court and the Fifth Circuit in various appeals by Dugaboy, another Dondero-related entity that, similar to HMIT, was a holder of a limited partnership interest in Highland whose interests were terminated as of the Effective Date of the Plan in exchange for a Contingent Claimant Trust Interest, have repeatedly rejected Dugaboy's claims to have standing based on the ***speculative nature of its alleged injuries as a contingent beneficiary of the Claimant Trust under the Plan***. For example, the Fifth Circuit affirmed the district court's dismissal of an appeal by Dugaboy of the bankruptcy court's order authorizing the creation of an indemnity subtrust, wherein Judge Fitzwater found that, in addition to lacking prudential standing under the

[195] The Disclosure Statement that was approved by this court, after notice and a hearing, on November 24, 2020, provided that "The salient terms of each Trustee's employment, including such Trustee's duties and compensation shall be set forth in the Claimant Trust Agreement . . . ." The CTA was part of a Plan Supplement (as amended) that was filed in advance of the confirmation hearing and provided:

> 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, (b) a success fee, and (c) severance.

See Highland Ex. 38, at § 3.13(a)(i).

"person aggrieved" test to appeal the bankruptcy court's order, Dugaboy lacked constitutional standing "because they have not identified any injury fairly traceable to the Order: ***the injuries identified are speculative at best and nonexistent at worst***."[196] HMIT's allegations of injury are, without a doubt, "merely conjectural or hypothetical" and are only speculative of possible future injury if its Contingent Claimant Trust Interest ever vests."[197] The court finds that HMIT would not meet the "concrete and particularized" or the "actual or imminent" requirements for an "injury in fact," and, thus, would lack constitutional standing to pursue the Proposed Claims.

With regard to the second requirement of constitutional standing—whether HMIT could show "traceability" with respect to the Claims Purchasers and/or Seery (i.e., a "causal connection between the assertedly unlawful conduct and the alleged injury"[198]), as noted above, there is only a speculative injury. Even if there is unlawful conduct asserted (i.e., sharing of MNPI to Claims Purchasers who then, as a *quid pro quo,* rubber stamped excessive compensation for Seery), there is nothing other than a hypothetical theory of an alleged injury (i.e., an allegedly less likelihood of a distribution on a Contingent Claimant Trust Interest).

With respect to the third requirement of constitutional standing—whether HMIT can show "redressability" (i.e., that it is likely, not speculative, that the injury can be redressed by a favorable

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[196] *Highland Capital Mgt. Fund Advisors, L.P. v. Highland Capital Mgt., L.P. (In re Highland Capital Mgt., L.P.)*, Civ. Act. No. 3:21-cv-1895-D, 2022 WL 270862, *1 n.2 (N.D. Tex. Jan. 28, 2022), *aff'd* 57 F.4th 494 (5th Cir. 2023)(emphasis added); *see also* Judge Scholer's opinion in *Dugaboy Inv. Tr. v. Highland Capital Mgt., L.P. (In re Highland Capital Mgt., L.P.)*, Civ. Act. No. 3:21-cv-2268-S, 2022 WL 3701720, *3 (N.D. Tex. Aug. 8, 2022)(cleaned up), *aff'd per curium*, No. 22-10831, 2023 WL 2263022 (5th Cir. Feb. 28, 2023) (where Dugaboy had argued that "***its pecuniary interest is . . . a potential recovery under the Plan as one of Debtor's former equity holders***" and that "it ha[d] standing as a 'contingent beneficiary' under the Plan, or a beneficiary who will be entitled to payment after all creditors are paid in full," and Judge Scholer stated, "This assertion is premised on the assumption that Dugaboy's 0.1866% pre-bankruptcy limited partnership interest in Debtor—which was extinguished under the Plan—makes it a contingent beneficiary of the creditor trust created under the Plan. . . . [S]uch a 'speculative prospect of harm is far from a direct, adverse, pecuniary hit' as required to confer standing."

[197] *Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009).

[198] *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984).

decision), there are multiple problems here.[199] The major remedy sought here is the equitable disallowance of the allowed Purchased Claims (and disgorgement and/or constructive trust of amounts paid or owed to the Claim Purchasers on account of their claims). There is no such remedy available here. As noted earlier, there is a similar concept of ***equitable subordination*** of a claim to another claim, or of an interest to another interest, pursuant to Bankruptcy Code section 510(c). But under the literal terms of section 510(c), ***claims cannot be subordinated to interests***. Moreover, the Fifth Circuit noted in the *Mobile Steel* case,[200] that ***equitable disallowance*** of a claim (as opposed to equitable subordination of a claims) is not an available remedy. Bankruptcy Code section 502(b)(1) and the Fifth Circuit's *Lothian Oil* case might permit "recharacterization" of a claim from debt to equity in certain circumstances—but not based on inequitable conduct but rather on the nature of a financial transaction. In any event, here, the claims have already been adjudicated and allowed (some after mediation, and all after Rule 9019 settlement orders). The only way to reconsider a claim in a bankruptcy case that has already been allowed is through Bankruptcy Code section 502(j) ("A claim that has been allowed or disallowed may be reconsidered for cause. . . according to the equities of the case."). As noted earlier, the problem here is that Bankruptcy Rule 9024 provides that a motion for "reconsideration of an order allowing or disallowing a claim against the estate ***entered without a contest*** is not subject to the one year limitation prescribed in Rule 60(c)" (emphasis added). As further noted earlier, here there was most definitely a "contest" with regard to all of these purchased claims. ***Thus, it would appear***

[199] *See supra* notes 182-184 and accompanying text. The court will note that, as discussed *supra* note 141 and pages 71-72, the remedy of equitable subordination (as to the Claims Purchasers) would not redress HMIT's alleged injury (because equitable subordination of claims to interests is not an available remedy in the Fifth Circuit and thus subordination of the Purchased Claims to other claims would not change HMIT's distributions from the Claimant Trust, if any), and because outright disallowance of all or part of the already allowed Purchased Claims is not an available remedy either, HMIT would not be able to meet the "redressability" requirement with respect to the Claims Purchasers.

[200] *In re Mobile Steel Co., Inc.*, 563 F.2d 692 (5th Cir. 1977).

that any effort to have a court reconsider and potentially disallow these claims pursuant to section 502(j) is untimely—as it has been well beyond a year since they were allowed.

3. HMIT Would Also Lack Prudential Standing to Bring the Proposed Claims.

Even if HMIT would have constitutional standing to bring the Proposed Claims in an adversary proceeding filed in the bankruptcy court, the Proposed Claims would still be barred if HMIT would lack prudential standing to bring them under applicable state or federal law. HMIT argues that it does have prudential standing under both federal bankruptcy law and Delaware law to pursue the Proposed Claims derivatively and also to bring the Proposed Claims in its individual capacity.

With regard to "federal bankruptcy law," HMIT argues that it has standing pursuant to: (a) Rule 23.1 of the Federal Rules of Civil Procedure, pertaining to derivative actions, which "applies to this proceeding pursuant to" Rule 7023.1 of the Federal Rules of Bankruptcy Procedure, and (b) *Louisiana World Exposition v. Federal Insurance Co. ("LWE")*,[201] the Fifth Circuit's leading case addressing when a creditors committee may be granted standing to bring causes of action on behalf of a bankruptcy estate. But, federal bankruptcy law does not confer standing ***where the plaintiff otherwise lacks standing under applicable state law***. In other words, whether HMIT would have prudential standing to sue under Delaware law is dispositive of the issue, regardless of the forum. Rule 23.1 "speaks only to the adequacy of the . . . pleadings," and "cannot be understood to 'abridge, enlarge, or modify any substantive right,'"[202] including a right (or lack thereof) to bring a derivative action under the substantive law of Delaware. Additionally, HMIT's reliance on *LWE* is misplaced: *LWE* permits creditors, in certain circumstances ***during*** a bankruptcy case, to "file

[201] 858 F.2d 233 (5th Cir. 1988).

[202] *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991)(quoting 28 U.S.C. § 2072(b)).

suit on behalf of a debtor-in-possession or a trustee"[203] and does not apply to a party's right to sue, derivatively, on behalf of the Reorganized Debtor or any entity that is the assignee of the former bankruptcy estate's assets. Upon confirmation of the Plan, the bankruptcy estate of Highland ceased to exist;[204] Highland is no longer a debtor-in-possession but a reorganized debtor, and the Claimant Trust is a new entity created under the Plan and Claimant Trust Agreement. Even if *LWE* did apply in this ***post***-confirmation context, it supports the application of Delaware law to the issue of prudential standing and does not supersede state-law requirements for standing. In *LWE*, before addressing the requirements a creditors' committee must meet to sue derivatively on behalf of a bankruptcy estate as a matter of federal bankruptcy law, the Fifth Circuit conducted a lengthy analysis to determine "as a threshold issue" whether the creditors' committee in that case could assert its claims under Louisiana law.[205] The court specifically addressed whether the creditors' committee could pursue a derivative action under Louisiana law and concluded that "there is no bar in Louisiana law to actions brought by or in the name of a corporation against the directors and officers of the corporation which benefit only the creditors of the corporation; indeed, Louisiana law specifically recognizes such actions."[206] So, even under *LWE* (which the court does not think applies in this post-confirmation context), if HMIT would be barred from bringing a derivative action on behalf the Reorganized Debtor or Claimant Trust under state law, the analysis stops there.[207] Thus, the court looks to Delaware law to determine if HMIT would have prudential standing to pursue the derivative claims on behalf the Reorganized Debtor and the Claimant Trust.

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[203] *LWE*, 858 F.2d at 247.

[204] *See In re Craig's Stores*, 266 F.3d 388, 390 (5th Cir. 2001).

[205] *LWE*, 858 F.2d at 236-45.

[206] *Id.* at 243.

[207] *See In re Dura Automotive Sys., LLC*, No. 19-123728 (Bankr. D. Del. June 10, 2020), Docket No. 1115 at 46 (where the Delaware bankruptcy court denied the creditors' committee standing to sue derivatively on behalf of a Delaware LLC because the committee lacked standing under the Delaware LLC Act, stating, "To determine that the third party

HMIT acknowledges that both the Reorganized Debtor and the Claimant Trust are organized under Delaware law, and thus the cause of action against Seery alleging breach of fiduciary duties to the Reorganized Debtor and the Claimant Trust are governed by Delaware law under the "Internal Affairs Doctrine."[208] In addition, because HMIT's breach of fiduciary duties claim is governed by Delaware law, its aiding and abetting theory of liability as to the Claims Purchasers is also governed by Delaware law.[209] For the reasons set forth below, the court finds that HMIT would lack prudential standing under Delaware law to bring the claims set forth in the Proposed Complaint, derivatively, on behalf of either the Claimant Trust or the Reorganized Debtor.

a) First, HMIT Would Lack Prudential Standing Under Delaware Law to Bring Derivative Actions on behalf of the Claimant Trust.

The Claimant Trust is a Delaware statutory trust governed by the Delaware Statutory Trust Act, 12 Del. C. §§ 3801–29,[210] and "to proceed derivatively against a Delaware statutory trust, a plaintiff has the burden of satisfying the continuous ownership requirement" such that "the plaintiff must be a beneficial owner" continuously from "the time of the transaction of which the plaintiff complains" through "the time of bringing the action."[211] This requirement is "mandatory and exclusive" and only "a beneficial owner" "has standing to bring a derivative claim on behalf of the

may bring the claim under the derivative basis and, thus, step into the shoes of the debtor to pursue them, the Court must look to the law of the debtors' state of incorporation or formation.").

[208] Motion for Leave, ¶ 21 and n.24; *see also* Plan Art. XII.M ("corporate governance matters . . . shall be governed by the laws of the state of organization" of the respective entity); *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1081–82 (Del. 2011) ("In American corporation law, the internal affairs doctrine is a dominant and overarching choice of law principle."). The Reorganized Debtor and the Claimant Trust are both organized under the laws of Delaware.

[209] *See Xtreme Power Plan Tr. v. Schindler (In re Xtreme Power)*, 563 B.R. 614, 632, 645 (Bankr. W.D. Tex. 2016) (applying Delaware law to claim for aiding and abetting breach of fiduciary duty involving Delaware corporation headquartered in Texas).

[210] *See* Proposed Complaint, ¶ 26.

[211] *Hartsel v. Vanguard Grp., Inc.*, 2011 WL 2421003, at *19 n.123 (Del. Ch. June 15, 2011), *aff'd* 38 A.3d 1254 (Del. 2012); 12 Del C. § 3816(b).

Trust."[212] The Highland Parties argue that HMIT is not a "beneficial owner" of the Claimant Trust and, therefore, would lack standing to bring derivative claims on behalf of the Claimant Trust. HMIT argues to the contrary: that it ***is*** currently, and was at all relevant times, a "beneficial owner" of the Claimant Trust under Delaware trust law such that it would have standing to bring derivative claims on behalf of the Claimant Trust if it were allowed to proceed with the filing of the Proposed Complaint. The disagreement turns on the nature of HMIT's interest under the Plan and the Claimant Trust Agreement and whether HMIT, as a holder of such interest, would be considered a "beneficial owner" of the Claimant Trust under Delaware trust law.

As noted, pursuant to the Plan, HMIT's former limited partnership interest in Highland was cancelled as of the Effective Date in exchange for its pro rata share of a "Contingent Claimant Trust Interest," as defined under the Plan.[213] HMIT argues that its Contingent Claimant Trust Interest makes it a contingent beneficiary of the Claimant Trust, which makes it a present "beneficial owner" under Delaware trust law.

The Highland Parties argue that HMIT is not a "beneficial owner" of the Claimant Trust; rather, the "beneficial owners" of the Claimant Trust are the "Claimant Trust Beneficiaries,"[214] which are defined in the Plan and the CTA as "the Holders of Allowed General Unsecured Claims" (which are in Class 8 under the Plan) and "Holders of Allowed Subordinated Claims" (which are in Class 9 under the Plan); [215] HMIT, a holder of a Class 10 interest under the Plan, is neither.

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[212] *In re Nat'l Coll. Student Loan Tr. Litig.*, 251 A.3d 116, 191 (Del. Ch. 2020) (citing *CML V, LLC v. Bax*, 28 A.3d 1037, 1042 (Del. 2011)). HMIT acknowledges this requirement in its Reply: "Delaware statutory trust law provides that a plaintiff in a derivative action on behalf of a trust must be a beneficial owner at the time of the action and at the time of the transaction." Reply, ¶ 19 (citing 12 Del C. § 3816).

[213] *See* Plan Art. III.H.10 and Art. I.B.44.

[214] Section 2.8 of the CTA provides, "The Claimant Trust Beneficiaries shall be the sole beneficiaries of the Claimant Trust . . . ." HMIT Ex. 26, § 2.8.

[215] *See* Plan Art. I.B.44 ("'*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

HMIT, as the holder of a "Contingent Claimant Trust Interest," has only an ***unvested*** contingent interest in the Claimant Trust and, as such, is not a "beneficial owner" of the Claimant Trust for standing purposes under Delaware trust law. HMIT argues that it "should be treated as a vested Claimant Trust Beneficiary due to [the Proposed Defendants'] wrongful conduct and considering the current value of the Claimant Trust Assets before and after the relief requested herein."[216] The court disagrees.

HMIT's status as a "beneficiary" of the Claimant Trust is defined by the CTA itself, pure and simple. The CTA specifically provides that "Contingent Trust Interests" "shall not have any rights under this Agreement" and will not "be deemed 'Beneficiaries' under this Agreement," "unless and until" they vest in accordance with the Plan and the CTA. It is undisputed that HMIT's Contingent Trust Interest has not vested under the terms of the Plan and the CTA, and the court does not have the power to equitably deem HMIT's Contingent Trust Interest to be vested based on HMIT's unsupported allegation of wrongdoing on the part of Seery, the Claimant Trustee. Thus, the court finds that HMIT is not a "beneficial owner" of the Claimant Trust and, therefore, lacks prudential standing under Delaware law to bring derivative claims on behalf of the Claimant Trust.[217]

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."); CTA § 1.1(h). *See also*, CTA, 1 at n.2 ("For the avoidance of doubt, and as set forth in the Plan, Holders of Class A Limited Partnership Interests and Class B/C Limited Partnership Interests will be Claimant Trust Beneficiaries only upon certification by the Claimant Trustee that the Holders of such Claims have been paid indefeasibly in full plus, to the extent applicable, post-petition interest in accordance with the terms and conditions set forth herein and in the Plan."). HMIT Ex. 26.

[216] Proposed Complaint ¶ 24.

[217] *See Nat'l Coll.*, 251 A.3d at 190–92 (dismissing creditors' derivative claims because they were not "beneficial owners of the Trusts"); *Hartsel*, 2011 WL 2421003, at *19 n.123 (dismissing derivative claims by investors that "no longer own shares" because "those investors no longer have standing to pursue a derivative claim").

b) HMIT Would Likewise Lack Prudential Standing Under Delaware Law to Bring Derivative Actions on behalf of the Reorganized Debtor.

HMIT acknowledges that the Reorganized Debtor, Highland Capital Management, L.P., is a Delaware limited liability partnership governed by the Delaware Limited Partnership Act, 6 Del. C. § 17-101, *et seq.*[218] To bring "a derivative action" on behalf of a limited partnership, "the plaintiff must be a partner or an assignee of a partnership interest" continuously from "the time of the transaction of which the plaintiff complains" through "the time of bringing the action."[219]

HMIT is not a partner, general or limited, of the Reorganized Debtor limited partnership. HMIT ***was*** a limited partner in the original debtor (specifically, a holder of Class B/C Limited Partnership interests in Highland), but that limited partnership interest was extinguished on August 11, 2021 (the Effective Date of the Plan) per the terms of the Plan, and HMIT does not own any partnership interest in the newly created Reorganized Debtor limited partnership.[220] Because HMIT would not hold a partnership interest in the Reorganized Debtor at "the time of bringing the action," it "lacks derivative standing" to bring claims "on the partnership's behalf."[221] HMIT likewise cannot satisfy "the continuous ownership requirement"; when HMIT's limited partnership interest in the original Debtor was cancelled on the Plan's Effective Date, HMIT "los[t] standing to continue a derivative suit" on behalf of the Debtor.[222] Finally, to the extent HMIT

[218] Proposed Complaint ¶ 25.

[219] 6 Del. C. § 17-1002; *see Tow v. Amegy Bank, N.A.*, 976 F. Supp. 2d 889, 904 (S.D. Tex. 2013) ("The [Delaware] partnership act facially bars any party other than a limited partner from suing derivatively. . . . Delaware courts historically have interpreted the provisions as giving the partners exclusive rights to sue for breach of another party's fiduciary duties to them.") (quoting *CML V, LLC v. Bax*, 6 A.3d 238, 245 (Del. Ch. 2010), *aff'd* 28 A.3d 1037 (Del. 2011)); *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1265 n.87 (Del. 2016) ("The statutory foundation for the continuous ownership requirement in the corporate realm is echoed in the limited partnership context.") (citing 6 Del. C. § 17-211(h)).

[220] *See* Plan Art. IV.A.

[221] *Tow*, 976 F. Supp. 2d at 904 (dismissing derivative claims by creditor on behalf of partnership for lack of standing).

[222] *El Paso*, 152 A.3d at 1265 (cleaned up) (dismissing derivative action for lack of standing where plaintiff's partnership interest was extinguished by a merger transaction); *see also Schmermerhorn v. CenturyTel, Inc. (In re*

seeks to bring a "double derivative" action on behalf of the Claimant Trust based on claims purportedly held by its wholly owned subsidiary, the Reorganized Debtor, HMIT lacks standing. A "double derivative" action is a suit "brought by a shareholder of a parent corporation to enforce a claim belonging to a subsidiary that is either wholly owned or majority controlled."[223] And, under Delaware law, "parent level standing is required to enforce a subsidiary's claim derivatively."[224] Because HMIT would lack derivative standing to bring claims on behalf of the parent Claimant Trust,[225] it also would lack standing to bring a double derivative action.

c) Finally, HMIT Would Also Lack Prudential Standing under Applicable Law to Bring the Proposed Claims As ***Direct*** Claims.

HMIT argues that it has "direct" standing to pursue the Proposed Claims on behalf of itself, individually.[226] But just because HMIT asserts that some or even all of the Proposed Claims are direct, not derivative claims, does not make it so: "a claim is not 'direct' simply because it is pleaded that way."[227] Rather, in determining whether claims are direct or derivative, a court must "look at the substance of the Petition, and the nature of the wrongs alleged therein, rather than the Plaintiffs' characterization."[228] And, under Delaware law, "whether a claim is solely derivative or

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SkyPort Global Commcn's, Inc.), 2011 WL 111427, at *25–26 (Bankr. S.D. Tex. Jan. 13, 2011) (holding that pre-petition shareholders "lack standing to bring a derivative claim" under Delaware law because they "had their equity interests in the company extinguished pursuant to the merger under the Plan"); *In re WorldCom, Inc.*, 351 B.R. 130, 134 (Bankr. S.D.N.Y. 2006) ("[T]he cancellation of WorldCom shares under the Plan … prevents the required continuation of shareholder status through the litigation.") (cleaned up).

[223] *Lambrecht v. O'Neal*, 3 A.3d 277, 282 (Del. 2010).

[224] *Sagarra*, 34 A.3d at 1079–81 (capitalization omitted) (citing *Lambrecht*, 3 A.3d at 282).

[225] *See supra* pp. 80-82.

[226] *See e.g.*, Motion for Leave ¶ 10 ("HMIT has individual standing to bring this action because Seery owed fiduciary duties directly to HMIT at that time . . . ."); *id.* ¶ 67 (arguing that "HMIT has [d]irect [s]tanding"); Proposed Complaint ¶ 24 ("HMIT has constitutional standing and capacity to bring these claims both individually and derivatively.").

[227] *Schmermerhorn*, 2011 WL 111427, at *26 (quoting *Gatz v. Ponsoldt*, 2004 WL 3029868 at *7 (Del. Ch. Nov. 5, 2004)).

[228] *See id.* (citing *Armstrong v. Capshaw, Goss & Bowers LLP*, 404 F.3d 933, 936 (5th Cir. 2005)); *see also Moore v. Simon Enters., Inc.*, 919 F.Supp. 1007, 1009 (N.D. Tex. 1995)("The determination of whether a claim is a derivative claim or a direct claim is made by reference to the nature of the wrongs alleged in the complaint, and is not limited by a [party's] characterization or stated intention.")(cleaned up).

may continue as a dual-natured claim 'must turn ***solely*** on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?'"[229] "In addition, to prove that a claim is direct, a plaintiff 'must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.'"[230] Similarly, in the bankruptcy context, whether a creditor can assert a claim directly or whether the claim belongs to the estate turns on the nature of the injury for which relief is sought: "[i]f the harm to the creditor comes about only because of harm to the debtor, then its injury is derivative, and the claim is property of the estate," such that "only the bankruptcy trustee has standing to pursue the claim for the estate . . . ."[231] "To pursue a claim on its own behalf, a creditor must show this direct injury is not dependent on injury to the estate."[232]

As a reminder, HMIT argues that the injury it has suffered is a devaluation of its interests in the Claimant Trust by virtue of alleged over-compensation of Seery as the Claimant Trustee. HMIT was unable, when pressed during closing arguments, to identify any other injury. It essentially admitted that the claims trades, in and of themselves, would not have harmed the Claimant Trust, the Reorganized Debtor, or individual stakeholders, including HMIT, ***since the Claims Purchasers acquired already allowed unsecured claims, such that the distributions on those claims pursuant to the Plan would be unchanged in the hands of new holders of the claims***.

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[229] *El Paso*, 152 A.3d at 1260 (quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)) (emphasis in original).

[230] *Id.* (quoting *Tooley*, 845 A.2d at 1033); *see also Schmermerhorn*, 2011 WL 111427, at *24 (same).

[231] *Meridian Cap. CIS Fund v. Burton (In re Buccaneer Res., L.L.C.)*, 912 F.3d 291, 293 (5th Cir. 2019) (citing 11 U.S.C. § 541(a)(1)).

[232] *Id.*; *see also Schertz-Cibolo-Universal City Indep. Sch. Dist. v. Wright (In re Educators Grp. Health Tr.)*, 25 F.3d 1281, 1284 (5th Cir. 1994)("If a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate.")(citations omitted).

Thus, by its own concessions, any alleged harm to HMIT (through devaluation of assets in the Claimant Trust) "comes about only because of harm to the debtor," so the alleged "injury is derivative."[233] The court concludes that all of the claims set forth in the Proposed Complaint allege derivative claims only, and that none would be direct claims against the Proposed Defendants. Thus, HMIT would lack prudential standing to bring any of the Proposed Claims in the Proposed Complaint, so its Motion for Leave should be denied.

d) Some Final Points Regarding Standing.

In this standing discussion, one should not lose sight of the fact that there are both procedural safeguards in place, as well as certain independent individuals in place with fiduciary duties that might act in the event of any shenanigans regarding Claimant Trust activities. Under section 4.1 of the CTA (approved as part of the Plan process), the CTOB, which includes an independent disinterested member in addition to representatives of the Claims Purchasers,[234] oversees the Claimant Trustee's performance of his duties, approves his compensation, and may remove him for cause. Moreover, there is a separate "Litigation Trustee" in this case who was brought in, post-confirmation, as an independent fiduciary to pursue claims and causes of action. These independent persons are checks and balances in the post-confirmation wind down of Highland. This is what creditors voted on in connection with the Plan. Seery and the Claims Purchasers are not in sole control of anything. The CTA, as well as Delaware law, very clearly set forth who can bring an action in the event of some colorable claim. This is the reality of prudential

[233] *Meridian*, 912 F.3d at 293–94 ("The creditors' injury (reduced bankruptcy recovery) derived from injury to the debtor (the loss of estate assets), so only the estate could sue the third parties."); *see also El Paso*, 152 A.3d at 1260–61 & n.60 (holding that claim "claims of corporate overpayment are normally treated as causing harm solely to the corporation and, thus, are regarded as derivative") (collecting cases); *Gerber v EPE Holdings, LLC*, 2013 WL 209658, at *12 (Del. Ch. Jan. 18, 2013) (holding that claims were derivative because plaintiff had "not identified any independent harm suffered by the limited partners"; "the partnership suffered all the harm at issue—it paid too much").

[234] *See supra* note 23 and accompanying text.

standing. Just as in the *Abraugh* case, where Louisiana law dictated that a mother could not bring a wrongful death case when the deceased prisoner had a surviving wife and child, Delaware law and the CTA dictate here that a contingent beneficiary cannot bring the Proposed Claims here. This is separate and apart from whether the claims are colorable.

C. Are the Proposed Claims "Colorable"?

1. What is the Proper Standard of Review for a "Colorability" Determination?

Although the court has determined that HMIT would ***not*** have standing (constitutional or prudential) to bring the Proposed Claims, this court will nevertheless evaluate whether the claims—assuming HMIT somehow has standing—might be "colorable." This, in turn, requires the court to assess what the legal standard is to determine if a claim is "colorable." As a reminder, the Plan's Gatekeeper Provision and this court's prior Gatekeeper Orders entered in January and July 2020 each required that, before a party may commence or pursue claims relating to the bankruptcy case against certain protected parties, it must first obtain a finding from the bankruptcy court that its proposed claims are "colorable." The Gatekeeper Provision and Gatekeeper Orders did not specifically define "colorable" or what type of legal standard should apply.

HMIT argues that the standard for review to be applied by this court is the same as a simple "plausibility" standard used in connection with a Rule 12(b)(6) motions to dismiss. In other words, the court should simply assess whether the allegations of the Proposed Complaint, taken as true and with all inferences drawn in favor of the movant, state a ***plausible*** claim for relief (i.e., colorable equals plausible), and that this standard does not allow for the weighing of evidence by the court.[235] The Proposed Defendants, however, argue that the test for colorability should be more

[235] Reply, ¶ 5 ("[T]he determination of 'colorability' does not allow the 'weighing' of evidence. At most, a Rule 12(b)(6) 'plausibility' standard applies.").

akin to the test applied under the *Barton* doctrine,[236] under which a plaintiff must make a *prima facie* case that a proposed claim against a bankruptcy trustee is "not without foundation." In this regard, they argue that the court can and should consider evidence outside of the four corners of the complaint—especially since HMIT attached to its Motion for Leave, as "evidence" to support it, two declarations of Dondero (as part of a 350-page attachment) and only attempted to withdraw those declarations after the Highland Parties urged that they be permitted to cross-examine Dondero on them.

This court ultimately determined that the "colorability" standard was somewhat of a mixed question of fact and law and, therefore, the parties could put on evidence at the June 8 Hearing if they so-chose. The court would not require it. It was up to the parties. But, in any event, the Proposed Defendants should have an opportunity to cross-examine Dondero on the statements made in his declarations since the declarations had been filed on the docket and the court had reviewed them at this point. HMIT attempted to withdraw the declarations and any reference to them in the Motion for Leave, by filing redacted versions of the Motion for Leave,[237] less than 72 hours before the June 8 Hearing; however, the redacted versions did not redact any allegations in the Motion for Leave that were purportedly supported by the Dondero declarations. Also, HMIT called Dondero as a direct witness, in addition to calling Seery as an adverse witness at the June 8 Hearing, albeit subject to its running objection to the evidentiary format of the hearing.[238] HMIT also filed a witness and exhibit list attaching 80 exhibits and over 2850 pages of evidence and

[236] *Barton v. Barbour*, 104 U.S. 126 (1881).

[237] Bankr. Dkt. Nos. 3815 and 3816.

[238] *See* June 8 Hearing Transcript, 7:20-24, 112:11-13.

moved for the admission of those exhibits at the June 8 Hearing (again, subject to its running objection to the evidentiary format of the hearing).[239]

In determining what appropriate legal standard applies here in the "colorability" analysis, the context in which the Gatekeeper Provision of the Plan was approved seems very relevant. In determining that the Gatekeeper Provision was legal, necessary, and in the best interest of all of the parties, this court set forth in the Confirmation Order a lengthy discussion of the factual support for it, and made specific findings relating to Dondero's post-petition litigation and the need for inclusion of the Gatekeeper Provision in the Plan.[240] This court observed that "prior to the commencement of the Debtor's bankruptcy case, and while under the direction of 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" and that "[d]uring the last several months, Dondero and the Dondero Related Entities have harassed the Debtor, which has resulted in further substantial, costly, and time-consuming litigation for the Debtor."[241] This court further found that: (1) Dondero's post-petition litigation "was a result of Dondero failing to obtain creditor support for his plan proposal and consistent with his comments, as set forth in Seery's credible testimony, that if Dondero's plan proposal was not accepted, he would 'burn down the place,'"[242] (2) without the Gatekeeper Provision in place, "Dondero and his related entities will likely commence litigation against the Protected Parties after the Effective Date" and that "the threat of continued litigation by 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

[239] *See Hunter Mountain Investment Trust's Witness and Exhibit List in Connection with Its Emergency Motion for Leave to File Verified Adversary Proceeding, and Supplement* ("HMIT W&E List")[Bankr. Dkt. No. 3818] and n.1 thereto; *see also* June 8 Hearing Transcript, 33:7-10.

[240] *See* Confirmation Order ¶¶ 76-79.

[241] *Id.* ¶ 77.

[242] *Id.* ¶ 78. *See supra* note 12.

costs and distraction such litigation or the threats of such litigation would cause,"[243] and, (3) "unless the [court] approves the Gatekeeper Provision, the Claimant Trustee and the Claimant Trust Oversight Board will not be able to obtain D&O insurance,[244] the absence of which will present unacceptable risks to parties currently willing to serve in such roles." Thus, as set forth in the Confirmation Order, the Gatekeeper Provision (and the Gatekeeper Orders as well, which were approved based on the same concerns regarding the threat of continued litigation by Dondero and his related entities) required Dondero and related entities to make a threshold showing of colorability, noting that 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)."[245]

The Fifth Circuit, in approving the Gatekeeper Provision on appeal, noted that that the Plan injunction and Gatekeeper Provision "screen and prevent bad-faith litigation against Highland Capital, its successors, and other bankruptcy participants that could disrupt the Plan's effectiveness."[246]

Again, the court believes it is appropriate to consider the context in which—and the purpose for which—the Gatekeeper Orders and Gatekeeper Provision were entered in assessing

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[243] *Id.*

[244] Asd noted at ⁋ 79 of the Confirmation Order, 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 for the post-confirmation parties implementing the Plan. 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*** required that the Confirmation Order approve the Gatekeeper Provision.

[245] *Id.* ¶ 80.

[246] *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P.* (*In re Highland Cap. Mgmt., L.P.*), 48 F.4th 419, 435 (5th Cir. 2022).

how "colorability" should work here. It seems that applying HMIT's proposed Rule 12(b)(6) "plausibility" standard would impose no hurdle at all to litigants and would render the threshold for bringing claims under the Gatekeeper Provision and Gatekeeper Orders entirely duplicative of the motion to dismiss standard that every litigant already faces.

The authorities cited by HMIT in support of its argument for applying a Rule 12(b)(6) standard are inapposite. HMIT has cited no authority that addresses the appropriate standard for assessing the "colorability" of claims in the context of a plan gatekeeper provision—specifically, one implemented in response to a demonstrated need to screen and prevent continued bad-faith, harassing litigation against a chapter 11 debtor that would impede the debtor's implementation of a plan, which is what we have here. HMIT relies on a bevy of cases that include benefits coverage disputes under ERISA, Medicare coverage disputes, and constitutional challenges[247]—none of which implicate the *Barton* doctrine and vexatious-litigant concerns that were referenced by the court in the Plan as justifications for the gatekeeping provisions at issue here.

In affirming the Plan's Gatekeeper Provision, the Fifth Circuit stated, "Courts have long recognized bankruptcy courts can perform a gatekeeping function" and noted, by way of example, that "[u]nder the '*Barton* doctrine,' the bankruptcy court may require a party to 'obtain leave of

[247] *See Gonzales v. Columbia Hosp. at Med. City Dallas Subsidiary, L.P.*, 207 F. Supp. 2d 570, 577 (N.D. Tex. 2002) (assessing whether an employee has "a colorable claim to vested benefits" such that the employee may be considered a "participant" under ERISA); *Abraham v. Exxon Corp.*, 85 F.3d 1126, 1129 (5th Cir. 1996) (same); *Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 790 (7th Cir. 1996) (same); *Lake Eugenie Land & Dev., Inc. v. BP Expl. & Prods. (In re Deepwater Horizon)*, 732 F.3d 326, 340 (5th Cir. 2013) (holding that claims administrator incorrectly interpreted class settlement agreement by permitting "claimants [with] no colorable legal claim" to receive awards); *Richardson v. United States*, 468 U.S. 317, 326 n.6 (1984) (discussing whether criminal defendant's double jeopardy claim was "colorable" such that it could be appealed before final judgments); *Trippodo v. SP Plus Corp.*, 2021 WL 2446204, at *3 (S.D. Tex. June 15, 2021) (assessing whether plaintiff stated a "colorable claim" against proposed additional defendants in determining whether plaintiff could amend complaint); *Reyes v. Vanmatre*, 2021 WL 5905557, at *3 (S.D. Tex. Dec. 13, 2021) (same); *Family Rehab., Inc. v. Azar*, 886 F.3d 496, 504 n.15 (5th Cir. 2018) (assessing whether plaintiff raised a "colorable claim" to warrant the district court's exercise of jurisdiction over a Medicare coverage dispute); *Am. Med. Hospice Care, LLC v. Azar*, 2020 WL 9814144, at *5 (W.D. Tex. Dec. 9, 2020) (same); *Harry v. Colvin*, 2013 WL 12174300, at *5 (W.D. Tex. Nov. 6, 2013) (considering whether plaintiff asserted a "colorable constitutional claim" such that the court could exercise jurisdiction); *Sabhari v. Mukasey*, 522 F.3d 842, 844 (8th Cir. 2008) (same); *Stanley v. Gonzales*, 476 F.3d 653, 657 (9th Cir. 2007) (same).

the bankruptcy court before initiating an action in district court when the action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor's official capacity."[248] As noted above, the Fifth Circuit found that the Gatekeeper Provision, which "requires that, before any lawsuit is filed, the plaintiff must seek the bankruptcy court's approval of the claim as 'colorable'"—*i.e.*, to "screen and prevent bad-faith litigation,"—is "sound."[249]

On balance, the court views jurisprudence applying the *Barton* doctrine and vexatious litigant injunctions—while not specifically addressing the "colorability" standard under gatekeeping provisions in a plan[250]—as more informative on how to approach "colorability" than any of the other authorities presented by the parties. One example is *In re VistaCare Group, LLC.*[251]

In *VistaCare*, the Third Circuit noted that, under the *Barton* doctrine, "[a] party seeking leave of court to sue a trustee must make a prima facie case against the trustee, showing that its claim is not without foundation," and emphasized that the "not without foundation" standard, while similar to the standard courts apply in evaluating Rule 12(b)(6) motions to dismiss, "involves a greater degree of flexibility" than a Rule 12(b)(6) motion to dismiss because "the bankruptcy court, which given its familiarity with the underlying facts and the parties, is uniquely situated to determine whether a claim against the trustee has merit," and "is also uniquely situated to determine the potential effect of a judgment against the trustee on the debtor's estate."[252] To satisfy the "*prima facie* case standard," "the movant must do more than meet the liberal notice-pleading

[248] *Id.* at 438 (cleaned up).

[249] *Id.* at 435.

[250] The court acknowledges that the *Barton* doctrine itself would not be directly applicable here because HMIT is proposing to bring the Proposed Complaint in the bankruptcy court – the "appointing" court of Seery.

[251] 678 F.3d 218 (3d Cir. 2012).

[252] *Id.* at 232-233 (cleaned up).

requirements of Rule 8."[253] "[I]f the [bankruptcy] court relied on mere notice-pleading standards rather than evaluating the merits of the allegations, the leave requirement would become meaningless."[254] This court agrees with the notion, that "[t]o apply a less stringent standard would eviscerate the protections" of the Gatekeeper Provision and Gatekeeper Orders.[255] The court notes, as well, that courts in the *Barton* doctrine context regularly hold evidentiary hearings on motions for leave to determine if the proposed complaint meets the necessary threshold for pursuing litigation. The Third Circuit in *VistaCare* noted that "[w]hether to hold a hearing [on a motion for leave to bring suit against a trustee] is within the sound discretion of the bankruptcy court,"[256] and that "the decision whether to grant leave may involve a 'balancing of the interests of all parties involved,'" which will ordinarily require an evidentiary hearing.[257] The Third Circuit applied "the deferential abuse of discretion standard" in considering whether the bankruptcy court's granting of leave should be affirmed on appeal.[258]

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[253] *In re World Mktg. Chi., LLC*, 584 B.R. 737, 743 (Bankr. N.D. Ill. 2018) (cleaned up; collecting cases).

[254] *Leighton Holdings, Ltd. v. Belofsky (In re Kids Creek Partners, L.P.)*, 2000 WL 1761020, at *2 (N.D. Ill. Nov. 30, 2000).

[255] *World*, 584 B.R. at 743 (quoting *Leighton*, 2000 WL 1761020, at *2).

[256] *VistaCare*, 678 F.3d at 232 n.12.

[257] *Id.* at 233 (quoting *In re Kashani*, 190 B.R. 875, 886–87 (9th Cir. BAP 1995)). The Third Circuit noted that the bankruptcy court's holding of an evidentiary hearing on the motion for leave was appropriate (though not required in every case)). *Id.* at 232 n.12.

[258] *Id.* at 224 ("We review a bankruptcy court's decision to grant a motion for leave to sue a trustee under the deferential abuse of discretion standard.") (citing *In re Linton*, 136 F.3d 544, 546 (7th Cir. 1998); *In re Beck Indus., Inc.*, 725 F.2d 880, 889 (2d Cir. 1984)). Courts of appeal routinely apply the deferential abuse of discretion standard to a bankruptcy court's decision regarding whether leave should be granted to sue a trustee. Although the Fifth Circuit has not squarely addressed this issue, all nine Circuits that have considered this issue have also adopted an abuse-of-discretion standard. *See In re Bednar*, 2021 WL 1625399, at *3 (B.A.P. 10th Cir. Apr. 27, 2021) ("[T]he Bankruptcy Court's decision to decline leave to sue the Trustee under the *Barton* doctrine is reviewed for abuse of discretion . . . .") (citing *VistaCare*); *SEC v. N. Am. Clearing, Inc.*, 656 F. App'x 969, 973–74 (11th Cir. 2016) ("Although we have never determined the standard of review for a challenge to the denial of a *Barton* motion, other Circuits that have considered the issue review a lower court's ruling on a *Barton* motion for an abuse of discretion.") (citing *VistaCare*); *In re Lupo*, 2014 WL 4653064, at *3 (B.A.P. 1st Cir. Sept. 17, 2014) ("Appellate courts review a bankruptcy court's decision to deny a motion for leave to sue under the abuse of discretion standard.") (citing *VistaCare*); *Grant, Konvalinka & Harrison, PC v. Banks (In re McKenzie)*, 716 F.3d 404, 422 (6th Cir. 2013) (holding that abuse-of-discretion standard applies to *Barton* doctrine); *Alexander v. Hedback*, 718 F.3d 762 (8th Cir. 2013) (applying abuse-of-discretion standard to *Barton* doctrine).

The Fifth Circuit has affirmed a bankruptcy court's conducting of an evidentiary hearing, in the context of applying a *Barton* doctrine analysis as to a proposed lawsuit against a trustee, without any concern that the inquiry was somehow improper.[259]

Similarly, courts in the vexatious litigant context, where there was an injunction requiring a movant to seek leave to pursue claims, have required movants to "show that the claims sought to be asserted have sufficient merit," including that "the proposed filing is both procedural and legally sound," and "that the claims are not brought for any improper purpose, such as harassment."[260] "For a prefiling injunction to have the intended impact, it must not merely require a reviewing official to apply an already existing level of review," such as the "plausibility" standard for a Rule 12(b)(6) motion.[261] Rather, courts apply "an additional layer of review," and "may appropriately deny leave to file when even part of the pleading fails to satisfy the reviewer that it warrants a federal civil action" or that the "litigant's allegations are unlikely," especially "when prior cases have shown the litigant to be untrustworthy or not credible . . . ."[262]

In summary, the court rejects HMIT's positions: (a) that it need only show, at most, that the allegations in the Proposed Complaint are "plausible" under the Rule 12(b)(6) standard for motions to dismiss; and (b) that this court improperly conducted an evidentiary hearing on the Motion for Leave (i.e., that consideration of evidence in this context is impermissible). The court notes, again, that HMIT's argument that this court is not permitted to consider evidence in making its "colorability" determination is completely contradictory to HMIT's actions in filing the Motion

[259] *See Howell v. Adler (In re Grodsky)*, 2019 WL 2006020, at *4 (Bankr. E.D. La. Apr. 11, 2019) (dismissing an action under *Barton* after "a close examination" by the bankruptcy court of the evidence regarding the trustee's actions and finding that "the plaintiffs' allegations are not based in fact"), *aff'd* 799 F. App'x 271 (5th Cir. 2020).

[260] *Silver v. City of San Antonio*, 2020 WL 3803922, at *1 (W.D. Tex. July 7, 2020) (denying leave to file lawsuit); *see also Silver v. Perez*, 2020 WL 3790489, at *1 (W.D. Tex. July 7, 2020) (same).

[261] *Silver*, 2020 WL 3803922, at *6.

[262] *Id.*

for Leave, where it attached two Dondero declarations as part of 350 pages of "objective evidence" that "supported" its motion.

The court concludes that the appropriate standard to be applied in making its "colorability" determination in ***this*** bankruptcy case, in the exercise of its gatekeeping function pursuant to the two Gatekeeper Orders and the Gatekeeper Provision in ***this*** Plan, is a broader standard than the "plausibility" standard applied to Rule 12(b)(6) motions to dismiss. It is, rather, a standard that involves ***an additional level of review***—one that places on the proposed plaintiff a burden of making a prima facie case that its proposed claims are ***not without foundation***, are ***not without merit***, and are ***not being pursued for any improper purpose such as harassment***. Additionally, this court may, and should, take into consideration its ***knowledge*** of the ***bankruptcy proceedings*** and ***the parties*** and any additional evidence presented at the hearing on the Motion for Leave. For ease of reference, the court will refer to this standard of "colorability" as the "Gatekeeper Colorability Test." The court considers this test as a sort of hybrid of what the *Barton* doctrine contemplates and what courts have applied when considering motions to file suit when a vexatious litigant bar order is in place.

2. HMIT's Proposed Complaint Does Not Present "Colorable" Claims Under this Court's Gatekeeper Colorability Test or Even Under a Rule 12(b)(6) "Plausibility" Standard.

The court finds, in the exercise of its gatekeeping function under the Gatekeeper Orders and the Gatekeeping Provision in the Plan, that the Motion for Leave should be denied as the claims set forth in the Proposed Complaint are not "colorable" claims. The court makes this determination after considering evidence admitted at the June 8 Hearing, including the testimony of Dondero, Patrick, and Seery, and the numerous exhibits offered by HMIT and the Highland Parties. HMIT's Proposed Claims lack foundation, are without merit, and appear to be motivated by the improper purposes of vexatiousness and harassment. But, even under the less stringent

"plausibility" standard under Rule 12(b)(6) motions to dismiss, where all allegations must be accepted as true, HMIT's "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," fail to "[]cross the line from conceivable to plausible."[263]

HMIT makes unsubstantiated and conclusory allegations in its Motion for Leave and Proposed Complaint that the Claims Purchasers purchased the large allowed unsecured claims only because Seery, while he was CEO of Highland prior to the Effective Date of the Plan, provided them with MNPI and assurances that the Purchased Claims were very valuable. This was allegedly in exchange for their agreement to approve, in their future capacities as members of the CTOB, excessive compensation for Seery in his capacity as the Claimant Trustee after the Effective Date of the Plan. This was an alleged *quid pro quo* that HMIT claims establishes Seery's breach of fiduciary duties and the Claims Purchasers' conspiracy to participate in that breach. As discussed below, these allegations are unsubstantiated and conclusory allegations, and they do not support the inferences that HMIT needs the court to make when it analyzes whether the Proposed Claims are "colorable"—or even merely plausible.

a) HMIT's Proposed Breach of Fiduciary Duties Claim Set Forth in Count I of the Proposed Complaint

Based on HMIT's Proposed Complaint and the evidence admitted at the June 8 Hearing, the court finds that HMIT has not pleaded facts that would support a "colorable" breach of fiduciary duties claim against Seery, under this court's Gatekeeper Colorability Test, nor a plausible claim pursuant to the Rule 12(b) standard. HMIT alleges that Seery breached his fiduciary duties (i) "[b]y disclosing material non-public information to Stonehill and Farallon"

[263] *Ashcroft v. Iqbal*, 556 U.S. 662, 679–80 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)).

before their purchase of certain Highland claims, and (ii) by receiving "compensation paid to him under the terms of the [CTA] since the Effective Date of the Plan in August 2021."[264]

As earlier noted, both the Reorganized Debtor and the Claimant Trust are organized under Delaware law and, thus, its proposed Count I against Seery for breach of fiduciary duties to these entities is governed by Delaware law under the "Internal Affairs Doctrine."[265] Under Delaware law, "[t]o bring a claim for breach of fiduciary duty, a plaintiff must allege '(1) that a fiduciary duty existed and (2) that the defendant breached that duty.'"[266] HMIT fails to plausibly or sufficiently allege either element such that its breach of fiduciary duty claims against Seery could survive.

Under Delaware law, officers and directors generally owe fiduciary duties only to the entity and its stakeholders as a whole, not to individual shareholders.[267] Because Seery did not owe any "duty" to HMIT directly and individually, the Proposed Complaint fails to state a claim for breach of fiduciary duties to HMIT. HMIT's "legal conclusion[]" that Seery "owed fiduciary duties to HMIT, as equity, and to the Debtor's Estate"[268] "do[es] not suffice" to plausibly allege the existence of any actionable fiduciary relationship.[269] And as discussed earlier in the standing section, HMIT does not have standing to assert a breach of fiduciary claim derivatively on behalf

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[264] Proposed Complaint ¶¶ 64–67.

[265] Motion for Leave, ¶ 21 and n.24; *see also* Plan Art. XII.M ("corporate governance matters . . . shall be governed by the laws of the state of organization" of the respective entity); *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1081–82 (Del. 2011) ("In American corporation law, the internal affairs doctrine is a dominant and overarching choice of law principle."). The Reorganized Debtor and the Claimant Trust are both organized under the laws of Delaware.

[266] *Brooks v. United Dev. Funding III, L.P.*, 2020 WL 6132230, at *30 (N.D. Tex. Apr. 15, 2020) (quoting *Joseph C. Bamford & Young Min Ban v. Penfold, L.P.*, 2020 WL 967942, at *8 (Del. Ch. Feb. 28, 2020)).

[267] *See Gilbert v El Paso Co.*, 1988 WL 124325, at *9 (Del. Ch. Nov. 21, 1988) ("[D]irectors' fiduciary duty runs to the corporation and to the entire body of shareholders generally, as opposed to specific shareholders or shareholder subgroups.") *aff'd*, 575 A.2d 1131 (Del. 1990); *Klaassen v Allegro Dev. Corp.*, 2013 WL 5967028, at *11 (Del. Ch. Nov. 7, 2013) (same).

[268] Proposed Complaint ¶ 63.

[269] *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

of the Claimant Trust or Reorganized Debtor. But even if HMIT had sufficiently alleged the existence of a fiduciary duty by Seery to HMIT—or to the Reorganized Debtor or Claimant Trust that HMIT would have standing to assert—Seery's alleged communications with Farallon would not have breached those duties.

HMIT alleges that Seery ""disclose[d] material non-public information to Stonehill and Farallon," and they "acted on inside information and Seery's secret assurances of great profits."[270] But the Proposed Complaint does not make any factual allegations regarding HMIT's "conclusory allegations," and its "legal conclusions" are "purely speculative, devoid of factual support," and therefore "stop[] short of the line between possibility and plausibility of entitlement to relief"[271] (and certainly stop short of being "colorable"). HMIT never alleges when any of these purported communications occurred, what material non-public information Seery provided, and what "assurances of great profits" he made to Farallon or to Stonehill. At the June 8 Hearing, Dondero could only clarify that he believed the MGM Email to have been MNPI and that he ***believed*** that Seery ***must have*** communicated that MNPI to Farallon at some point between December 17, 2020 (the date the MGM Email was sent) and May 28, 2021 (the day that Dondero alleges to have had three telephone calls with representatives of Farallon, Messrs. Patel and Linn, regarding Farallon's purchase of the bankruptcy claims). Dondero alleges that, during these phone calls, Patel and Linn gave Dondero no reason for their purchase of the claims that "made [any] sense." Dondero and Patrick also both testified that neither of them had any personal knowledge: (a) of a *quid pro quo* arrangement between Seery and the Claims Purchasers, (b) of Seery having actually communicated any information from the MGM Email to Farallon, or (c) whether Seery's post-Effective Date compensation had or had not been negotiated in an arms' length transaction. Dondero only

[270] Proposed Complaint ¶¶ 3, 64; *see also id.* ¶¶ 13–14, 40, 47, 50.

[271] *Reed v. Linehan (In re Soporex, Inc.)*, 463 B.R. 344, 367, 386 (Bankr. N.D. Tex. 2011) (cleaned up).

speculates regarding these things, because it "made no sense" to him that the Claims Purchasers would have acquired the bankruptcy claims without having received the MNPI. But HMIT admits in the Proposed Complaint that Farallon and Stonehill purchased the Highland claims at discounts of 43% to 65% to their allowed amounts. Thus, they would receive at least an 18% return based on publicly available estimates in Highland's court-approved Disclosure Statement.[272] The evidence established that, if the acquisition of the UBS claims is excluded—recall that the UBS claims were not purchased until August 2021, which was after the May 28, 2021 phones calls that Dondero made to Farallon personnel—the Claims Purchasers would have expected to net over $33 million in profits, or nearly a 30% return on their investment, had Highland met its projections (this is based on the aggregate purchase price of $113 million for the non-UBS claims purchased in the Spring 2021).

To be clear, the only purported MNPI identified in HMIT's Proposed Complaint was the MGM Email Dondero sent to Seery containing "information regarding Amazon and Apple's interest in acquiring MGM." But, the evidence showed that this information was widely reported in the financial press at the time. Thus, it could not have constituted MNPI as a matter of law.[273] Moreover, the evidence showed that Dondero ***did not*** communicate in the MGM Email the actual inside information that he claimed to have obtained as a board member of MGM–which was that Amazon had met MGM's "strike price" and that the MGM board was going into exclusive negotiations with Amazon to culminate the merger with them (and, thus, Apple was no longer considered a potential purchaser). Dondero admitted that he included Apple in the MGM Email for the purpose of making it look like there was a competitive process still ongoing. In other

[272] Proposed Complaint ¶¶ 3, 37, 42.

[273] *See, e.g., SEC v. Cuban*, 2013 WL 791405, at *10–11 (N.D. Tex. Mar. 5, 2013) (holding that information is not "material, nonpublic information" and "'becomes public when disclosed to achieve a broad dissemination to the investing public'") (quoting *SEC v. Mayhew*, 121 F.3d 44, 50 (2d Cir. 1997)).

words, the MGM Email, at the very least, did not include MNPI and, at worst, was deceptive regarding the status of the negotiations between MGM and potential purchasers.

As to HMIT's allegations that Seery's post-Effective Date compensation is "excessive" and that the negotiations between Seery and the CTOB "were not arm's-length,"[274] the evidence at the June 8 Hearing reflected that the allegations are completely speculative, without any foundation whatsoever, and lack merit. And they are also simply not plausible. HMIT fails to allege facts in the Proposed Complaint that would support a reasonable inference that Seery breached his fiduciary duty to HMIT or the estate as a result of bad faith, self-interest, or other intentional misconduct rising to the level of a breach of the duty of loyalty.[275]

b) HMIT's Proposed Claims Set Forth in Counts II (Knowing Participation in Breach of Fiduciaries) and III (Conspiracy)

HMIT seeks to hold the Claims Purchasers secondarily liable for Seery's alleged breach of fiduciaries duties on an aiding and abetting theory in Count II of the Proposed Complaint[276] and, along with Seery, on a civil conspiracy theory of liability in Count III of the Proposed Complaint.[277] Because HMIT's breach of fiduciary duties claim is governed by Delaware law, its aiding and abetting breach of fiduciary duties claim against the Claims Purchasers (Count II) is also governed by Delaware law.[278] HMIT's conspiracy cause of action against the Claims

[274] Proposed Complaint ¶¶ 4, 13, 54, 74.

[275] *See Pfeffer v. Redstone*, 965 A.2d 676, 690 (Del. 2009) (dismissing claim for breach of duty of loyalty against a director where "conclusory allegations" failed to give rise to inference that director failed to perform fiduciary duties); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 507 (Del. Ch. 2000) (dismissing claim for breach of fiduciary duty where "[a]though the complaint makes the conclusory allegation that the defendants breached their duty of disclosure in a 'bad faith and knowing manner,' no facts pled in the complaint buttress that accusation.").

[276] Proposed Complaint ¶¶ 69-74.

[277] Proposed Complaint ¶¶ 75-81.

[278] *See Xtreme Power Plan Tr. v. Schindler (In re Xtreme Power)*, 563 B.R. 614, 632, 645 (Bankr. W.D. Tex. 2016) (applying Delaware law to claim for aiding and abetting breach of fiduciary duty involving Delaware corporation headquartered in Texas).

Purchasers and Seery (Count III), on the other hand, does not involve a matter of "internal affairs" or of corporate governance, so it is governed by Texas law under the Plan.[279]

As an initial matter, because HMIT does not present either a "colorable"—or even plausible claim—that Seery breached his fiduciary duties, it cannot show that it has alleged a "colorable" or plausible claim for secondary liability for the same alleged wrongdoing.[280] In addition, HMIT's civil conspiracy claim against the Claims Purchasers and Seery is based entirely on Dondero's speculation and unsupported inferences and, thus, HMIT has not "colorably" alleged, or even plausibly alleged, its conspiracy claim. Under Texas law, "civil conspiracy is a theory of vicarious liability and not an independent tort."[281] "[T]he elements of civil conspiracy [are] "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result."[282] While HMIT alleges that "Defendants conspired with each other to unlawfully breach fiduciary duties,"[283] it is simply a "legal conclusion" and not the kind of allegation that the court must assume to be true even for purposes of determining plausibility under a motion to dismiss.[284]

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[279] *Klinek v. LuxeYard, Inc.*, 596 S.W.3d 437, 450 n.9 (Tex. App. – Houston [14th Dist.] 2020) (applying Delaware law to fiduciary duty claim and Texas law to conspiracy theory); (Plan Art. XII.M)(which provides for the application of Texas law to "the rights and obligations arising under this Plan" except for "corporate governance matters.")

[280] *See English v. Narang*, 2019 WL 1300855, at *14 (Del. Ch. Mar. 20, 2019) ("As a matter of law and logic, there cannot be secondary liability for aiding and abetting an alleged harm in the absence of primary liability.") (cleaned up; collecting cases); *Hill v. Keliher*, 2022 WL 213978, at *10 (Tex. App. Jan. 25, 2022) ("[A] defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable.") (quoting *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996)). Because HMIT's breach of fiduciary duty claim is governed by Delaware law, its aiding and abetting theory of liability is also governed by Delaware law. *See Xtreme Power Plan Tr. v. Schindler (In re Xtreme Power)*, 563 B.R. 614, 632, 645 (Bankr. W.D. Tex. 2016) (applying Delaware law to claim for aiding and abetting breach of fiduciary duty involving Delaware corporation headquartered in Texas). By contrast, "conspiracy is not an internal affair" or a matter of corporate governance, so it is governed by Texas law under the Plan. *Klinek v. LuxeYard, Inc.*, 596 S.W.3d 437, 450 n.9 (Tex. App. – Houston [14th Dist.] 2020) (applying Delaware law to fiduciary duty claim and Texas law to conspiracy theory); (Plan Art. XII.M).

[281] *Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 142 (Tex. 2019).

[282] *Id.* at 141 (cleaned up).

[283] Proposed Complaint ¶ 76.

[284] *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 555 U.S. at 565–66).

HMIT repeats four times that Seery provided MNPI to Farallon and Stonehill as a "as a *quid pro quo*" for "additional compensation,"[285] each time based upon conclusory allegations based "upon information and belief" and, frankly, pure speculation from Dondero that his imagined "scheme," "covert *quid pro quo*," and secret "conspiracy" between Seery, on the one hand, and Farallon and Stonehill, on the other,[286] ***must have*** occurred because "[i]t made no sense for the [Claims] Purchasers to invest millions of dollars for assets that – per the publicly available information – did not offer a sufficient potential profit to justify the publicly disclosed risk" (i.e., "[t]he counter-intuitive nature of the purchases at issue compels the conclusion that the [Claims] Purchasers acted on inside information and Seery's assurance of great profits.")[287] Importantly, HMIT admits that the Claims Purchasers would have turned a profit based on the information available to them at the time of their acquisitions of the Purchased Claims.[288] HMIT's allegations about the level of potential profits were contradicted by their own allegations and other evidence admitted at the June 8 Hearing. But Dondero's speculation about what level of projected return would be sufficient to justify the acquisition of the claims by the Claims Purchasers, or any other third-party investor, does not give rise to a plausible inference that they acted improperly.[289] Thus, HMIT cannot meet

[285] Proposed Complaint ¶ 77; *see also id.* ¶¶ 4, 47, 74.

[286] *See id.* ¶ 3 ("Thus, acting within a cloak of secrecy, Seery provided close business acquaintances, the other Defendants with material non-public information concerning the value of assets which they then used to purchase the largest approved unsecured claims.").

[287] *Id.*

[288] *See, e.g., id.* ¶ 3 (alleging that acquiring the claims "did not offer a ***sufficient*** potential profit to justify the publicly disclosed risk")(emphasis added); ¶ 43 ("Furthermore, although the publicly available projections suggested only a small margin of error on any profit potential for its significant investment . . . ."); ¶ 49 ("Yet, in this case, it would have been *impossible* for Stonehill and Farallon (in the absence of inside information) to forecast *any* ***significant*** profit at the time of their multi-million-dollar investments given the publicly available, negative financial information.") (third emphasis added).

[289] In fact, the court did not allow Mr. Dondero to testify regarding what kind of information a hypothetical investor in bankruptcy claims would require or what level of potential profits would justify the purchase of bankruptcy claims by investors in the bankruptcy claims trading market because he was testifying as a fact witness, not an expert. Thus, the court only allowed Dondero to testify as to what data ***he*** (or entities he controls or controlled) would rely on, what ***his*** risk tolerance would have been, and what level of potential profits ***he*** would have required to purchase an allowed unsecured bankruptcy claim in a post-confirmation situation. June 8 Hearing Transcript, 129:6-130:4.

its burden, under the Gatekeeper Colorability Test, of making a prima facie showing that its allegations do not lack foundation or merit. Nor can it meet a plausibility standard.

In addition, contrary to the Proposed Complaint's statement that it would have been "***impossible*** for Stonehill and Farallon (in the absence of insider information) to forecast ***any*** significant profit at the time of their multi-million-dollar investments," the evidence showed there were already reports in the financial press that MGM was engaging with Amazon, Apple, and others in selling its media portfolio, and thus the prospect of an MGM transaction increasing the value of, and return on, the Purchased Claims, "at the time of their multi-million-dollar investments" was publicly available information.[290] HMIT's suggestion that the Claims Purchasers were in possession of inside information not publicly available when they acquired the Purchased Claims is simply not plausible. Nor is HMIT's allegation that "[u]pon information and belief" Farallon "conducted no due diligence but relied on Seery's profit guarantees" plausible. The allegations regarding Farallon not conducting any due diligence are based, again, entirely on Dondero's speculation and inferences he made from what Patel and Linn (of Farallon) allegedly told him on May 28, 2021; Dondero did not testify that either Patel or Linn ever told him specifically that they had conducted no due diligence. HMIT's allegations in the Proposed Complaint that ***Farallon*** "conducted no due diligence," are based on Dondero's speculation, unsubstantiated, and contradicted by the testimony of Seery, who testified that emails to him from Linn in June 2020 and later in January 2021 indicated to him that Farallon, at least, had been conducting some level of due diligence in that they had been following and paying attention to the

[290] The court notes, as well, that the Claim Purchasers acquired the UBS claims in August 2021—approximately two and a half months ***after*** the announcement of the MGM-Amazon transaction (which was on May 26, 2021)—a fact that HMIT makes no attempt to harmonize with its conspiracy theory that the Claims Purchasers profited from the misuse of MNPI allegedly given to them by Seery.

Highland case.[291] In addition, there are no allegations in the Proposed Complaint regarding whether Stonehill conducted due diligence or not, and Patrick testified that neither he nor HMIT had any personal knowledge of how much due diligence Farallon or Stonehill did prior to acquiring the Purchased Claims.[292] The court finds and concludes that HMIT's allegations of aiding and abetting and conspiracy in Counts II and III of the Proposed Complaint are based on unsubstantiated inferences and speculation, lack internal consistency, and lack consistency with verifiable public facts. Accordingly, HMIT has failed to show that these claims have a foundation and merit and has also failed to show that they are plausible.

c) HMIT's Proposed Claims Set Forth in Counts IV (Equitable Disallowance), V (Unjust Enrichment and Constructive Trust), and VI (Declaratory Relief) of the Proposed Complaint

i. Count IV (Equitable Disallowance).

In Count IV of its Proposed Complaint, HMIT seeks "equitable disallowance" of the claims acquired by Farallon's and Stonehill's special purpose entities Muck and Jessup, "to the extent over and above their initial investment," and, in the alternative, equitable subordination of their claims to all claims and interests, including HMIT's unvested Class 10 Contingent Claimant Trust Interest, "given [their] willful, inequitable, bad faith conduct" of allegedly "purchasing the Claims based on material non-public information" and being "unfairly advantaged" in "earning significant profits on their purchases."[293] As noted above, these remedies are not available to HMIT.[294]

First, HMIT's request to equitably subordinate the Purchased Claims to all claims and interests is not permitted because Bankruptcy Code § 510(c), by its terms, permits equitable

[291] *See* June 8 Hearing Transcript, 239:6-21.
[292] *See id.*, 310:19-312:2.
[293] Proposed Complaint ¶¶ 83-87.
[294] *See infra* pages 74-75.

subordination of a ***claim to other claims*** or an ***interest to other interests*** but does not permit equitable subordination of a ***claim to interests***.

Second, "equitable" disallowance of claims is not an available remedy in the Fifth Circuit pursuant to the *Mobile Steel* case.[295]

Third, reconsideration of an already-allowed claim in a bankruptcy case can only be accomplished through Bankruptcy Code § 502(j), which, pursuant to Federal Rule of Bankruptcy Procedure 9024, allows reconsideration of allowance of a claim that was allowed following ***a contest*** (which is certainly the case with respect to the Purchased Claims) based on the "equities of the case." But this is only if the request for reconsideration is made within the one-year limitation prescribed in Rule 60(c) of the Federal Rules of Civil Procedure. HMIT's request for disallowance of Muck and Jessup's Purchased Claims (if it could somehow be construed as a request for reconsideration of their claims), is clearly untimely, as it is being made well beyond a year since their allowance by this court following contests and approval of Rule 9019 settlements. Thus, the court finds that HMIT has not alleged a colorable or even plausible claim in Count IV of the Proposed Complaint and, therefore, the Motion for Leave should be denied.

ii. Count V (Unjust Enrichment and Constructive Trust)

In Count V of the Proposed Complaint, HMIT alleges that, "by acquiring the Claims using [MNPI], Stonehill and Farallon were unjustly enriched and gained an undue advantage over other creditors and former equity" and that "[a]llowing [the Claims Purchasers] to retain their ill-gotten benefits would be unconscionable;" thus, HMIT alleges, the Claims Purchasers "should be forced to disgorge all distributions over and above their original investment in the Claims as restitution for their unjust enrichment" and "a constructive trust should be imposed on such proceeds . . . ."[296]

[295] *In re Mobile Steel Co., Inc.*, 563 F.2d 692 (5th Cir. 1977).

[296] Proposed Complaint ¶¶ 89-93.

HMIT alleges further that "Seery was also unjustly enriched by his participation in this scheme and he should be required to disgorge or restitute all compensation he has received from the outset of his collusive activities" and "[a]lternatively he should be required to disgorge and restitute all compensation received since the Effective Date" over which a constructive trust should be imposed.[297] HMIT has not alleged a colorable or even a plausible claim for unjust enrichment or constructive trust in Count V.

Under Texas law,[298] "[u]njust enrichment is not an independent cause of action but rather characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances which give rise to an implied or quasi-contractual obligation to repay."[299] Thus, "when a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory."[300] Here, as noted above, HMIT's only alleged injury is a diminution of the value of its unvested Contingent Claimant Trust Interest by virtue of Seery's allegedly having wrongfully obtained excessive compensation, with the help of the Claims Purchasers. ***Yet Seery's compensation is governed by express agreements*** (i.e., the Plan and the CTA). Thus, HMIT's claim based on unjust enrichment is not an available theory of recovery.

iii. Count VI (Declaratory Relief)

HMIT seeks declaratory relief in Count VI of the Proposed Complaint, essentially, that Dondero's conspiracy theory is correct and that HMIT's would succeed on the merits with respect

[297] *Id.* ¶ 94.

[298] Under the Plan, Texas law governs HMIT's "claim" for unjust enrichment because it is not a "corporate governance matter." (Plan Art. XII.M.) It also governs HMIT's "claim" for constructive trust, which "is merely a remedy used to grant relief on the underlying cause of action." *Sherer v. Sherer*, 393 S.W.3d 480, 491 (Tex. App. 2013).

[299] *Taylor v. Trevino*, 569 F. Supp. 3d 414, 435 (N.D. Tex. 2021) (cleaned up); *see also Yowell v. Granite Operating Co.*, 630 S.W.3d 566, 578 (Tex. App. 2021) (same).

[300] *Taylor*, 569 F. Supp. 3d at 435 (quoting *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000)).

to the Proposed Claims if it were permitted leave to bring them in an adversary proceeding.[301] But, a request for declaratory relief is not "an independent cause of action"[302] and "in the absence of any underlying viable claims such relief is unavailable."[303] This court has already found and concluded that HMIT would not have constitutional or prudential standing to bring the underlying causes of action in the Proposed Complaint. This court has also found and concluded that all of the Proposed Claims are without foundation or merit and are not even plausible and are all; being brought for the improper purpose of continuing Dondero's vexatious, harassing, bad-faith litigation. Thus, HMIT would not be entitled to pursue declaratory judgement relief as requested in Count VI of the Proposed Complaint.

d) HMIT Has No Basis to Seek Punitive Damages

HMIT separately alleges that the Claims Purchasers' and Seery's "misconduct was intentional, knowing, willful, in bad faith, fraudulent, and in total disregard of the rights of others," thus entitling HMIT to an award of punitive damages under applicable law. But, HMIT abandoned its proposed fraud claim that was in its Original Proposed Complaint, so its sole claim for primary liability is Seery's alleged breach of his fiduciary duties. And under Delaware law, the "court cannot award punitive damages in [a] fiduciary duty action."[304]

[301] Proposed Complaint ¶¶ 96-99.

[302] *See Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 932 (5th Cir. 2023).

[303] *Green v. Wells Fargo Home Mtg.*, 2016 WL 3746276, at *2 (S.D. Tex. June 7, 2016) (citing *Collin Cty. v. Homeowners Ass'n for Values Essential to Neighborhoods*, 915 F.2d 167, 170–71 (5th Cir. 1990)); *see also Hopkins v. Cornerstone Am.*

[304] *Buchwald v. Renco Grp. (In re Magnesium Corp. of Am.)*, 539 B.R. 31, 52 (S.D.N.Y. 2015) (citing *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1154 (Del. Ch. 2006)), *aff'd* 682 F. App'x 24 (2d Cir. 2017).

3. HMIT Does Not Present "Colorable" Claims Under this Court's Gatekeeper Colorability Test Because It Seeks to Bring the Proposed Complaint for Improper Purposes of Harassment and Bad-Faith, Vexatiousness.

Under this court's Gatekeeper Colorability Test, in addition to showing that its allegations and claims are not without foundation or merit, HMIT must also show that the Proposed Claims are not being brought for any improper purpose. Taking into consideration the court's knowledge of the bankruptcy proceedings and the parties and the evidence presented at the hearing on the Motion for Leave, the court finds that HMIT is acting at the behest of, and under the control or influence of, Dondero in continuing to pursue harassing, bad faith, vexatious litigation to achieve his desired result in these bankruptcy proceedings. So, in addition to failing to show that its Proposed Claims have foundation and merit, HMIT cannot show that it is pursuing the Proposed Claims for a proper purpose and, thus, cannot meet the requirements under the Gatekeeper Colorability Test; HMIT's Motion for Leave should be denied.

IV. CONCLUSION

The court concludes, having taken into consideration both its knowledge of the bankruptcy proceedings and the parties and the evidence presented at the hearing on the Motion for Leave, that HMIT's Motion for Leave should be denied for three independent reasons: (1) HMIT would lack constitutional standing to bring the Proposed Claims (and, thus, the federal courts would lack subject matter jurisdiction over the Proposed Claims); (2) even if HMIT would have constitutional standing to pursue the Proposed Claims, it would lack prudential standing to bring the Proposed Claims; and (3) even if HMIT would have both constitutional standing and prudential standing to bring the Proposed Claims, it has not met its burden under the Gatekeeper Colorability Test of showing that its Proposed Claims are "colorable" claims—that the Proposed Claims are not without foundation, not without merit, and not being pursued for an improper purpose. Moreover,

even if this court's Gatekeeper Colorability Test should be replaced with a Rule 12(b)(6) "plausibility" standard, the Proposed Claims are not plausible.

Accordingly,

IT IS ORDERED that HMIT's Motion for Leave be, and hereby is **DENIED**.

###End of Memorandum Opinion and Order###

Appendix Exhibit 145

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

In re	§	
	§	**Civ. Act. No. 3:21-cv-0881-x**
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	
	§	**Consolidated with:**
	§	**3:21-cv-0880-x**
Reorganized Debtor/Plaintiff,	§	**3:21-cv-1010-x**
	§	**3:21-cv-1378-x**
v.	§	**3:21-cv-1379-x**
	§	**3:21-cv-3160-x**
NEXPOINT ASSET MANAGEMENT, L.P. (f/k/a HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.), et al.,	§	**3:21-cv-3162-x**
	§	**3:21-cv-3179-x**
	§	**3:21-cv-3207-x**
		3:22-cv-0789-x

Defendants.

NOTICE OF APPEAL TO UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

James Dondero ("Dondero"), defendant in Civ. Act. No. 3:22-cv-0881-x (consolidated with the above-captioned matters) and the adversary proceeding styled *Highland Capital Management, L.P. vs. James Dondero, et al.*, Adversary Proceeding No. 21-03003-sgj, appeals to the United States Court of Appeals for the Fifth Circuit from the following orders of the District Court for the Northern District of Texas: (1) the AMENDED FINAL JUDGMENT AGAINST JAMES DONDERO entered in this consolidated case as Dkt. 148 on August 3, 2023, and (2) Electronic Orders Dkt. 129 and Dkt. 131 (clarified by Electronic Order Dkt. 135, entered on July 6, 2023) which denied as moot the Motion for Ruling on Pending Objections (addressing, *inter alia*, an Objection to Order Denying Motions to Extend Expert Disclosure and Discovery Deadlines).

The parties to the judgment appealed from and the names and addresses of their respective attorneys are as follows:

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Dated: September 1, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 1, 2023, a true and correct copy of the foregoing document was served via the Court's CM/ECF system on all parties registered to receive electronic notices in this case.

/s/ Deborah Deitsch-Perez
Deborah Deitsch-Perez

Appendix Exhibit 146

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Counsel for James P. Seery, Jr.

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
Reorganized Debtor.	)	

HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND CLAIMANT TRUST, AND JAMES P. SEERY, JR.'S JOINT MOTION FOR AN ORDER REQUIRING SCOTT BYRON ELLINGTON AND HIS COUNSEL TO SHOW CAUSE WHY THEY SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THE GATEKEEPER PROVISION AND GATEKEEPER ORDERS

[1] Highland's last four digits of its taxpayer identification number are (8357). The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

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Statutes and Rule

Pursuant to 11 U.S.C. § 105(a) and Federal Rule of Bankruptcy Procedure 9011, Highland Capital Management, L.P. ("HCMLP," or, as applicable, the "Debtor"), the reorganized debtor in the above-referenced action, the Highland Claimant Trust (the "Trust"; together with HCMLP, "Highland"), and James P. Seery, Jr., HCMLP's Chief Executive Officer and the Claimant Trustee of the Trust ("Seery"), by and through their undersigned counsel, file this motion (the "Motion") seeking an order requiring Scott Byron Ellington ("Ellington") and his counsel, The Pettit Law Firm ("Pettit") and Lynn Pinker Hurst & Schwegmann, LLP, to show cause why they should not be held in civil contempt for violating the Gatekeeper Provision and Gatekeeper Orders.[2] In support of their Motion, Highland and Seery state as follows:

PRELIMINARY STATEMENT

1. Ellington and his counsel point blank admit—in writing—that they are using a Texas state court "stalking" case against Daugherty to pursue claims against Highland and Seery.

2. Ellington and his counsel allege, among other things, that (i) "with the assistance of at least one other individual" (*i.e.*, Seery), Daugherty stalked Ellington and others, and (ii) Daugherty and Seery engaged in a *quid pro quo* pursuant to which "Daugherty's settlement in the bankruptcy became materially better . . . only after Daugherty had provided Seery and Clubok with thousands upon thousands of pages of his investigatory work regarding Ellington."

3. Relying on these meritless allegations, Ellington seeks discovery in connection with the "settlement of Mr. Daugherty's proof of claim in the Highland bankruptcy" and "negotiations between Mr. Daugherty and Mr. Seery, as a representative of the Highland Estate" for the purpose of manufacturing claims against Highland and Seery:

[2] Capitalized terms not defined in this Preliminary Statement have the meanings ascribed to them below.

> The production provided by Mr. Daugherty, Mr. Seery, and others in this matter suggests the factual conclusion that the Highland Estate provided Mr. Daugherty with ***additional settlement consideration*** in exchange for information on Mr. Ellington.
>
> We believe that Mr. Daugherty and Mr. Seery's communications regarding ***settlement of Mr. Daugherty's proof of claim*** in the Highland bankruptcy are relevant to the factual issues that will be tried in this matter. To the extent that the redacted communications relate in any way to the ***negotiations between Mr. Daugherty and Mr. Seery, as a representative of the Highland Estate***, please produce those communications.

Ellington's pursuit of claims against Highland and Seery is a clear violation of the Gatekeeper Provision and Gatekeeper Orders.

4. The Gatekeeper Provision in the Court-approved Plan and this Court's Confirmation Order prohibit any "Enjoined Parties"—including Ellington and his counsel—from "pursu[ing] a claim or cause of action of any kind against any Protected Party"—including Highland and Seery—"that arose or arises from or is related to the Chapter 11 Case" without first obtaining leave from this Court. This Court's January and July 2020 Gatekeeper Orders likewise prohibit Ellington and his counsel from pursuing claims against any Independent Director or Seery without first obtaining leave from this Court.

5. In January 2022, Ellington and his counsel commenced the state court Stalking Action alleging that Daugherty followed, harassed, and photographed Ellington, his girlfriend, and his family members, and asserting state-law claims for stalking and invasion of privacy. Ellington's lawsuit does not refer to Seery or any settlement negotiations. Daugherty sought to remove the Stalking Action to this Court, arguing that this Court had jurisdiction because, among other things, the case related to Daugherty's settlement of his proof of claim with the Debtor (the "Daugherty Settlement"), to which Ellington had objected. But Ellington falsely represented to this Court that "[t]he State Court Action does not implicate the Daugherty Settlement; even if it

did, the Daugherty Settlement is resolved and its relevance is moot." This Court relied on Ellington's representations and remanded the Stalking Action to state court.[3]

6. Having successfully evaded this Court's jurisdiction, Ellington and his counsel are now using the Stalking Action as a vehicle to pursue claims against Highland and Seery, contending—among other things, and notwithstanding their prior representations to this Court—that the negotiation of the Daugherty Settlement was an integral part of a "stalking" conspiracy. In response to Ellington's broad third-party subpoenas in the Stalking Action, Seery has produced tens of thousands of pages of documents, including text messages between Seery and Daugherty. Because certain text messages strings include unresponsive communications, Seery produced approximately 38 pages of documents with redactions. While pressing for the production of those unresponsive communications and for the deposition of Judge Russell Nelms (a former independent director of the Debtor), Ellington and his counsel revealed that they are pursuing claims against Highland and Seery based on Seery's negotiation of the Daugherty Settlement.

7. This timing is no accident. Ellington and his counsel are coordinating their efforts with James Dondero ("Dondero") and his related entities, which have used the Stalking Action to advance Dondero's interests in the bankruptcy case. For example, Dugaboy (Dondero's supposed family "trust") filed a motion to compel forensic imaging of Seery's iPhone based on text messages and related correspondence exchanged in the Stalking Action.[4] Now, as this Court is aware, the parties in this post-confirmation case are scheduled to hold a mediation regarding a global

[3] Based on Ellington's representations that the Stalking Action was not related to Highland or its Protected Parties, Highland did not take a position regarding removal of the Stalking Action.

[4] *See The Dugaboy Investment Trust's Motion to Preserve Evidence and Compel Forensic Imagining of James P. Seery, Jr.'s iPhone* (the "Imaging Motion"; Dkt. No. 3802). The Imaging Motion is based entirely on discovery-related communications exchanged among counsel in the Stalking Action—which never included counsel for Dondero or Dugaboy.

settlement in October. By pursuing yet another post-confirmation dispute, Ellington and his counsel are desperately trying to create leverage for Dondero and his affiliates against Highland and Seery in the mediation.

8. If Ellington and his counsel can use the Stalking Action to pursue claims against Highland and Seery relating to the Debtor's bankruptcy, then the Gatekeeper Provision is a dead letter and Enjoined Parties will pursue harassing and frivolous claims against Highland and Seery in state court. Ellington and his counsel clearly violated the Gatekeeper Provision and must face consequences to ensure future compliance by all Enjoined Parties. Accordingly, Highland and Seery respectfully request that this Court order Ellington and his counsel to show cause why they should not be held in civil contempt for violating this Court's Orders.

RELEVANT BACKGROUND

A. This Court Adopted The Gatekeeper Orders And Provision To Protect Against Baseless, Distracting Litigation And The Threat Of Such Litigation.

9. On January 16, 2020, this Court entered a gatekeeper order ("January 2020 Order"; Dkt. No. 339) protecting the Debtor's Independent Directors:

> ***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.

(*Id.* ¶ 10 (emphasis added).)

10. On July 16, 2020, this Court entered a substantially similar gatekeeper order ("July 2020 Order"; Dkt. No. 854; together with the January 2020 Order, the "Gatekeeper

Orders"), protecting "Mr. Seery" from pursuit of claims "relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor." (*Id.* ¶ 5.)

11. On February 22, 2021, this Court entered an order ("Confirmation Order"; Dkt. No. 1943) confirming Highland's Plan, which contains a similar "gatekeeping" provision ("Gatekeeper Provision") protecting "any Protected Party" from pursuit of claims by any "Enjoined Party" "that arose or arises from or is related to the Chapter 11 Case." (*Id.* at 77; Plan at 50–51.)[5] "[T]he Gatekeeper Provision in the Plan provides protection to a broader number of persons than the persons protected under the January 2020 Order (addressing the Independent Directors and their agents and advisors) and the July 2020 Order (addressing Seery in his role as CEO and CRO of the Debtor)." (Aug. 25, 2023 Order at 32 ("August 2023 Order"; Dkt. No. 3903).) Under the Plan, Ellington and his counsel are "Enjoined Parties" and Seery and Highland are "Protected Parties."[6]

12. "The Gatekeeper Provision was not included in the Plan *sans raison*." (August 2023 Order at 4.) The Gatekeeper Provision, among other things, "prevent[s] baseless litigation designed merely to harass the post-confirmation entities charged with monetizing the Debtor's assets for the benefit of its economic constituents," mitigates the "costs and distraction such litigation or the threats of such litigation would cause," and "avoid[s] 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." (Confirmation Order ¶¶ 78–79.)

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[5] References to the "Plan" are to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (Dkt. No. 1808).

[6] Ellington is an "Enjoined Party" because he (i) held "Claims against or Equity Interests in the Debtor"; (ii) "has appeared and/or filed any motion, objection, or other pleading in this Chapter 11 Case"; and (iii) is a "Related Entity," because he was Debtor's former general counsel was therefore "an insider of the Debtor on or before the Petition Date." (Plan at 8, 14.) Ellington's counsel are "Enjoined Parties" because they are "Related Persons" to Ellington. (*Id.*) HCMLP, the Trust, and Seery, are expressly listed as "Protected Parties." (*Id.* at 13.)

13. The Gatekeeper Provision is working as this Court intended. Most recently, in this Court's August 25 Order, the Gatekeeper Provision prevented Hunter Mountain Investment Trust ("HMIT") from pursuing baseless, speculative claims against Seery and certain purchasers of claims in Debtor's bankruptcy. (August 2023 Order at 91, 94, 104.)

B. Ellington Unsuccessfully Objected To The Daugherty Settlement.

14. On December 23, 2020, Patrick Daugherty ("Daugherty") filed an amended proof of claim in Debtor's 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. (Confirmation Order ¶ 9.) On February 2, 2021, the Debtor and Daugherty informed this Court that they had reached an agreement in principle to settle Daugherty's claim under which Daugherty would receive $750,000 in cash, an $8.25 million general unsecured claim, and a $2.75 million subordinated claim. (*Id.*)

15. On December 8, 2021, the Debtor sought this Court's approval of the finalized settlement of Daugherty's proof of claim. (Dkt. No. 3088.) The final terms of the Daugherty Settlement were the same as the terms announced in February 2021 with three differences: (i) Daugherty would receive a $3.75 million (instead of a $2.75 million) subordinated claim; (ii) the Debtor would transfer to Daugherty interests in an employee deferred-compensation vehicle; and (iii) the Debtor would make reasonable efforts to petition the Oversight Board to grant Daugherty observer access. (*Id.* ¶ 40; Dkt. No. 3257 ¶¶ 2–3.)[7]

16. On February 15, 2022, Ellington objected to the Daugherty Settlement. (Dkt. No. 3242.) Ellington did "***not object to any of the economic terms*** of the Settlement Agreement."

[7] Highland agreed to these modifications after discovering the pre- and post-petition Sentinel frauds directed by Dondero and Ellington after the confirmation hearing.

(*Id.* ¶ 5 (emphasis added).) He objected only to "two newly added" non-economic terms, which he claimed would "give Daugherty a platform to obtain confidential information about Ellington and others and a mechanism to find new ways to harass Ellington." (*Id.*)[8] Ellington could have taken discovery on his objections, *see* Fed. R. Bankr. P. 9014(c), including discovery into the negotiation of the Daugherty Settlement, but chose not to. Ellington represented to this Court that he "has no reason to believe that HCMLP was aware of the alleged [stalking] activities of Daugherty or the allegations raised in the [Stalking] Action at the time HCMLP entered into" the Daugherty Settlement. (*Id.* ¶ 4.)

17. On March 1, 2022, this Court overruled Ellington's Objections and approved the Daugherty Settlement in its entirety. (Dkt. No. 3306.) Ellington did not appeal this Court's ruling.

C. Ellington Sues Daugherty In Texas State Court For Alleged Stalking.

18. On January 11, 2022, Ellington commenced an action (the "Stalking Action") by filing a petition in the 101st Judicial District Court of Dallas County ("Petition"; Ex. 2)[9] alleging that Daugherty was "observed outside Ellington's office, his residence, the residence of his long-time girlfriend, . . . his sister's residence, and his father's residence no less than 143 times, often taking photographs and video recordings while either parked or driving slowly by." (*Id.* ¶ 12.) Ellington asserts claims against Daugherty for stalking and for invasion of privacy by intrusion under Texas law and seeks injunctive relief and exemplary damages. (*Id.* ¶¶ 19–36.)

19. Under Texas law, Ellington's claims turn on whether Daugherty "engaged in harassing behavior" such that Ellington "reasonably feared for [his] safety or the safety of a member of [his] family." (*Id.* ¶¶ 21–22); Texas Civ. Prac. & Rem. Code §§ 85.001–02. Ellington

[8] Notably, although the Debtor agreed to make reasonable efforts to petition the Oversight Board to grant Daugherty observer access, Daugherty has never appeared before the Oversight Board or participated in any of its meetings.

[9] References to "Ex." refer to exhibits to the accompanying declaration of Joshua S. Levy.

acknowledges that Daugherty's "supposed motivations in stalking Plaintiff are irrelevant." (Ex. 1 ¶ 2.) Ellington's Petition makes no mention of Seery or the Daugherty Settlement.

1. Ellington Represented Repeatedly To This Court That The Stalking Action Is Unrelated To This Chapter 11 Case Or The Daugherty Settlement.

20. On January 18, 2022, Daugherty removed the Stalking Action to this Court and initiated an adversary proceeding. (Dkt. No. 3185.) On January 25, 2023, Ellington moved to remand the Stalking Action to state court, arguing repeatedly that the Stalking Action "***does not implicate*** the Daugherty Settlement," "the Daugherty Settlement ***has no bearing*** on the merits of Ellington's stalking and invasion of privacy claims," and the Stalking Action "***has no impact*** on the already resolved Daugherty Settlement." (Ex. 3 at 3, 6 (emphasis added); *see also* Ex. 4 (Mar. 29, 2022 Hr'g Tr.) at 14:13–16 (arguing that the Daugherty Settlement is "fully resolved and really moot to the motion before the Court").) Ellington further argued that Stalking Action "is independent of the administration of the bankruptcy" and "do[es] not invoke substantive rights in bankruptcy." (Ex. 3 at 4, 7.)

21. Relying on Ellington's representations, this Court remanded the Stalking Action to state court, holding that "[t]here is a remoteness, extreme remoteness to the bankruptcy case," because "the only possible hook . . . for the bankruptcy court or federal jurisdiction was if this somehow implicated the gatekeeping order" or "if the estate was somehow going to be impacted," but "I just didn't find, based on the evidence or argument, any of those things implicated." (Ex. 4 at 32:23–34:4.)

2. Ellington And His Counsel Are Using Discovery Materials From The Stalking Action To Facilitate Litigation Against The Highland Parties and Seery.

22. On November 3, 2022, Ellington served on Seery a third-party subpoena in the Stalking Action (the "Subpoena"; Ex. 5) seeking, among other things, "all communications and documents" between Seery and Daugherty relating to Ellington, certain individuals affiliated with

Ellington, certain locations associated with Ellington, and any "investigation conducted by Daugherty" relating to Ellington. Seery produced tens of thousands of pages of documents in response to the Subpoena, including emails and text messages between Seery and Daugherty.

23. In February and March 2023, Highland's counsel and Ellington's counsel corresponded about Seery's text messages on his personal iPhone in connection with the Subpoena. (Dkt. Nos. 3803-1 to -4.) Two different Dondero-controlled entities—HMIT and Dugaboy Investment Trust ("Dugaboy")—used this correspondence in the Stalking Action (on which neither of them were copied) to advance Dondero's interests in this bankruptcy case by (i) bringing the Imaging Motion, and (ii) contending that the mistaken allegation concerning the supposed loss of certain text messages somehow made HMIT's claims "colorable." (*See* August 2023 Order at 39–42; Ex. 6 (June 8, 2023 Hr'g Tr.) at 28:24–29:12, 33:2–4, 33:14–35:15, 36:2–17, 237:2–25.)

3. Ellington And His Counsel Are Using The Stalking Action To Pursue Claims Against The Highland Parties And Seery.

24. On June 19, 2023, Ellington served a second third-party subpoena on Seery in the Stalking Action seeking Seery's deposition. (Ex. 7.) Counsel for Ellington and Seery met and conferred by email and telephone about this subpoena for several weeks, and Seery's counsel provided Ellington's counsel with copies of the Gatekeeper Orders and Gatekeeper Provision. (Ex. 9.) On July 13, 2023, Ellington served a further amended subpoena on Seery, which included additional topics for testimony. (Ex. 8.) Ellington and his counsel sought to depose Seery about, among other things, "[a]ny consideration provided to Daugherty with respect to Mr. Daugherty's so-called 'investigation' of Mr. Ellington or the stalking in this case, including, but not limited to, the treatment of Mr. Daugherty's Proof of Claim in the Highland bankruptcy." (*Id.*) Ultimately,

Seery agreed to testify about certain topics relevant to the Stalking Action, and Seery's deposition was scheduled for July 31, 2023. (Ex. 10.)

25. On July 14, 2023, Seery made a supplemental production to Ellington of text messages between Seery and Daugherty "with redactions to the extent they contain information that is not responsive to the Subpoena." (Ex. 11.) On July 19, 2023, Ellington's counsel, Julie Petit, asserted—without any knowledge of what was redacted—that "we do not see how the redacted texts could truly be nonresponsive" and demanded that Seery "produce the redacted text messages" without redactions. (Ex. 12.) Seery's counsel responded that "[t]he redacted material is not responsive to any request" in the Subpoena, represented that it "is unrelated to Mr. Ellington or the allegations in your complaint," and cautioned that "seeking materials beyond those related to 'stalking' would exceed the scope of reasonable discovery directed to Mr. Seery as a third-party and would constitute the 'pursuit' of claims against Mr. Seery or other covered parties without leave of the Bankruptcy Court" in violation of the Gatekeeper Provision. (*Id.*)

26. On July 24, 2023, Pettit provided a new theory of relevance for the redacted text messages:

> The production provided by Mr. Daugherty, Mr. Seery, and others in this matter suggests the factual conclusion that the Highland Estate provided Mr. Daugherty with ***additional settlement consideration*** in exchange for information on Mr. Ellington.
>
> We believe that Mr. Daugherty and Mr. Seery's communications regarding ***settlement of Mr. Daugherty's proof of claim*** in the Highland bankruptcy are relevant to the factual issues that will be tried in this matter. To the extent that the redacted communications relate in any way to the ***negotiations between Mr. Daugherty and Mr. Seery, as a representative of the Highland Estate***, please produce those communications.

(*Id.* (emphasis added).) Pettit acknowledged that documents regarding the Daugherty Settlement may not be relevant to the Stalking Action, stating that "we can always amend our live petition as needed to give you comfort that you are producing relevant and responsive materials." (*Id.*)

27. On July 25, 2023, Seery's counsel responded to Ellington's new theory of relevance, arguing that "these allegations regarding settlement with Mr. Daugherty are not legitimately related to the 'stalking' claims alleged in Texas state court." (*Id.*) Seery's counsel again "advised that Mr. Ellington is bound by the Plan, the Plan Injunction, and the Gatekeeping Orders," and "[t]o the extent Mr. Ellington is now seeking discovery regarding the settlement, this constitutes 'pursuit' of claims against Highland and/or Mr. Seery without leave of the Bankruptcy Court in violation of the Bankruptcy Court's Gatekeeping Orders." (*Id.*) Seery's counsel put Ellington and his counsel on notice that "Mr. Seery, Highland, and the Claimant Trust take these matters seriously and will enforce all rights and seek appropriate sanctions." (*Id.*) Finally, Seery's counsel confirmed that, "[i]n any event, the redacted information does not relate to any allegations in your stalking lawsuit or even settlement negotiations between Mr. Daugherty and Mr. Seery," so they are "irrelevant and therefore appropriately redacted." (*Id.*)

28. While Ellington and his counsel were seeking irrelevant documents and testimony from Seery in the Stalking Action, they were also seeking to obtain documents from and depose Judge Nelms. (Declaration of Richard L. Wynne Exs. 1, 3, 5.) Judge Nelms responded that he had no responsive documents, and his counsel represented to Ellington's counsel that Judge Nelms "was not involved in, and has no knowledge of, the matters that are at issue in" the Stalking Action, and asked Ellington's counsel "to reconsider your plan to depose him." (*Id.* Exs. 2, 4.)

29. On July 25, 2023, the day after Pettit raised the relevance of the Daugherty Settlement to Seery's counsel, Pettit did the same in a lengthy email to Judge Nelms's counsel filled with baseless speculation and inaccuracies:

> While we do believe Daugherty left Judge Nelms was left in the dark regarding Daugherty's stalking, what is significant is that all of this happened during the time Judge Nelms was on the board and Jim Seery and Andy Clubok *did know about Mr. Daugherty's inappropriate investigation*. In fact, not only were Seery and Clubok aware—but according to Daugherty, Seery himself told Daugherty that he "appreciated" the investigation. . . .
>
> At the Plan Confirmation hearing on February 2, 2021, the Debtor and Daugherty announced a ***settlement of Daugherty's proof of claim in the Highland Bankruptcy***. Nine months later in November 2021, ***the Debtor and Daugherty executed a settlement agreement*** that, in addition to the material terms announced in February 2021, gave Daugherty an additional $1m in Class 9, part of Highland's investment track record to claim as his own, ownership of two Highland affiliates he could use to pursue litigation claims, and a prospective observer role on the Claimant Oversight Board. The Debtor agreed to all of this additional settlement consideration subsequent to receiving Mr. Daugherty's cooperation in investigating Ellington. Given the Board's role in approving settlement of material proofs of claim in the bankruptcy, Ellington believes that Judge Nelms should have been made aware of Daugherty's actions—if not by Daugherty, then certainly by Jim Seery and Andy Clubok.
>
> It does not seem to be a coincidence that Judge Nelms was excluded from all communications relating to the stalking and investigation. It does not seem to be a coincidence that ***Mr. Daugherty's settlement in the bankruptcy became materially better for Mr. Daugherty*** after Judge Nelms was seemingly cut out of communications and only after Mr. Daugherty had provided Seery and Clubok with thousands upon thousands of pages of his investigatory work regarding Ellington. And it does not seem to be a coincidence that Judge Nelms participated in the legitimate negotiations with Daugherty, but that Judge Nelms was purposefully excluded from what Mr. Ellington believes were the illegitimate negotiations.

(*Id.* Ex. 4 (citations omitted; certain emphasis added).)

30. Ellington and his counsel then stopped responding to Judge Nelms' counsel and personally served a second third-party subpoena on Judge Nelms in the Stalking Action seeking Nelms' deposition, forcing Judge Nelms to file a motion to quash the renewed deposition. (*Id.* Ex. 5.) After conferring for weeks, Petit eventually provided to Judge Nelms' counsel proposed deposition topics, including:

> 9. Any consideration provided to Daugherty with respect to Mr. Daugherty's so-called "investigation" of Mr. Ellington or the stalking in this case, including, but not limited to, the treatment of Mr. Daugherty's Proof of Claim in the Highland bankruptcy.
>
> 10. The process for approval of Mr. Daugherty's proof of claim with respect to the settlement announced on the record in the Highland bankruptcy on February 2, 2021.
>
> 11. The ordinary process for negotiation and settlement of material proofs of claim in the Highland bankruptcy.

(*Id.* Ex. 6.)

31. Judge Nelms and John Dubel (another former independent director of the Debtor) have offered to provide declarations that they do not have any knowledge relevant to the stalking allegations, but Ellington and his counsel have continued to use the Stalking Action to harass them. For example, Ellington left a document subpoena at Dubel's home when he was out of town and, when Dubel did not respond, Ellington and his counsel sought to hold Dubel in contempt and threatened monetary damages. (*Id.* Exs. 7, 8.)

32. On July 27, 2023, two business days before Seery's scheduled deposition, Ellington's counsel informed Seery's counsel that "[w]e are going to file a Motion to Compel the redacted text messages," "[w]e will postpone Mr. Seery's deposition," and will "take it after the issue of the redactions is resolved by the Court." (Ex. 10.)[10]

[10] Seery is prepared to provide unredacted copies of the text message conversations at issue to this Court *in camera* should this Court request that he do so.

33. On August 21, 2023, Ellington moved to compel the production of unredacted text messages between Daugherty and Seery ***from Daugherty***—not Seery—in Texas state court. (Ex. 1.) Ellington did not provide notice to Seery or his counsel of his motion and stated vaguely that he "intends to also seek full production from Seery." (*Id.* ¶ 12.) Ellington asserted that the redacted "text messages are relevant to Daugherty's investigation," but provided no basis for his assertion; he stated only that "they were sent during the relevant time, were by and between Seery and Defendant, and are surrounded by messages referencing Plaintiff and Defendant's investigation of him." (*Id.* at 5.) Tellingly, Ellington's motion made no mention of the Daugherty Settlement or any of the speculative theories of relevance Petit raised in her emails. Ellington also selectively attached email correspondence between his counsel and Seery's counsel to avoid showing the Texas court or Daugherty any emails referencing the Daugherty Settlement and Seery's counsel's responses. Instead, Ellington emphasized that his lawsuit is about allegations of "stalking and otherwise harassing him and his family," and asserted that Daugherty's "supposed motivations in stalking Plaintiff are irrelevant." (*Id.* ¶¶ 1–2 & Ex. D.)

34. On August 29, 2023, Daugherty filed a response to Ellington's motion arguing, among other things, that Ellington seeks "to gather otherwise impermissible discovery for use in concurrent bankruptcy proceedings" in violation of the "gatekeeping order in the bankruptcy court." (Ex. 13 ¶¶ 1, 3; *see also id.* ¶ 17 n.6 ("[T]his case is about gathering discovery for use in the bankruptcy proceedings, not an effort to support his baseless claims for stalking or invasion of privacy."); *id.* ¶ 20 ("Ellington should not be permitted to utilize this case as leverage to gain impermissible backdoor discovery in bankruptcy proceedings or elsewhere.").)

35. On September 11, 2023, the Texas state court granted in part Ellington's motion to compel with certain handwritten modifications: "Defendant [Daugherty] shall produce all text

messages with James Seery regarding Plaintiff [Ellington] ***and the stalking issues***; including the unredacted versions of the text messages already produced by James Seery." (Ex. 14 (handwritten modifications emphasized).) Because the redacted material does not relate to Ellington or any "stalking issues," this order will not result in the production of any additional documents or information.

ARGUMENT

I. Ellington And His Counsel Violated The Gatekeeper Provision And Gatekeeper Orders By Pursuing Claims Against Highland And Seery In The Stalking Action.

36. Under the Gatekeeper Provision, Ellington and his counsel may not "commence or ***pursue a claim or cause of action of any kind*** against" Highland and Seery "that arose or arises from or is related to the Chapter 11 Case" without this Court granting leave to do so. (Plan at 50–51 (emphasis added); Confirmation Order at 77.) Yet that is precisely what Ellington and his counsel are doing by using the Stalking Action to seek discovery into the Debtor's negotiations regarding the Court-approved Daugherty Settlement, which has nothing to do with any alleged stalking.

37. The Gatekeeper Provision applies to the claims Ellington and his counsel are pursuing against Highland and Seery, and Ellington's counsel has never disputed its applicability.

a. ***First***, under the Plan, Ellington and his counsel are Enjoined Parties subject to the Gatekeeper Provision and Highland and Seery are Protected Parties protected by the Gatekeeper Provision. (*See supra* ¶ 11, fn.6.)

b. ***Second***, Ellington and his counsel's speculation that Seery engaged in "inappropriate negotiations" with Daugherty in connection with his proof of claim in Debtor's Chapter 11 bankruptcy such that Debtor provided Daugherty with

additional consideration in the Daugherty Settlement plainly "arises from or is related to the Chapter 11 Case." (*See supra* ¶¶ 24–35.)

c. ***Third***, Ellington and his counsel's efforts to obtain discovery in the Stalking Action to develop potential claims against Highland and Seery constitutes "pursu[ing] a claim or cause of action" under the Gatekeeper Provision as a matter of law. During prior contempt proceedings under the Gatekeeper Orders, the District Court held that "[t]o pursue a claim, a party must 'try' or 'seek' to bring that claim," which encompasses a broader range of actions than "bring[ing] a claim against Seery." *Charitable DAF Fund LP v. Highland Capital Mgmt. LP*, 2022 WL 4538466, at *3 (N.D. Tex. Sept. 28, 2022). The District Court rejected contemnors' argument that "the term *pursue* in the gatekeeper orders refers only to legal activities that occur *after* a claim has already been filed," reasoning that "most dictionaries define *pursue* as 'seeking' or 'trying' to obtain a desired end." *Id.* at *2 (emphasis in original; citations omitted) (collecting dictionaries). By seeking discovery into negotiations between Seery, on behalf of Debtor, and Daugherty regarding the Daugherty Settlement—which has nothing to do with whether or not Daugherty stalked Ellington—Ellington and his counsel are pursuing claims against Highland and Seery.

38. The Gatekeeper Orders also apply to the claims Ellington and his counsel are pursuing against Seery. Under the January 2020 Order, Ellington and counsel may not "commence or pursue a claim or cause of action of any kind against any Independent Director," including Seery, "relating in any way to the Independent Director's role as an independent director" without this Court's leave. (January 2020 Order ¶ 10 (emphasis added).) Under the July 2020 Order,

Ellington and counsel may not "commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor" without this Court's leave. (July 2020 Order ¶ 5.) By seeking discovery regarding "the negotiations between Mr. Daugherty and Mr. Seery, ***as a representative of the Highland Estate***" (Ex. 12 (emphasis added)), Ellington and his counsel are pursuing claims against Seery in his capacities as Independent Director, CEO, and CRO of the Debtor, which are subject to the Gatekeeper Orders. Tellingly, Ellington did not pursue such discovery in connection with his objections to the Daugherty settlement but is instead doing so years later in the Stalking Action.

39. Ellington and his counsel are using the Stalking Action as a vehicle to pursue potential claims against Highland and Seery while evading this Court's jurisdiction, the Gatekeeper Provision, and the Gatekeeper Orders. But this Court held 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." (Confirmation Order ¶ 81 (collecting cases).) And the Fifth Circuit agreed that the "bankruptcy court retains jurisdiction post-confirmation" under "the gatekeeper provision" over "matters pertaining to the implementation or execution of the plan." *In re Highland Capital Mgmt, L.P.*, 48 F.4th 419, 439 (5th Cir. 2022) (cleaned up); *see also In re Salubrio, LLC*, 2023 WL 3105153, at *8–9 (W.D. Tex. Mar. 31, 2023) (rejecting argument that a bankruptcy court's gatekeeping order was overly broad to the extent it prohibits claims brought in state court "against the Trustee, the Trustee's attorney, or other creditors without leave of Court") (citing *Highland*, 48 F.4th at 439).

II. This Court Should Hold Ellington And His Counsel In Civil Contempt.

40. "The power to impose sanctions for contempt of an order is an inherent and well-settled power of all federal courts—including bankruptcy courts." *In re Highland Capital Mgmt., L.P.*, 2021 WL 3418657, at *10 (Bankr. N.D. Tex. Aug. 4, 2021) (collecting in cases), *aff'd in*

relevant part sub nom. Charitable DAF Fund LP v. Highland Capital Mgmt. LP, 2022 WL 4538466 (N.D. Tex. Sept. 28, 2022). "A bankruptcy court's power to sanction those who 'flout its authority is both necessary and integral' to the court's performance of its duties." *Id.* (cleaned up) (quoting *Schermerhorn v. Cenurytel, Inc. (In re SkyPort Global Comm's, Inc.)*, 2013 WL 4046397, at *1 (Bankr. S.D. Tex. Aug. 7, 2013), *aff'd*, 661 F. App'x 835 (5th Cir. 2016)).

41. Parties "commit[] contempt when they violate a definite and specific order of the court requiring them to perform or refrain from performing a particular act or acts with knowledge of the court's order." *Id.* at *11 (cleaned up) (quoting *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995)). "If the purpose of the sanction is to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor's violation, the order is considered purely civil." *Id.* (citing *In re Bradley*, 588 F.3d 254, 263 (5th Cir. 2009)). "[T]he party seeking an order of contempt in a civil contempt proceeding need only establish, by clear and convincing evidence (1) that a court order was in effect, and (2) that the order required certain conduct by the respondent, and (3) that the respondent failed to comply with the court's order." *Id.* (citing *United States v. Puente*, 558 F. App'x 338, 341 (5th Cir. 2013) (per curiam); *FDIC v. LeGrand*, 43 F.3d 163, 170 (5th Cir. 1995)). "[T]he contemptuous actions need not be willful so long as the contemnor actually failed to comply with the court's order." *Id.* at *12 (quoting *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578 (5th Cir. 2000)).

42. These requirements are easily satisfied here. As discussed above (*see supra* ¶¶ 9–39), the Gatekeeper Provision and Gatekeeper Orders remain in effect and apply to Ellington and his counsel; Seery's counsel provided copies of them to Ellington's counsel in the Stalking Action and repeatedly provided notice that they would seek sanctions for any violations; the Gatekeeper Provision prohibits pursuing claims against Highland or Seery relating to the Debtor's Chapter 11

case without this Court's leave; the Gatekeeper Orders prohibit pursuing claims against Seery relating to his role as Independent Director, CEO, or CRO of the Debtor; and Ellington's counsel admitted that Ellington and his counsel are using the Stalking Action to seek discovery into alleged misconduct in the negotiation of the settlement of Daugherty's proof of claim in Debtor's Chapter 11 case.

CONCLUSION

43. For the foregoing reasons, Highland and Seery respectfully request this the Court order Ellington and his counsel to show cause why they should not be held in civil contempt for violating the Gatekeeper Provision and Gatekeeper Orders, enter an Order in the form appended as Exhibit A hereto, and grant any further relief as the Court deems just and proper.

Dated: September 13, 2023

PACHULSKI STANG ZIEHL & JONES LLP

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CERTIFICATE OF CONFERENCE

On June 30, 2023, Seery's counsel emailed Ellington's counsel that Highland's counsel "wants to attend [Seery's] deposition and potentially raise objections under the Gatekeeper Orders entered by the Bankruptcy Court (which I've attached) to ensure discovery in the *Ellington* litigation is not used in connection with the *Highland* bankruptcy in violation of the Gatekeeper Orders." On July 11, 2023, counsel for Seery, Ellington, Highland, and Judge Nelms met and conferred by phone. All counsel agreed that counsel for Seery and Highland could raise objections to deposition questions to Seery based on the Gatekeeper Provision and Gatekeeper Orders.

On July 24, 2023, after Ellington's counsel's emailed demanding that Seery produce text messages without redactions, Seery's counsel emailed Ellington's counsel that seeking discovery from Seery beyond information related to the "stalking" allegations in the Stalking Action "would constitute the 'pursuit' of claims against Mr. Seery or other covered parties without leave of the Bankruptcy Court." Seery's counsel reserved the right to seek relief under the Gatekeeper Provision in the event Ellington proceeded with seeking this discovery. Later that day, Ellington's counsel responded demanding that Seery produce unredacted text message communications to the extent they "relate in any way to the negotiations between Mr. Daugherty and Mr. Seery, as a representative of the Highland Estate." On July 25, 2023, Seery's counsel emailed Ellington's counsel that Seery "will enforce all rights and seek appropriate sanctions" if Ellington continues to seek materials unrelated to the allegations in the Stalking Action. On July 27, 2023, Ellington's counsel emailed Seery's counsel that Ellington would file a motion to compel the production of Seery's text messages beyond those that are relevant to the stalking allegations. On August 21, 2023, Plaintiff filed a motion to compel these text messages from Daugherty in Texas state court.

On September 13, 2023, Seery's counsel made multiple telephone calls to, and left multiple voicemails with, Ellington's counsel, in an attempt to meet and confer regarding this Motion. Ellington's counsel did not return these calls or voicemails. Seery's counsel then emailed Ellington's counsel informing them that Seery and Highland counsel intended to file this Motion, explaining that "[a]s we've discussed by phone and by email, we believe that you and Scott Ellington are using discovery in the stalking litigation against Patrick Daugherty to pursue claims against Highland and Jim Seery in violation of the Gatekeeper Provision and Gatekeeper Orders entered by the Bankruptcy Court." Ellington's counsel demanded to see "a copy of the proposed motion prior to filing," which Seery's counsel opposed because it is not required by Local Civil Rule 7.1(a). Seery's counsel invited Ellington's counsel to "immediately withdraw all of [their] impermissible demands" and, "[f]ailing that, we will mark your position on this motion as opposed when filing." Ellington's counsel has not withdrawn any discovery requests and therefore opposes this Motion.

/s/ Joshua S. Levy

Joshua S. Levy

Exhibit A

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
Reorganized Debtor.	)	

ORDER GRANTING HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND CLAIMAINT TRUST, AND JAMES P. SEERY, JR.'S JOINT MOTION FOR AN ORDER REQUIRING SCOTT BYRON ELLINGTON AND HIS COUNSEL TO SHOW CAUSE WHY THEY SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THE GATEKEEPER PROVISION AND GATEKEEPER ORDERS

Having considered (1) *Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery, Jr.'s Joint Motion For an Order Requiring Scott Byron Ellington and His Counsel*

[1] Highland's last four digits of its taxpayer identification number are (8357). The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

to Show Cause Why They Should Not Be Held in Civil Contempt for Violating the Gatekeeper Provision and Gatekeeper Orders [Docket No.__] (the "Motion");[2] (2) the exhibits annexed to the *Declaration of Joshua S. Levy in Support of Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery, Jr.'s Joint Motion For an Order Requiring Scott Byron Ellington and His Counsel to Show Cause Why They Should Not Be Held in Civil Contempt for Violating the Gatekeeper Provision and Gatekeeper Orders* [Docket No.__], (3) the exhibits annexed to the *Declaration of Richard L. Wynne in Support of Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery, Jr.'s Joint Motion For an Order Requiring Scott Byron Ellington and His Counsel to Show Cause Why They Should Not Be Held in Civil Contempt for Violating the Gatekeeper Provision and Gatekeeper Orders* [Docket No.__], and (4) all prior proceedings related to this matter, including the proceedings that led to the entry of each of the Gatekeeper Orders and the Confirmation Order; this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); this Court having found that venue of this proceeding and the Motion in this District is proper pursuant 28 U.S.C. §§ 1408 and 1409; this Court having found that sanctions are warranted under Section 105(a) of the Bankruptcy Code and that the relief requested in the Motion is in the best interest of Highland, its creditors, and other parties-in-interest; this Court having found that Highland's and Seery'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; this Court having determined that the legal and factual bases set forth in the Motion establish good cause for the relief granted herein; upon all of the proceedings

[2] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Motion.

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. Scott Byron Ellington and his counsel, The Pettit Law Firm and Lynn Pinker Hurst & Schwegmann LLP, shall show cause before this Court on **[ ], September [ ], 2023 at 9:30 a.m (Central Time)** why an order should not be granted: (1) finding and holding each of them in contempt of court; (2) directing them, jointly and severally, to pay Highland an amount of money equal to Highland's and Seery's actual expenses incurred in bringing this Motion, payable within three (3) calendar days of presentment of an itemized list of expenses; and (3) granting Highland and Seery such other and further relief as the Court deems just and proper under the circumstances.

3. 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

Appendix Exhibit 147

E-Filed: Oct 19 2023 03:34PM EDT
Filing ID 71135277
Case Number 60,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PATRICK DAUGHERTY,	§	
	§	
Plaintiff Below, Appellant,	§	No. 60, 2023
	§	
v.	§	Court Below: Court of Chancery
	§	of the State of Delaware
JAMES DONDERO, HUNTON ANDREWS KURTH LLP, MARC KATZ, MICHAEL HURST, SCOTT ELLINGTON, and ISAAC LEVENTON,	§	C.A. No. 2019-0956
	§	
Defendants Below, Appellees.	§	

Submitted: September 27, 2023
Decided: October 19, 2023

Before **SEITZ**, Chief Justice; **VALIHURA**, and **TRAYNOR**, Justices.

O R D E R

Now this 19th day of October 2023, having considered this matter on the briefs and oral arguments of the parties and the record below, and having concluded that the same should be affirmed on the basis of and for the reasons assigned by the Court of Chancery in its Opinion dated January 27, 2023;

NOW THEREFORE, IT IS HEREBY ORDERED that the judgment of the Court of Chancery be and the same hereby is AFFIRMED.

BY THE COURT:

/s/ Karen L. Valihura
Justice

Appendix Exhibit 148

PACHULSKI STANG ZIEHL & JONES LLP
Jeffrey N. Pomerantz (CA Bar No.143717) (*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*)
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Los Angeles, CA 90067
Telephone: (310) 277-6910/Facsimile: (310) 201-0760

HAYWARD PLLC
Melissa S. Hayward
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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:	Chapter 7
HIGHLAND SELECT EQUITY MASTER FUND, L.P.,[1]	Case No. 23-31037-swe7
Debtor.	
In re:	Chapter 7
HIGHLAND SELECT EQUITY FUND GP, L.P.,[2]	Case No. 23-31039-mv17
Debtor.	

[1] The Debtor's last four digits of its taxpayer identification number are (0466). The headquarters and service address for the Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

[2] The Debtor's last four digits of its taxpayer identification number are (9917). The headquarters and service address for the Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

STIPULATION WITHDRAWING
MOTION TO TRANSFER/REASSIGN CASE

Debtors Highland Select Equity Master Fund, L.P. ("Select Master") and Highland Select Equity Fund GP, L.P. ("Select GP" and together with Select Master, the Select Debtors") and Highland Capital Management, L.P. ("Highland"), on the one hand, and The Dugaboy Investment Trust ("Dugaboy"), on the other hand, and Scott Seidel, Chapter 7 Trustee of the Select Debtors' bankruptcy estates (the "Trustee") hereby enter the following stipulation (the "Stipulation"):

WHEREAS, on June 12, the Debtors filed their Motion to Transfer/Reassign Case (Docket [Docket No. 9/9][3] (the "Motion to Transfer");

WHEREAS, on July 10, 2023, Dugaboy filed its objection to the Motion to Transfer (Docket No. 17/20);

WHEREAS, on July 10, 2023, the Trustee filed his response to the Motion to Transfer (Docket No. 21/19);

WHEREAS, on July 14, 2023, Highland filed its response and joinder to the Motion to Transfer [Docket No. 26/27] (the "Joinder", and together with the Motion to Transfer, the "Motion");

WHEREAS, the counsel for each of the parties met and conferred in good faith and reached the following agreement to fully and finally resolve the Motion to Transfer:

1. The Motion shall be deemed withdrawn with prejudice, subject to the terms of the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)*, as may be applicable [*see* Case No. 19-34054-sgj11, Docket No. 1808].

[3] References to "Docket No. __/__" refer first to the docket maintained in the Select Master bankruptcy case and then to the docket maintained in the Select GP bankruptcy case.

2. The Court shall retain jurisdiction over all disputes arising out of or otherwise concerning the interpretation and enforcement of the Stipulation.

Dated: October 18, 2023

PACHULSKI STANG ZIEHL & JONES LLP

Jeffrey N. Pomerantz (CA Bar No.143717) (*pro hac vice*)
John A. Morris (NY Bar No. 2405397) (*pro hac vice*)
Gregory V. Demo (NY Bar No. 5371992) (*pro hac vice*)
Hayley R. Winograd (NY Bar No. 5612569) (*pro hac vice*)
10100 Santa Monica Boulevard, 13th Floor
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gdemo@pszjlaw.com
hwinograd@pszjlaw.com

-and-

HAYWARD PLLC

/s/ Zachery Z. Annable

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Counsel for Highland Capital Management, L.P.

QUILLING, SELANDER, LOWNDS, WINSLETT & MOSER, P.C.

/s/ Hudson M. Jobe

Hudson M. Jobe
State Bar No. 24041189
2001 Bryan Street, Suite 1800

Dallas, Texas 75201
(214) 871-2100 (Telephone)
(214) 871-2111 (Facsimile)

Counsel for Select Debtors

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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Email: deborah.deitschperez@stinson.com
Email: michael.aigen@stinson.com

Attorneys for The Dugaboy Investment Trust

PASSMAN & JONES

/s/ Jerry C. Alexander
Jerry C. Alexander
Texas Bar No. 00993500
1201 Elm Street, Suite 2500
Dallas, Texas 75270
Telephone (214) 742-2121
Facsimile (214) 748-7949
Email: alexanderj@passmanjones.com

Proposed Special Counsel for Trustee

Appendix Exhibit 149

PACHULSKI STANG ZIEHL & JONES LLP
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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 7
HIGHLAND SELECT EQUITY MASTER FUND, L.P.,[1]	Case No. 23-31037-swe7
Debtor.	
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Dated: October 18, 2023

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gdemo@pszjlaw.com
hwinograd@pszjlaw.com

-and-

HAYWARD PLLC

/s/ Zachery Z. Annable

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Counsel for Highland Capital Management, L.P.

QUILLING, SELANDER, LOWNDS, WINSLETT & MOSER, P.C.

/s/ Hudson M. Jobe

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Counsel for Select Debtors

STINSON LLP

/s/ Deborah Deitsch-Perez
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Michael P. Aigen
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Email: michael.aigen@stinson.com

Attorneys for The Dugaboy Investment Trust

PASSMAN & JONES

/s/ Jerry C. Alexander
Jerry C. Alexander
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Dallas, Texas 75270
Telephone (214) 742-2121
Facsimile (214) 748-7949
Email: alexanderj@passmanjones.com

Proposed Special Counsel for Trustee

Appendix Exhibit 150

UNITED STATES BANKRUPTCY COURT

Northern DISTRICT OF Texas

Case number 19-34054 sgj11

In re: Highland Capital Management, LP § Case No. 19-34054

§

§

Debtor(s) §

☐ Jointly Administered

Post-confirmation Report

Chapter 11

Quarter Ending Date: 09/30/2023 Petition Date: 10/16/2019

Plan Confirmed Date: 02/22/2021 Plan Effective Date: 08/11/2021

This Post-confirmation Report relates to: ◉ Reorganized Debtor

○ Other Authorized Party or Entity: _____

Name of Authorized Party or Entity

/s/ Zachery Z. Annable

Signature of Responsible Party

10/20/2023

Date

Zachery Z. Annable, Hayward PLLC

Printed Name of Responsible Party

10501 N. Central Expressway, Suite 106
Dallas TX 75231

Address

STATEMENT: This Periodic Report is associated with an open bankruptcy case; therefore, Paperwork Reduction Act exemption 5 C.F.R. § 1320.4(a)(2) applies.

1934054231023000000000005

Debtor's Name Highland Capital Management, LP Case No. 19-34054

Part 1: Summary of Post-confirmation Transfers

	Current Quarter	Total Since Effective Date
a. Total cash disbursements	$14,718,284	$137,036,885
b. Non-cash securities transferred	$0	$0
c. Other non-cash property transferred	$0	$5,194,652
d. Total transferred (a+b+c)	$14,718,284	$142,231,537

Part 2: Preconfirmation Professional Fees and Expenses

				Approved Current Quarter	Approved Cumulative	Paid Current Quarter	Paid Cumulative
a.	Professional fees & expenses (bankruptcy) incurred by or on behalf of the debtor		*Aggregate Total*	$0	$33,005,136	$0	$33,005,136
	Itemized Breakdown by Firm						
		Firm Name	Role				
	i	Pachulski Stang Ziehl & Jones	Lead Counsel	$0	$24,312,860	$0	$24,312,860
	ii	Development Specialists, Inc.	Financial Professional	$0	$5,765,448	$0	$5,765,448
	iii	Kurtzman Carson Consultants	Other	$0	$2,054,716	$0	$2,054,716
	iv	Hayward & Associates PLLC	Local Counsel	$0	$872,112	$0	$872,112
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b.				Approved Current Quarter	Approved Cumulative	Paid Current Quarter	Paid Cumulative
	Professional fees & expenses (nonbankruptcy) incurred by or on behalf of the debtor *Aggregate Total*			$0	$7,604,472	$0	$7,604,472
	Itemized Breakdown by Firm						
		Firm Name	Role				
	i	Hunton Andrews Kurth LLP	Other	$0	$1,149,807	$0	$1,149,807
	ii	Foley Gardere, Foley & Lardne	Other	$0	$629,088	$0	$629,088
	iii	Deloitte	Financial Professional	$0	$553,413	$0	$553,413
	iv	Mercer (US) Inc.	Other	$0	$204,767	$0	$204,767
	v	Teneo Capital, LLC	Financial Professional	$0	$1,364,823	$0	$1,364,823
	vi	Wilmer Cutler Pickering Hale	Other	$0	$2,650,937	$0	$2,650,937

	vii	Carey Olsen	Other	$0	$280,264	$0	$280,264
	viii	ASW Law	Other	$0	$4,976	$0	$4,976
	ix	Houlihan Lokey Financial Advi	Other	$0	$766,397	$0	$766,397
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c.	All professional fees and expenses (debtor & committees)			$0	$60,171,929	$0	$60,171,929

Part 3: Recoveries of the Holders of Claims and Interests under Confirmed Plan

	Total Anticipated Payments Under Plan	Paid Current Quarter	Paid Cumulative	Allowed Claims	% Paid of Allowed Claims
a. Administrative claims	$0	$0	$15,750	$15,750	100%
b. Secured claims	$5,843,261	$0	$5,274,477	$5,274,477	100%
c. Priority claims	$16,498	$0	$1,213,832	$1,213,832	100%
d. General unsecured claims	$205,144,544	$14,361,077	$284,566,669	$397,485,568	72%
e. Equity interests	$0	$0	$0		

Part 4: Questionnaire

a. Is this a final report? Yes ○ No ◉

If yes, give date Final Decree was entered: _____

If no, give date when the application for Final Decree is anticipated: _____

b. Are you current with quarterly U.S. Trustee fees as set forth under 28 U.S.C. § 1930? Yes ◉ No ○

Privacy Act Statement

28 U.S.C. § 589b authorizes the collection of this information and provision of this information is mandatory. The United States Trustee will use this information to calculate statutory fee assessments under 28 U.S.C. § 1930(a)(6) and to otherwise evaluate whether a reorganized chapter 11 debtor is performing as anticipated under a confirmed plan. Disclosure of this information may be to a bankruptcy trustee when the information is needed to perform the trustee's duties, or to the appropriate federal, state, local, regulatory, tribal, or foreign law enforcement agency when the information indicates a violation or potential violation of law. Other disclosures may be made for routine purposes. For a discussion of the types of routine disclosures that may be made, you may consult the Executive Office for United States Trustee's systems of records notice, UST-001, "Bankruptcy Case Files and Associated Records." *See* 71 Fed. Reg. 59,818 et seq. (Oct. 11, 2006). A copy of the notice may be obtained at the following link: http://www.justice.gov/ust/eo/rules_regulations/index.htm. Failure to provide this information could result in the dismissal or conversion of your bankruptcy case, or other action by the United States Trustee. 11 U.S.C. § 1112(b)(4)(F).

I declare under penalty of perjury that the foregoing Post-confirmation Report and its attachments, if any, are true and correct and that I have been authorized to sign this report.

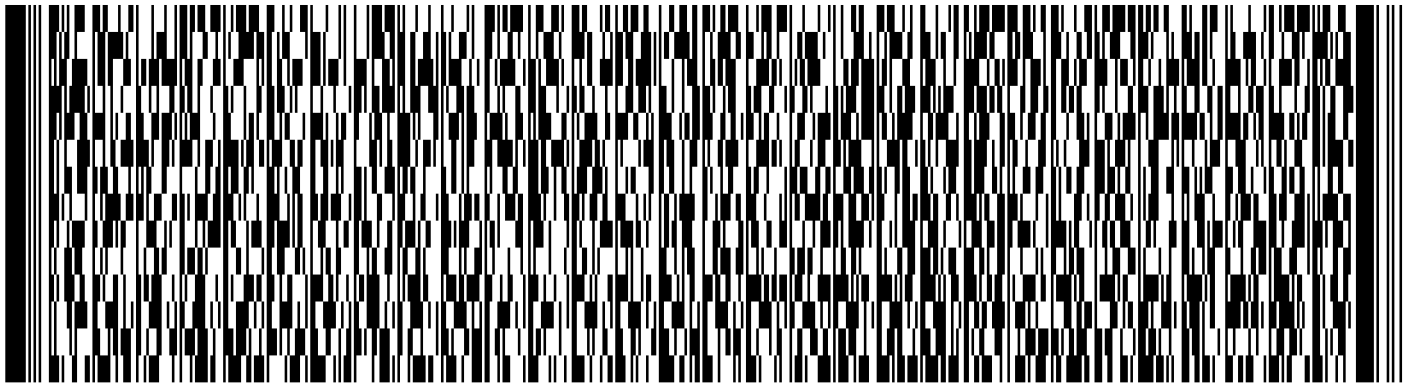
/s/ James Seery
Signature of Responsible Party

James Seery
Printed Name of Responsible Party

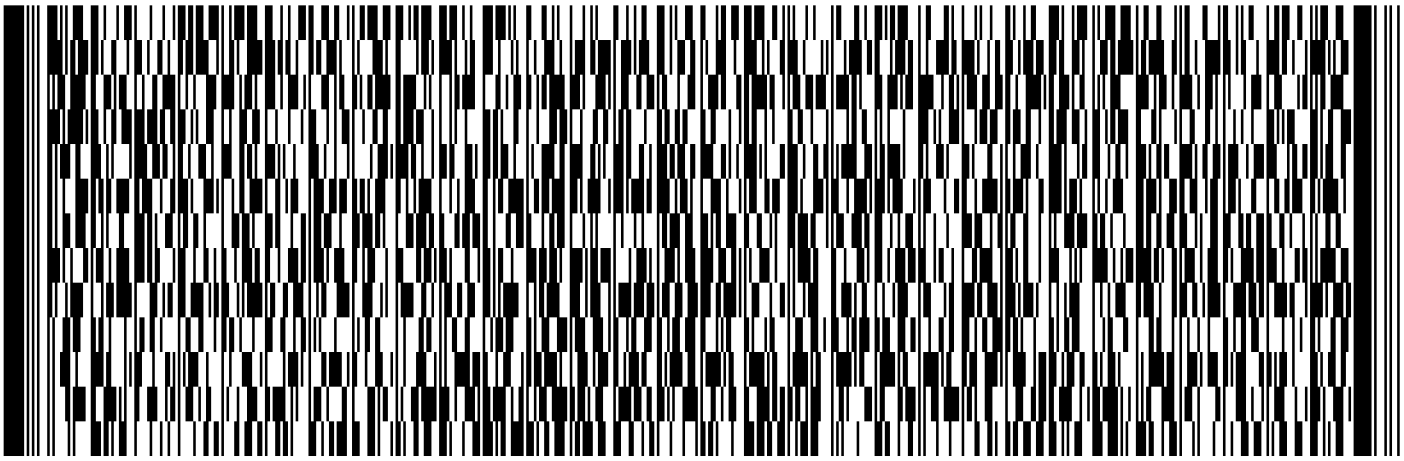
CEO
Title

10/20/2023
Date

Debtor's Name Highland Capital Management, LP Case No. 19-34054



Page 1



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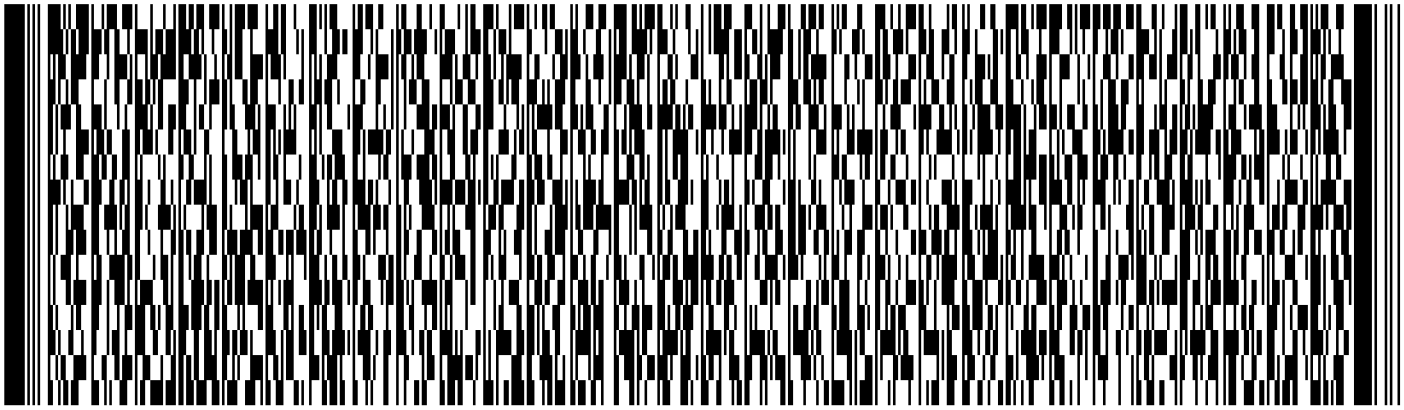
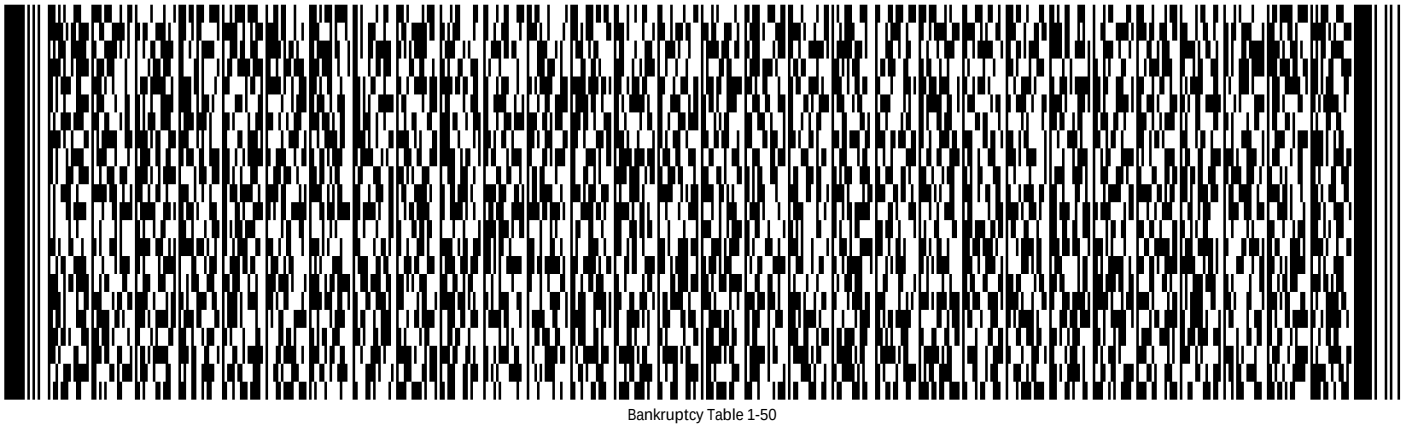
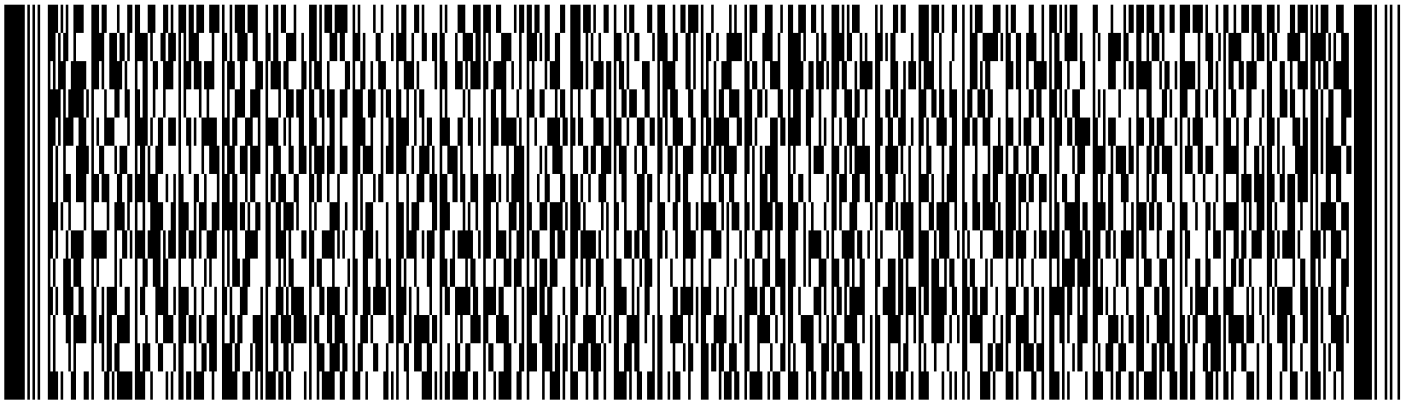


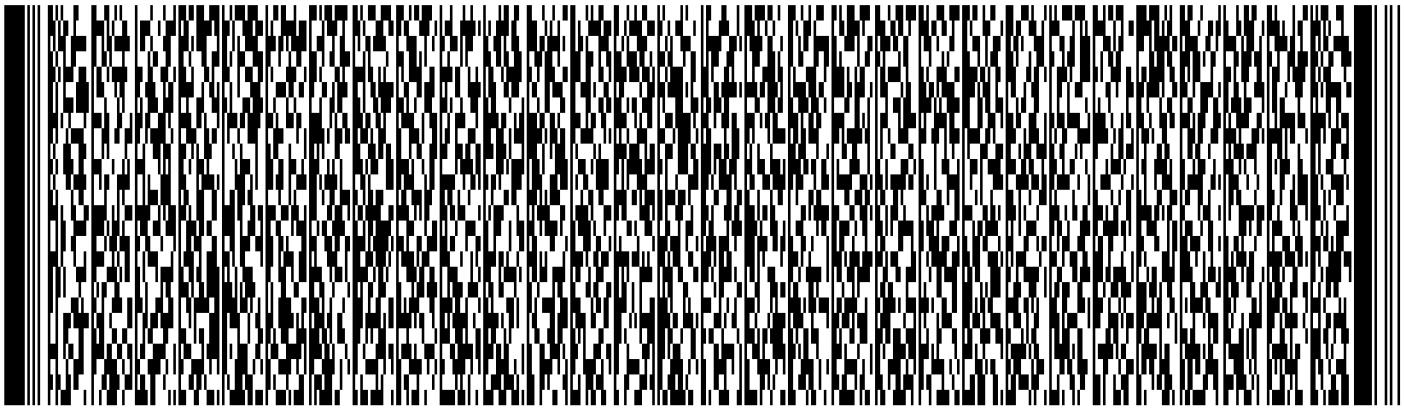
Page 2 Minus Tables



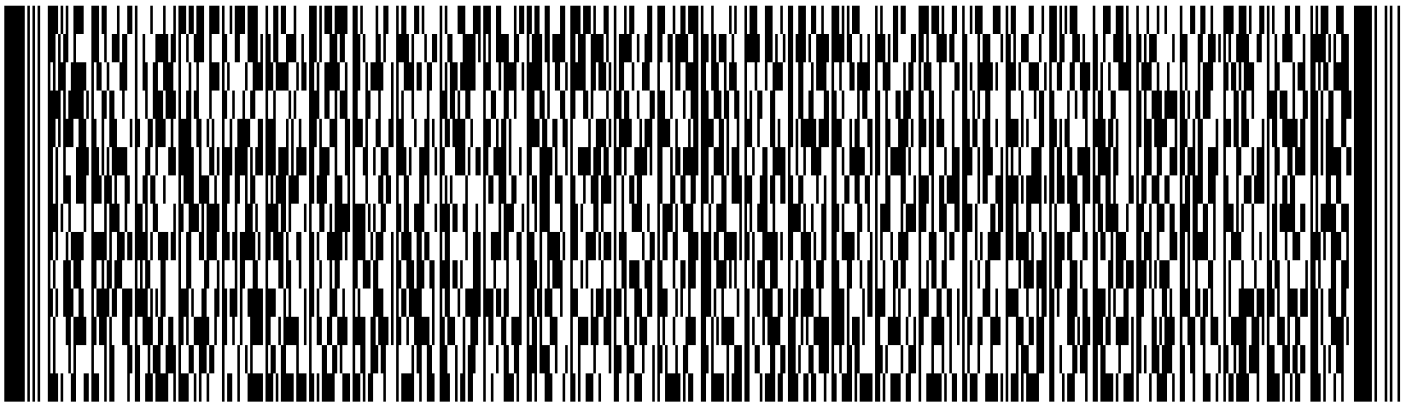
Bankruptcy Table 1-50



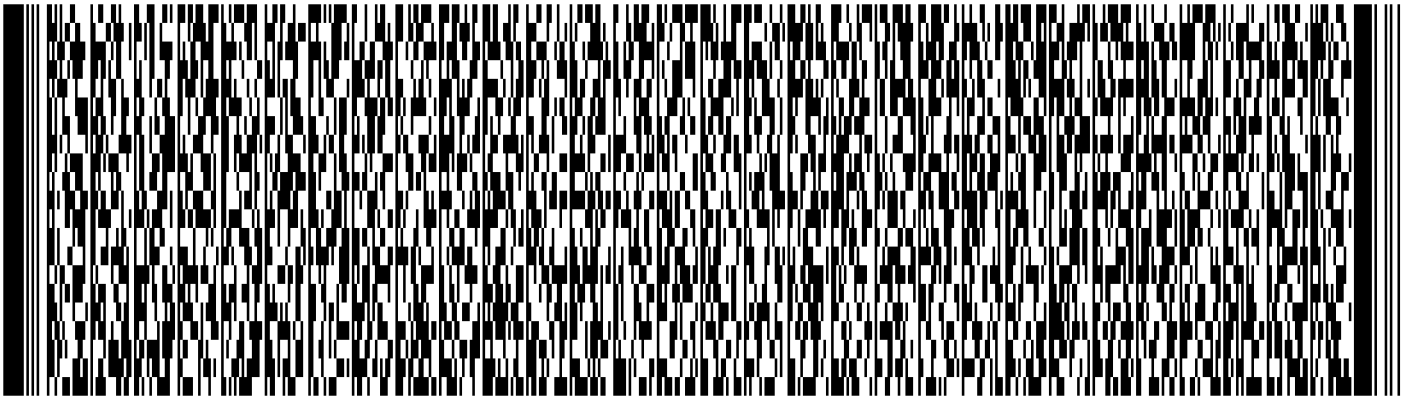
Bankruptcy Table 51-100



Non-Bankruptcy Table 1-50



Non-Bankruptcy Table 51-100



Part 3, Part 4, Last Page

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
Reorganized Debtor.	)	

GLOBAL NOTES TO POST CONFIRMATION REPORT

The Reorganized Debtor has filed the attached post-confirmation report (the "PCR") in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court"), on behalf of debtor Highland Capital Management, L.P., Case No. 19-34054 (SGJ) (the "Bankruptcy Case"). The Reorganized Debtor prepared the PCR with the assistance of the Reorganized Debtor's employees, advisors, and professionals. The PCR was prepared solely for the purpose of complying with the post-confirmation quarterly reporting requirements established by the United States Trustee Program (*see* https://www.justice.gov/ust/chapter-11-operating-reports). The PCR should not be relied upon by any persons for any information in connection with current or future financial conditions or events relating to the Reorganized Debtor or its estate.

The financial information contained in the PCR is preliminary, unaudited, limited in scope, and is not prepared in accordance with accounting principles generally accepted in the United States of America nor in accordance with other applicable non-bankruptcy law. In preparing the PCR, the Reorganized Debtor relied on financial data from the books and records available to it at the time of such preparation, as well as certain filings on the docket in the Bankruptcy Case. Although the Reorganized Debtor made commercially reasonable efforts to ensure the accuracy and completeness of the PCR, inadvertent errors or omissions may exist. The Reorganized Debtor reserves the right to amend and supplement the PCR as may be necessary or appropriate.

Part 2: Preconfirmation Professional Fees and Expenses

In Section A of the PCR, the Reorganized Debtor listed the bankruptcy related professionals employed in connection with the Bankruptcy Case.

In Section B of the PCR, the Reorganized Debtor listed non-bankruptcy professionals, those that would have been retained absent the Bankruptcy Case, and the ordinary course professionals ("OCP"). Hunton Andrews Kurth LLP ("Hunton") and Wilmer Cutler Pickering Hale and Dorr LLP ("Wilmer Hale") were originally ordinary course professionals but were later employed

[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.

professionals. The amounts listed for Hunton and Wilmer Hale include the OCP payments and employed professional payments.

In Section C of the PCR, the Reorganized Debtor totals all payments included in Sections A and B, along with payments made to professional employed by the official committee of unsecured creditors (the "Committee").

The approved current quarter, approved cumulative, and paid cumulative will have the same amount listed due to approval and payment of final fee applications.

Part 3: Recoveries of the Holders of Claims and Interests under Confirmed Plan

The payments made to holders of General Unsecured Claims were disbursed from the Claimant Trust, but for presentation purposes, have been included in Part 3 of the post-confirmation report for the Reorganized Debtor.

The presentation contained in this PCR does not reflect the material and necessary reserves that will be taken in accordance with Reorganized Debtor's governing documents and the Plan.

The Debtor reserves all right to object to any claim in accordance with the terms of the Plan.

Appendix Exhibit 151

Docket #3956 Date Filed: 10/23/2023

UNITED STATES BANKRUPTCY COURT

Northern DISTRICT OF Texas

Case number 19-34054 sgj11

In re: Highland Capital Management, LP
Debtor(s)

Case No. 19-34054

☐ Jointly Administered

Post-confirmation Report

Chapter 11

Quarter Ending Date: 09/30/2023

Petition Date: 10/16/2019

Plan Confirmed Date: 02/22/2021

Plan Effective Date: 08/11/2021

This Post-confirmation Report relates to:
○ Reorganized Debtor
◉ Other Authorized Party or Entity: Highland Claimant Trust
Name of Authorized Party or Entity

/s/ Zachery Z. Annable
Signature of Responsible Party

10/20/2023
Date

Zachery Z. Annable, Hayward PLLC
Printed Name of Responsible Party

10501 N. Central Expressway, Suite 106
Dallas TX 75231
Address

STATEMENT: This Periodic Report is associated with an open bankruptcy case; therefore, Paperwork Reduction Act exemption 5 C.F.R. § 1320.4(a)(2) applies.

Debtor's Name Highland Capital Management, LP Case No. 19-34054

Part 1: Summary of Post-confirmation Transfers

	Current Quarter	Total Since Effective Date
a. Total cash disbursements	$31,299,362	$357,092,784
b. Non-cash securities transferred	$0	$0
c. Other non-cash property transferred	$0	$0
d. Total transferred (a+b+c)	$31,299,362	$357,092,784

Part 2: Preconfirmation Professional Fees and Expenses

				Approved Current Quarter	Approved Cumulative	Paid Current Quarter	Paid Cumulative
a.	Professional fees & expenses (bankruptcy) incurred by or on behalf of the debtor		*Aggregate Total*				
	Itemized Breakdown by Firm						
		Firm Name	Role				
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	iii						
	iv						
	v						
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	viii						
	ix						
	x						
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b.				Approved Current Quarter	Approved Cumulative	Paid Current Quarter	Paid Cumulative
	Professional fees & expenses (nonbankruptcy) incurred by or on behalf of the debtor *Aggregate Total*						
	Itemized Breakdown by Firm						
		Firm Name	Role				
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	iii						
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Debtor's Name Highland Capital Management, LP Case No. 19-34054

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c.	All professional fees and expenses (debtor & committees)						

Part 3: Recoveries of the Holders of Claims and Interests under Confirmed Plan

	Total Anticipated Payments Under Plan	Paid Current Quarter	Paid Cumulative	Allowed Claims	% Paid of Allowed Claims
a. Administrative claims	$0	$0	$15,750	$15,750	100%
b. Secured claims	$5,843,261	$0	$5,274,477	$5,274,477	100%
c. Priority claims	$16,498	$0	$1,213,832	$1,213,832	100%
d. General unsecured claims	$205,144,544	$14,361,077	$284,566,669	$397,485,568	72%
e. Equity interests	$0	$0	$0		

Part 4: Questionnaire

a. Is this a final report? Yes ○ No ◉

If yes, give date Final Decree was entered: _____

If no, give date when the application for Final Decree is anticipated: _____

b. Are you current with quarterly U.S. Trustee fees as set forth under 28 U.S.C. § 1930? Yes ◉ No ○

Privacy Act Statement

28 U.S.C. § 589b authorizes the collection of this information and provision of this information is mandatory. The United States Trustee will use this information to calculate statutory fee assessments under 28 U.S.C. § 1930(a)(6) and to otherwise evaluate whether a reorganized chapter 11 debtor is performing as anticipated under a confirmed plan. Disclosure of this information may be to a bankruptcy trustee when the information is needed to perform the trustee's duties, or to the appropriate federal, state, local, regulatory, tribal, or foreign law enforcement agency when the information indicates a violation or potential violation of law. Other disclosures may be made for routine purposes. For a discussion of the types of routine disclosures that may be made, you may consult the Executive Office for United States Trustee's systems of records notice, UST-001, "Bankruptcy Case Files and Associated Records." *See* 71 Fed. Reg. 59,818 et seq. (Oct. 11, 2006). A copy of the notice may be obtained at the following link: http://www.justice.gov/ust/eo/rules_regulations/index.htm. Failure to provide this information could result in the dismissal or conversion of your bankruptcy case, or other action by the United States Trustee. 11 U.S.C. § 1112(b)(4)(F).

I declare under penalty of perjury that the foregoing Post-confirmation Report and its attachments, if any, are true and correct and that I have been authorized to sign this report.

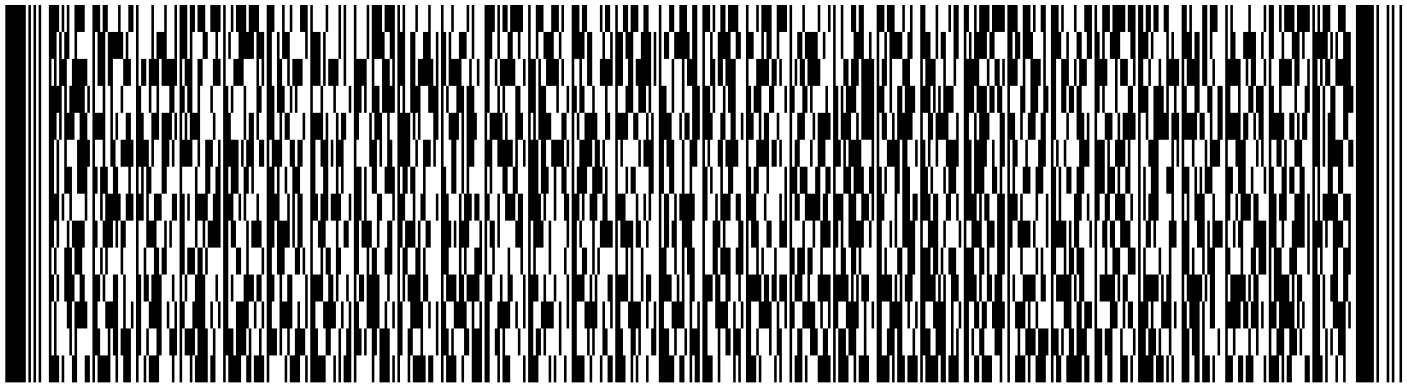
/s/ James Seery
Signature of Responsible Party

James Seery
Printed Name of Responsible Party

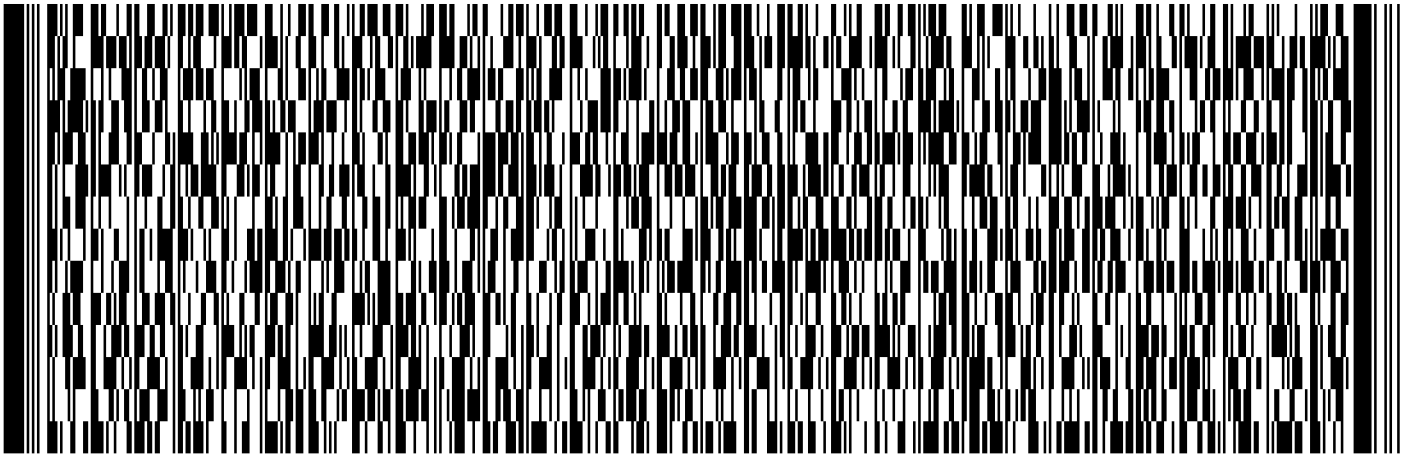
Claimant Trustee
Title

10/20/2023
Date

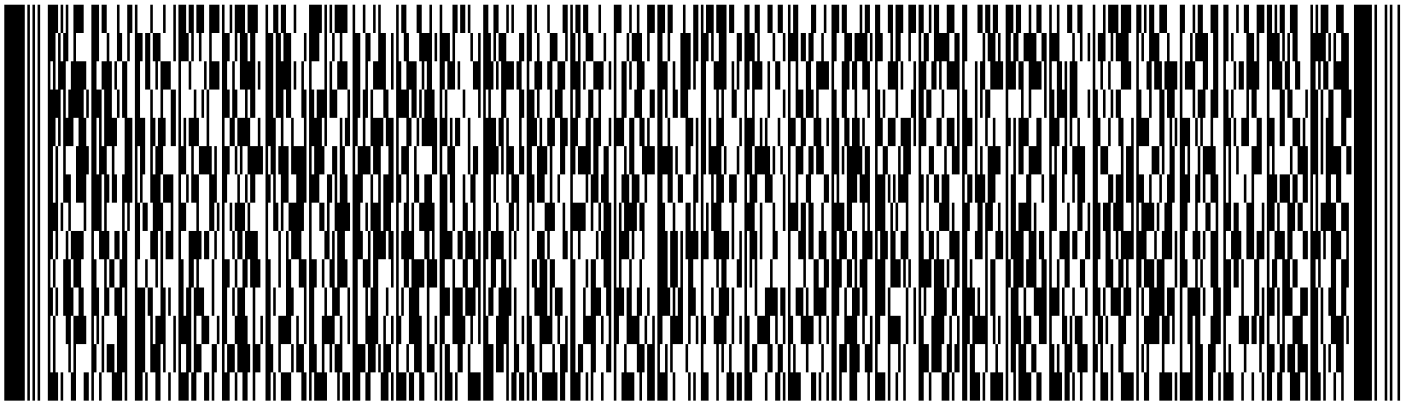
Debtor's Name Highland Capital Management, LP Case No. 19-34054



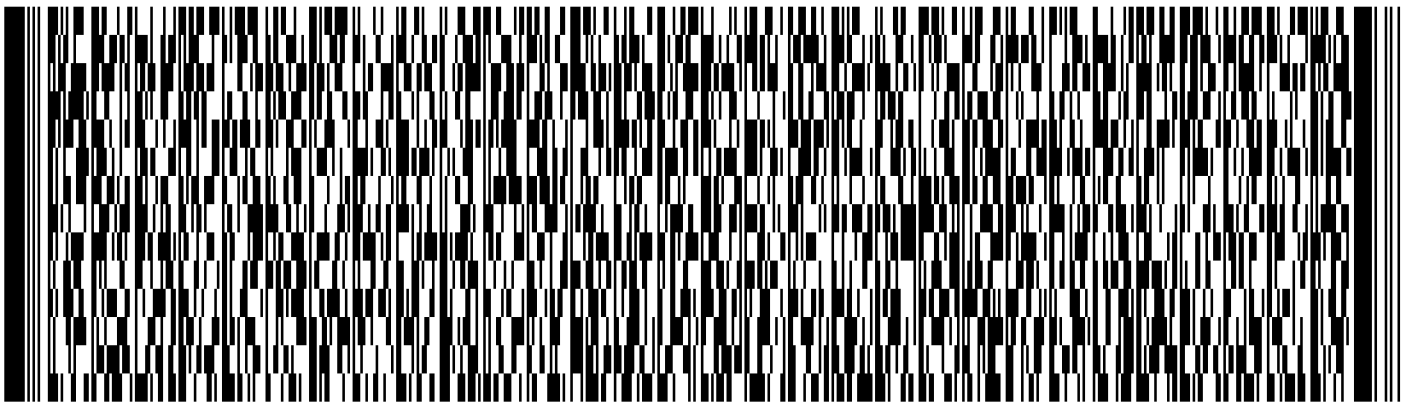
Page 1



Other Page 1

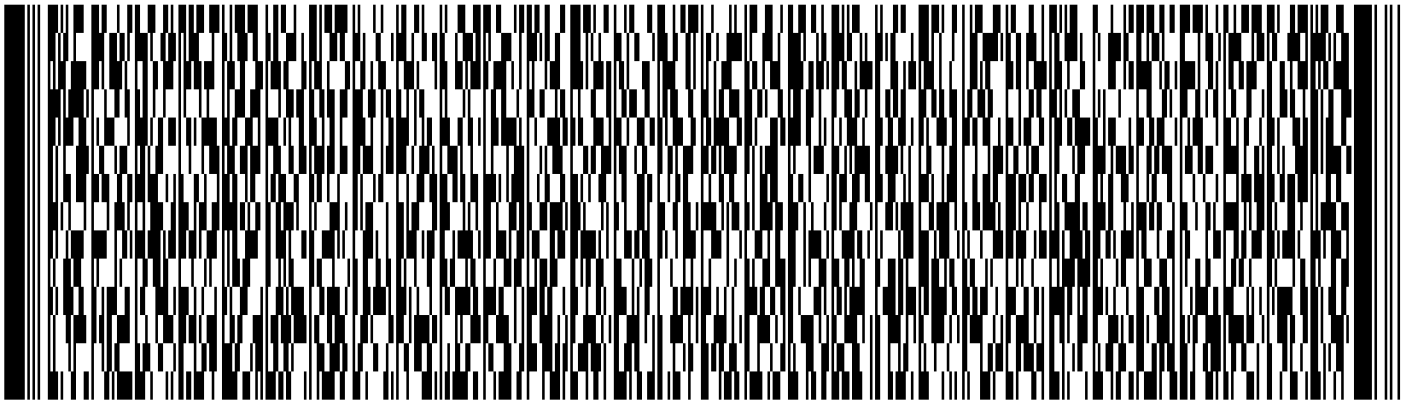


Page 2 Minus Tables

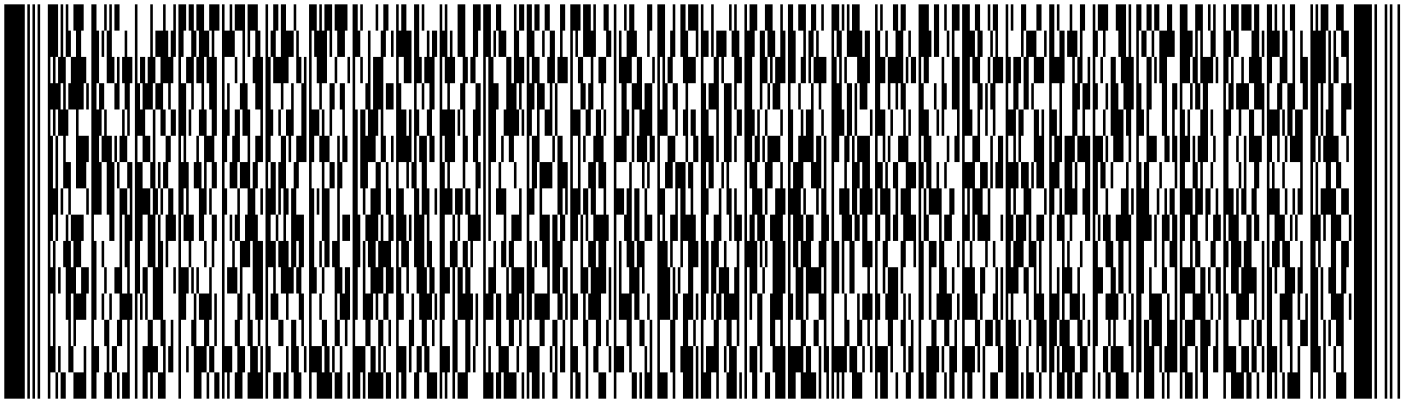


Bankruptcy Table 1-50

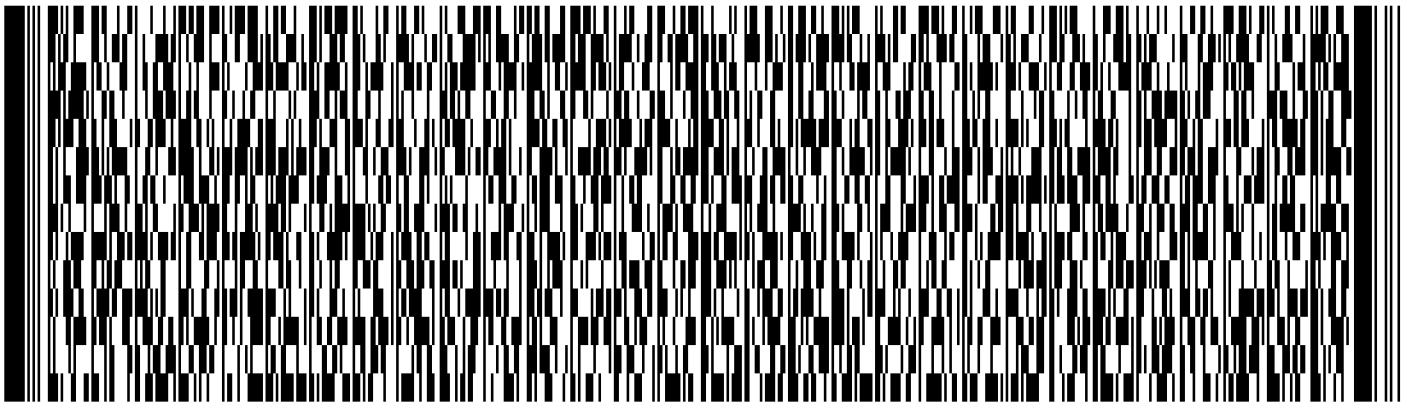
Debtor's Name Highland Capital Management, LP Case No. 19-34054



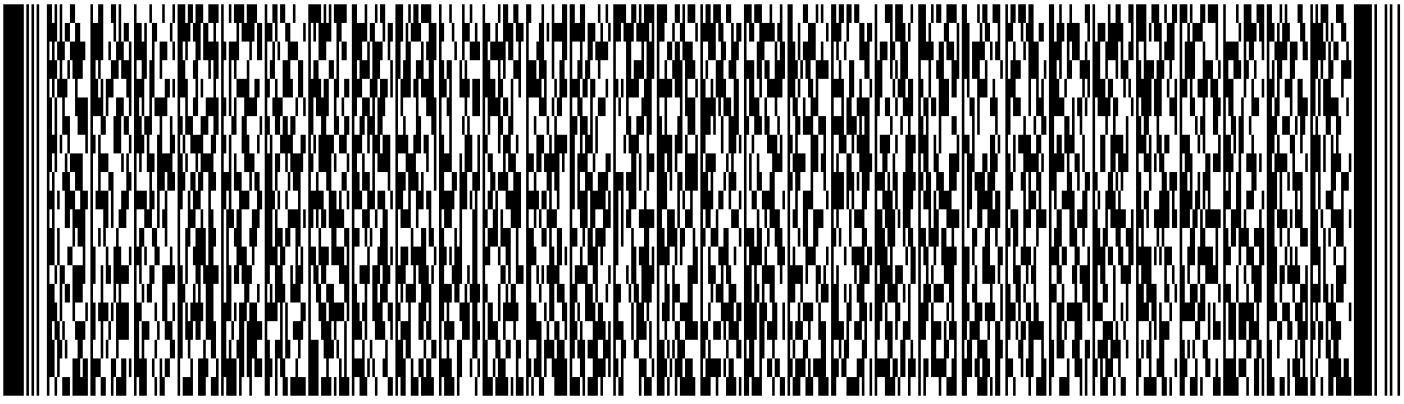
Bankruptcy Table 51-100



Non-Bankruptcy Table 1-50



Non-Bankruptcy Table 51-100



Part 3, Part 4, Last Page

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
Reorganized Debtor.	)	

GLOBAL NOTES TO POST CONFIRMATION REPORT

The Highland Claimant Trust has filed the attached post-confirmation report (the "PCR") in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court"), with respect to the case of Reorganized Debtor Highland Capital Management, L.P., Case No. 19-34054 (SGJ) (the "Bankruptcy Case"). The Highland Claimant Trust prepared the PCR with the assistance of the Reorganized Debtor's employees, advisors, and professionals. The PCR was prepared solely for the purpose of complying with the post-confirmation quarterly reporting requirements established by the United States Trustee Program (*see* https://www.justice.gov/ust/chapter-11-operating-reports). The PCR should not be relied upon by any persons for any information in connection with current or future financial conditions or events relating to the Highland Claimant Trust, the Reorganized Debtor or its estate.

The financial information contained in the PCR is preliminary, unaudited, limited in scope, and is not prepared in accordance with accounting principles generally accepted in the United States of America nor in accordance with other applicable non-bankruptcy law. In preparing the PCR, the Highland Claimant Trust relied on financial data from the books and records available to it at the time of such preparation, as well as certain filings on the docket in the Bankruptcy Case. Although the Highland Claimant Trust made commercially reasonable efforts to ensure the accuracy and completeness of the PCR, inadvertent errors or omissions may exist. The Highland Claimant Trust reserves the right to amend and supplement the PCR as may be necessary or appropriate.

Part 2: Preconfirmation Professional Fees and Expenses

The Highland Claimant Trust did not make any payment of professional fees prior to Confirmation of the Plan.

[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.

Part 3: Recoveries of the Holders of Claims and Interests under Confirmed Plan

For presentation purposes, the chart showing claims anticipated under the plan, paid claims and allowed claims are reflected in both the Reorganized Debtor and Claimant Trust post-confirmation report under Part 3: Recoveries of the Holders of Claims and Interests under the Confirmed Plan.

The presentation contained in this PCR does not reflect the material and necessary reserves that will be taken in accordance with the Claimant Trust's governing documents and the Plan.

Appendix Exhibit 152

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Assistant: Susan Marshall
smarshall@polleyfaith.com

October 27, 2023

Mani Sanghera
Compliance & Disclosure - General Inquiries
300 - 100 Adelaide St. West
Toronto, ON
M5H 1S3

VIA EMAIL (complianceanddisclosure@tsxventure.com)

Dear Mr. Sanghera,

Re: NexPoint Hospitality Trust

We are Canadian counsel to Highland Capital Management, L.P. ("**Highland**"), a minority unitholder of NexPoint Hospitality Trust ("**NHT**"). We write this letter to draw your attention to three potential breaches of TSXV policies in relation to NHT's having entered into over $82 million in convertible notes with related parties.[1] While NHT has undertaken to amend $56 million of the convertible notes at the request of the TSXV, $26 million of the notes remain unamended and potentially remain in breach of TSXV Policy 4.1. Additionally, NHT inaccurately described the notes in its news releases contrary to TSXV Policy 3.3, and did not obtain minority approval of these notes as may have been required by TSXV Policy 5.9.

Currently, NHT is trading on the TSXV at $0.25 per unit with a market capitalization of $7,338,014. Conversion of the notes therefore poses a significant risk of dilution to NHT's minority unitholders.

Background of the convertible notes

NHT is a real estate investment trust (a "**REIT**") that began listing on the TSXV in March 2019.[2] According to NHT's Interim Consolidated Financial Statements for Q2 2023, NHT has $82,723,000 in convertible notes outstanding as of June 30, 2023.[3] These notes were entered into with entities controlled or managed by James Dondero (who is NHT's CEO and one of its trustees), starting in January 2019 through to the end of 2022. NHT consistently disclosed that these notes were exempted from the minority approval requirements under section 5.7(1)(a) of MI 61-101 ("**MI 61-101**") for related party transactions because the notes did not exceed 25% of NHT's market capitalization at the time they were entered into.[4]

[1] All dollar amounts are USD.
[2] NHT Prospectus, dated March 27, 2019, **TAB 1**.
[3] NHT Interim Consolidated Financial Statements for Q2 2023, **TAB 2**, p. 23 ["**Q2 2023**"].
[4] See NHT News Releases dated March 30, 2021 (**TAB 3**), April 8, 2022 (**TAB 4**), May 27, 2022 (**TAB 5**), and November 14, 2022 (**TAB 6**).

The notes are described as maturing in 20 years "in most cases" and being convertible into Class B units of NHT's operating partnership (the "**OP**"),[5] which indirectly holds NHT's assets.[6] When the notes were originally disclosed throughout 2021 and 2022—including as recently as NHT's 2022 audited annual financial statements filed on April 4, 2023[7]—the loans were consistently described as being convertible at the option of NHT. For example, NHT's news release on March 30, 2021 described the notes as convertible "at the option of NHT *in its sole discretion*" [emphasis added],[8] and its Q2 2022 financial statements described the notes as "convertible at any time *at the election of the Company* into Class B Units" [emphasis added].[9]

However, in NHT's Q1 2023 financial statements, the description of the loans changed for the first time to "convertible at any time *at the election of the holders* into Class B Units" [emphasis added].[10] This deliberate change in the disclosure suggests that NHT became aware of the misleading disclosure in previous news releases and financial statements, but NHT made the change without any explanation and without any acknowledgement that it was in fact a change to the disclosure.

The TSXV's required amendments

In a June 26, 2023 news release, NHT announced that, at the request of the TSXV, it had undertaken to amend $56,165,000 of the convertible notes.[11] NHT also disclosed that MI 61-101 required minority approval of the amendments. On August 31, 2023, NHT set the 2023 annual and special meeting of the unitholders for October 12, 2023.[12]

In its Management Information Circular filed on September 21, 2023 (the "**Information Circular**"), NHT further disclosed that the TSXV required amendments to 32 of the convertible notes issued between June 2021 and September 2022 in the aggregate amount of $56,165,000.[13] The Information Circular explained that, although NHT initially filed the convertible notes with the TSXV under TSXV Policy 5.1 – *Loans, Loan Bonuses, Finder's Fees and Commissions,* the TSXV advised NHT in December 2022 that the notes were required to be treated as "Convertible Securities" under TSXV Policy 4.1 – *Private Placements*. The Information Circular disclosed that "due to this determination, the TSXV required the following amendments":[14]

(i) either the conversion feature be removed or limited to five years from the date of issuance of the loan;
(ii) the conversion feature be limited to the principal amount of the loan; and

[5] See Q2 2023, **TAB 2**, p. 23.
[6] NHT Prospectus, **TAB 1**, p. (i).
[7] NHT Audited Consolidated Financial Statements for the years ended December 31, 2022 and December 31, 2021, **TAB 7**.
[8] NHT News Release, dated March 30, 2021, **TAB 3**.
[9] NHT Interim Consolidated Financial Statements for Q2 2022, **TAB 8**, p. 24.
[10] NHT Interim Consolidated Financial Statements for Q1 2023, **TAB 9**, p. 24.
[11] NHT News Release, dated June 26, 2023, **TAB 10**.
[12] Notice, dated August 31, 2023, **TAB 11**.
[13] NHT Notice of Annual and Special Meeting of Unitholders and Management Information Circular, dated September 21, 2023 ["**Information Circular**"], **TAB 12**, p. 17.
[14] Information Circular, **TAB 12**, pp. 18-19.

(iii) the conversion price be fixed at a price equal to the market price of the REIT's units on the TSXV at the time of the issuance of the loan.

Highland's application for additional information on the convertible notes

Highland did not believe that the Information Circular provided sufficient disclosure to allow it to make an informed vote on the proposed amendments. Highland therefore commenced an application to the Capital Markets Tribunal seeking an amended information circular.

In response to Highland's application, NHT moved the meeting to October 26, 2023. Also in response to the application, NHT issued a news release on October 19, 2023 with additional information on the convertible notes.[15] The next day, Highland withdrew its application to the Capital Markets Tribunal. The news release disclosed two key pieces of information.

First, NHT clarified and corrected its earlier disclosure. It disclosed that:

> Previous disclosure of the REIT stated that the Loans were, subject to approval of the TSXV, convertible at any time at the election of the REIT into Class B Units. The REIT wishes to clarify and correct this earlier disclosure. The Loans are, and have always been, only convertible into Class B Units at the option of their respective holder. However, if any of the Loans are converted by their respective holders into Class B Units and the holder then elects to redeem those Class B Units, the REIT may elect to satisfy the redemption by issuing Units to the holder.

The news release does not explain why the previous disclosure did not properly describe the conversion rights, or why NHT failed to correct the misleading disclosure until Highland's application forced the issue.

Second, NHT disclosed that it had initially filed the convertible notes under TSXV Policy 5.1 because the convertible notes were convertible into units of the OP, rather than NHT's "publicly traded units". NHT cited that TSXV Policy 5.1 defined "loan" as excluding "any form of debt instrument issued by an Issuer that is not convertible into Listed Shares". This is an extremely narrow interpretation of TSXV Policy 5.1 that the TSXV clearly rejected as it required amendments to $56 million of the notes to bring them into compliance with Policy 4.1.

The remaining $26 million in convertible notes may breach Policy 4.1

Highland has serious concerns about the more than $26 million in convertible notes that have not been subjected to the TSXV's required amendments (the "**Unamended Notes**").

As described above, NHT issued over $82 million in convertible notes, but the TSXV required amendments to only just over $56 million worth of the notes. NHT has never disclosed that the Unamended Notes differ in any significant way from the convertible notes that the TSXV required to be amended. Nor has NHT offered any explanation as to why the Unamended Notes were not subject to the same amendments as the other notes. The Unamended Notes therefore likely also violate the

[15] NHT News Release, dated October 19, 2023, **TAB 13**.

requirements of TSXV Policy 4.1. If so, they should be subject to the same amendments as the other $56 million in notes.

Without being subject to amendments to bring about compliance with Policy 4.1, the $26 million in Unamended Notes could be converted at the holders' option at the current NHT unit market price of $0.25, which is a fraction of the unit market price when these notes were issued. This conversion could lead to an additional 104 million units being issued, when the total number of outstanding units is currently only 29,352,055. The Unamended Notes pose a significant risk of dilution for Highland and other minority unitholders. The required amendments would help to mitigate this risk and provide NHT's minority unitholders with the protection that Policy 4.1 intends.

Highland requests that the TSXV review the Unamended Notes, including any amendments to or assignments of those notes, to determine whether amendments are required to bring about compliance with TSXV Policy 4.1.

NHT may have breached TSXV Policy 3.3 – Timely Disclosure

TSXV Policy 3.3 requires accurate disclosure in news releases. Section 3.8(g) of the policy requires reporting issuers to immediately disclose "the borrowing or lending of a significant amount of funds" and section 8.3 states that "The responsibility for the adequacy and accuracy of the content of news releases rests with the directors of an Issuer."[16]

NHT has confirmed that its previous disclosures about its convertible notes are not accurate, as described above. To repeat, NHT disclosed on October 19, 2023 that:[17]

> Previous disclosure of the REIT stated that the Loans were, subject to approval of the TSXV, convertible at any time at the election of the REIT into Class B Units. The REIT wishes to clarify and correct this earlier disclosure. The Loans are, and have always been, only convertible into Class B Units at the option of their respective holder.

We note that under TSXV Policy 3.3 the TSXV has several remedies available to it, up to and including removal of the trustees.[18] We bring this potential breach of the policy to the TSXV's attention for its consideration and possible investigation.

NHT may have breached TSXV Policy 5.9 – Protection of Minority Security Holders in Special Transactions

TSXV Policy 5.9 adopts Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**").[19] Under section 5.6 of MI 61-101, NHT is required to obtain minority approval for related party transactions, subject to certain exemptions. NHT has consistently disclosed that the convertible notes were exempt from the requirement for minority approval because the fair market value of the transactions did not exceed 25% of NHT's market capitalization at the time they were entered into. However, section 5.5(iii) of MI 61-101 states that the fair market values of "connected transactions" shall be aggregated in determining whether the tests for this exemption are

[16] TSXV Policy 3.3 – Timely Disclosure.
[17] NHT News Release, dated October 19, 2023, **TAB 13**.
[18] TSXV Policy 3.3 – Timely Disclosure, s. 12.
[19] TSXV Policy 5.9 – Protection of Minority Security Holders in Special Transactions, s. 2.2.

met.[20] MI 61-101 defines "connected transactions" as "two or more transactions that have at least one party in common, directly or indirectly…and are negotiated or completed at approximately the same time."

NHT's convertible notes appear to be connected transactions. NHT consistently entered into convertible notes with entities affiliated with Dondero between 2019 and 2022, and it disclosed that these notes were all entered into for the purpose of funding NHT's operating expenses. These convertible notes together have far exceeded 25% of NHT's market capitalization—in Q1 2022 alone, NHT entered into $22,925,000 of convertible notes, which was more than 25% of NHT's market capitalization in the same period.

It appears that minority approval may have been required before NHT entered into the convertible notes, even though such approval was not sought. Highland requests that should NHT file any new convertible notes for the TSXV's review, the TSXV consider as part of its review whether minority approval was required, and, if so, obtained.

If we can be of any assistance we would be pleased to discuss this matter further.

Sincerely,

POLLEY FAITH LLP

Jeffrey Haylock
JH/dc

Encls.

[20] MI 61-101, s. 5.5(iii).

Appendix Exhibit 153

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

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

MOTION OF JAMES D. DONDERO AND STRAND ADVISORS, INC.
FOR LEAVE TO FILE ADVERSARY COMPLAINT

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Rules

James D. Dondero ("Mr. Dondero") and Strand Advisors, Inc. ("Strand" and, collectively, "Plaintiffs") respectfully move for leave to file an Adversary Proceeding Complaint (attached as Ex. A) against the law firm of Pachulski Stang Ziehl & Jones LLP ("Pachulski") for breaching its fiduciary duty of loyalty to Plaintiffs under Texas law.

BACKGROUND

I. Plaintiffs' Attorney-Client Relationship With Pachulski Stang Ziehl & Jones LLP

1. Highland Capital Management, L.P. ("HCMLP") is an SEC-registered investment advisory business founded in 1993 by Mr. Dondero, directly and indirectly constituting a material aspect of Mr. Dondero's personal wealth. Compl. at ¶16. From the company's formation until the confirmation of the HCMLP bankruptcy plan in August 2021, Strand was HCMLP's general partner ("GP"), and Mr. Dondero in turn wholly owned Strand. *Id.* at ¶18. Prior to filing for bankruptcy, HCMLP provided money management and advisory services for approximately $2.5 billion of assets under management and provided sub-advisory services for an additional $15 billion of assets under management. *Id.* at ¶17. Nevertheless, HCMLP suffered losses during the 2008 financial crisis, leading to lawsuits by investors. *Id.* at ¶¶20-26. After one of the most contentious disputes resulted in a large arbitration award that HCMLP lacked the immediate liquidity to pay, Mr. Dondero sought advice about protecting HCMLP, as well as his and Strand's interest in the entity.

2. In October 2019, Mr. Dondero (HCMLP's co-founder) and Strand (HCMLP's general partner) turned to Pachulski for help, who advised that Plaintiffs restructure the arbitration debt by putting HCMLP into Chapter 11 bankruptcy proceedings in Delaware. *Id.* at ¶¶28-33. Bankruptcy, Pachulski counseled, would protect Plaintiffs' interest in HCMLP by providing an orderly mechanism to address the arbitration debt while ensuring that Plaintiffs retained control of HCMLP throughout the bankruptcy, which Pachulski represented would be quick. *Id.* at ¶ 33.

3. Throughout the next several months, Pachulski continued to advise Plaintiffs on how to best protect their interests in HCMLP by, among other things, (a) providing Plaintiffs legal advice regarding their objectives vis-à-vis the bankruptcy; (b) negotiating on behalf of Plaintiffs with the unsecured creditors committee ("UCC"); and (c) advising Plaintiffs to relinquish their control of HCMLP to avoid the appointment of an independent trustee in favor of an independent board, which was affected through a Governance Settlement.[1] *Id.* at ¶87. Pachulski knew that the appointment of a trustee would likely ensure that their representation of HCMLP would end (as the trustee would hire new counsel). *Id.* at ¶66. But if an independent board were appointed instead, Pachulski could likely stay on as counsel to HCMLP. *Id.* In short, Pachulski counseled Plaintiffs to engage in a course of conduct that was in dissonance with Plaintiffs' primary objectives but that was in

[1] The Governance Settlement refers to a compromise reached between HCMLP and the UCC that was approved by the Bankruptcy Court on January 9, 2020. This agreement outlines the terms for the governance and operation of HCMLP during the bankruptcy proceedings. *See* Dkts. 281, 339.

consonance with Pachulski's own financial interest as a bankruptcy and restructuring law firm.

4. Shortly after Plaintiffs executed documents effectuating the Governance Settlement, the independent directors (the majority of whom were selected by the UCC) overseeing HCMLP became hostile towards Plaintiffs. *Id*. at ¶79. HCMLP then proceeded to take numerous actions adverse to Plaintiffs, including (1) obtaining a temporary restraining order ("TRO") that, among other things, prevented Mr. Dondero from contacting HCMLP's employees; (2) moving to have Dondero held in contempt for violating the TRO (eventually resulting in Mr. Dondero being ordered to pay $450,000 to compensate HCMLP for its legal fees incurred in pursuing a contempt order); (3) filing multiple adversary proceedings against Mr. Dondero and entities affiliated with him; and (4) advocating in favor of the Fifth Amended Plan of Reorganization, which both wiped out Strand's interest in HCMLP and created a Litigation Sub-Trust whose Trustee has since asserted claims against Plaintiffs. *Id*. at ¶¶14, 80.

5. Though Pachulski knew that HCMLP's creditors might move to appoint a bankruptcy trustee (and thus thwart the Plaintiffs' singular goal of retaining control of HCMLP), Pachulski failed to advise Mr. Dondero and Strand that Pachulski was not representing their interests in the restructuring and that they should retain independent outside counsel. *Id*. at ¶¶35, 55. And despite advising Plaintiffs on a host of issues after being approached by Mr. Dondero, Pachulski never

advised that its interests as counsel to HCMLP had become adverse to Plaintiffs and thus Plaintiffs should consider retaining independent outside counsel. *Id*.

6. In short, as detailed in the Adversary Complaint, Pachulski placed its own business interests ahead of Plaintiffs' interests, and its actions both undermined Plaintiffs' primary goals in consenting to the bankruptcy (*i.e.*, a fast exit from bankruptcy with Plaintiffs still in control) and exposed Plaintiffs to substantial liability. *Id*. at ¶81. The Adversary Complaint thus alleges that Pachulski's actions constitute a breach of its fiduciary duty of loyalty to Plaintiffs, entitling Plaintiffs to legal relief. *Id*. at ¶¶14-15, 86-92.

II. The Gatekeeper Provision

7. On February 22, 2021, the Court confirmed the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified, the "Plan"). The Plan became effective in August 2021, and includes a "Gatekeeper Provision." *See* Dkt. 1943 at ¶76. That provision "require[s] that, before a party may commence or pursue claims relating to the bankruptcy case against certain protected parties, it must first obtain (1) a finding from the bankruptcy court that its proposed claims ('Proposed Claims') are 'colorable'; and (2) specific authorization by the bankruptcy court to pursue the Proposed Claims." *See* Dkt. 3903 at 4 (citation omitted). Pachulski is a Protected Party under the Plan. *See* Dkt. 1943, Exhibit A at ¶105(xiv).

8. Because Plaintiffs are concerned that their fiduciary duty claim is arguably nearing a limitations period, Plaintiffs recently reached out to Pachulski requesting that it sign a tolling agreement to preserve Plaintiffs' claim. *See* Ex. B

(Email correspondence between A. Ruhland and J. Morris, dated 11/28/23 – 12/1/23). Pachulski refused. *Id.* Plaintiffs urged Pachulski to reconsider, both for the preservation of the value of the Highland estate and to reduce animosity between the parties. *Id.* As of the filing of this motion, Pachulski has not changed its position, necessitating the filing of this Motion and attached complaint.

LEGAL STANDARD

9. Under the Plan, a complaint may be filed against a Protected Party only if it satisfies the "Gatekeeper Colorability Test." *See* Dkt. 3903 at 91. According to the Bankruptcy Court, this legal standard is "a broader standard than the 'plausibility' standard applied to Rule 12(b)(6) motions to dismiss" and "involves ***an additional level of review*** . . . [requiring plaintiffs to make] a prima facie case that its proposed claims are ***not without foundation***, are ***not without merit***, and are ***not being pursued for any improper purpose such as harassment***." *Id.* (emphasis in original). The Court explained that the test permits it to consider "its ***knowledge*** of the ***bankruptcy proceedings*** and ***the parties*** and any additional evidence presented at the hearing on the Motion for Leave." *Id.* (emphasis in original).[2]

ARGUMENT

I. Plaintiffs Have A Proper Purpose For Bringing Their Claim

[2] Plaintiffs do not concede that the Gatekeeper Colorability Test outlined in Dkt. 3903 is the appropriate standard under a gatekeeper provision in the Fifth Circuit. Nonetheless, Plaintiffs have drafted this Motion consistent with the Court's articulation of the Gatekeeper Colorability Test.

10. A breach of fiduciary duty claim under Texas law has a four-year statute of limitations period. *See Gomez Acosta v. Falvey*, 594 S.W.3d 386, 393 (Tex. App.—El Paso 2019, no pet.). Letting a client's claim expire may be considered attorney malpractice. *See Floyd v. Hefner*, 556 F. Supp. 2d 617, 643 (S.D. Tex. 2008) (*citing James Mazuca and Associates v. Schumann*, 82 S.W.3d 90, 97 (Tex. App.—San Antonio 2002, pet. denied).

11. Plaintiffs' claim for breach of fiduciary duty is not brought to harass Pachulski or for any improper purpose. Plaintiffs have a good faith concern that their claim for breach of fiduciary duty may be nearing its limitations period. Importantly, Plaintiffs did not want to file this Motion for Leave or the attached Adversary Complaint as this time, but Pachulski declined to sign (or even negotiate regarding the terms of) Plaintiffs' tolling agreement. *See* Ex. B; *see also Charles Equip. Energy Sys., LLC v. INNIO Waukesha Gas Engines, Inc*., 2023 WL 2346337, *7 (S.D.N.Y. Mar. 3, 2023) ("parties who want to forestall the running of the limitations period in order to engage in discussions aimed at resolving a dispute can accomplish that goal by signing toiling agreements to that effect. In the absence of such agreement . . . the limitations period runs."). Plaintiffs' Adversary Complaint is an effort by Plaintiffs to avail themselves of the only available legal remedy for the harm they have suffered due to Pachulski's actions. Thus, out of an abundance of caution, Plaintiffs had to file this Motion. As explained further below and detailed in the attached Adversary Complaint, Plaintiffs' breach of fiduciary duty claim is colorable and its Motion for Leave should be granted.

II. Plaintiffs Have A Colorable Claim Against Pachulski

12. Plaintiffs should be granted leave to assert a breach of fiduciary duty claim against Pachulski. "A Texas law claim for breach of fiduciary duty requires the plaintiff to plead the following elements: (1) the existence of a fiduciary duty, (2) breach of the duty, (3) causation, and (4) damages." *In re Life Partners Holdings, Inc.*, 926 F.3d 103, 125 (5th Cir. 2019) (citing *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017) (cleaned up). The Texas Supreme Court has emphasized:

> In Texas, we hold attorneys to the highest standards of ethical conduct in their dealings with their clients. The duty is highest when the attorney . . . takes a position adverse to his or her client's interests. As Justice Cardozo observed, '[a fiduciary] is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.' Accordingly, a lawyer must conduct his or her business with inveterate honesty and loyalty, *always keeping the client's best interest in mind.*

Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 560-61 (Tex. 2006) (emphasis added) (citations omitted). Importantly, a plaintiff need not prove causation or actual damages "as to any equitable remedies [] sought." *Parker*, 514 S.W.3d at 221.

A. Pachulski Had A Fiduciary Duty of Loyalty to Plaintiffs

13. In Texas, an attorney-client relationship exists when an attorney agrees to render professional services to a client. *See Vinson & Elkins v. Moran*, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.) (citation omitted). "[A]n attorney-client relationship may [] be . . . implied from actions that reveal the parties' intent to establish the relationship." *See In re Adobe Energy, Inc*,

82 F. App'x 106, 114 (5th Cir. 2003); *see also Acme Truck Line, Inc. v. Gardner*, 2014 WL 6982277, at *2 (S.D. Tex. Dec. 9, 2014). An attorney owes a fiduciary duty of loyalty to his client throughout the course of the representation. *Gillis v. Provost & Umphrey L. Firm, LLP*, 2015 WL 170240, at *10 (Tex. App.—Dallas 2015, no pet.).

14. As set forth in the Adversary Complaint and summarized below, Pachulski's interactions with Plaintiffs evince an attorney-client relationship under Texas law, resulting in a fiduciary relationship with Plaintiffs:

15. ***Pachulski's Actions Evince An Attorney-Client Relationship With Plaintiffs***. Pachulski's actions—starting from the moment Plaintiffs approached the firm in September 2019 to discuss their objectives of resolving the outstanding arbitration debt expeditiously and retaining control of HCMLP—demonstrate the existence of an attorney-client relationship. Specifically, the following acts are indicative of an attorney client relationship: (1) engaging in numerous discussions with Mr. Dondero personally, as well as in his capacity as President of Strand, regarding how best to retain control of HCMLP and to protect his financial interest;[3] (2) advising Mr. Dondero to give up control of Strand (a non-debtor) to an independent board;[4] (3) advising Mr. Dondero to appoint a Chief Restructuring Officer to increase the likelihood that Mr. Dondero and Strand would retain control over HCMLP in bankruptcy;[5] (4) advising Mr. Dondero regarding alternative proposals he should make to the UCC to address their concerns about

[3] *See, e.g.*, Compl. at ¶¶9-10, 12-13.
[4] *See, e.g.*, Compl. at ¶¶12, 82.
[5] *See, e.g.*, Compl. at ¶¶10, 34.

Plaintiffs retaining control of HCMLP during the bankruptcy;[6] and (5) advising Plaintiffs to execute various documents to effectuate a change in control without advising Plaintiffs to hire independent outside counsel.[7] Plaintiffs clearly expected Pachulski to advise them on the above matters (otherwise, why would Pachulski repeatedly provide them advice), yet Pachulski took no steps to communicate that *it was not* representing Plaintiffs' interests. *See Valls v. Johanson & Fairless, L.L.P.*, 314 S.W.3d 624, 634 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("[A]n attorney-client relationship may arise by implication if the lawyer knows a person reasonably expects him to provide legal services but does nothing to correct that misapprehension.").

16. ***Plaintiffs' Actions Evince An Attorney-Client Relationship With Pachulski.*** The actions of Plaintiffs suggest that they believed they were clients of Pachulski: (1) Plaintiffs approached Pachulski for legal advice regarding how to protect their substantial financial interest in HCMLP given the large arbitration award and articulated their objectives to retain control of HCMLP;[8] (2) Plaintiffs acted in accordance with Pachulski's advice that Mr. Dondero give up control of Strand (a non-debtor) to an independent board;[9] (3) Plaintiffs acted in accordance with Pachulski's advice that Mr. Dondero appoint a CRO to increase the likelihood that Mr. Dondero and Strand retain control over HCMLP in bankruptcy;[10] (4)

[6] *See, e.g.*, Compl. at ¶52.
[7] *See, e.g.*, Compl. at ¶¶47, 52, 54.
[8] *See, e.g.*, Compl. at ¶¶9, 28.
[9] *See, e.g.*, Compl. at ¶¶12, 54, 69, 75.
[10] *See, e.g.*, Compl. at ¶¶10-11, 36.

Plaintiffs acted in accordance with Pachulski's advice to Mr. Dondero regarding alternative proposals to the UCC to address concerns about Plaintiffs' retention of control of HCMLP during the bankruptcy;[11] and (5) Plaintiffs never retained independent outside counsel other than Pachulski because Pachulski had repeatedly advised Plaintiffs with respect to protecting Plaintiffs' interests in HCMLP, both before and after HCMLP filed for bankruptcy.[12] These facts plainly support the existence of an attorney-client relationship. *See Johnson v. Williams*, 2006 WL 1653656, at *6 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (reversing grant of summary judgment because evidence suggested existence of attorney-client relationship when "the lawyer fails to manifest lack of consent . . . and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services." (citing Restatement (Third) of the Law Governing Lawyers § 14 (2000))).

B. Pachulski Breached Its Duty of Loyalty to Plaintiffs

17. Attorneys breach their fiduciary duties to clients by their "failure to disclose conflicts of interest, . . . placing personal interests over the clients' interests, improper use of client confidences, taking advantage of the client's trust, engaging in self-dealing, and making misrepresentations." *Goffney v. Rabson*, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). The duty of loyalty

[11] *See, e.g.*, Compl. at ¶¶52, 54.
[12] *See, e.g.*, Compl. at ¶¶65, 69, 75.

encompasses the duty "to render a full and fair disclosure of facts material to the client's representation." *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988).

18. The Adversary Complaint includes a colorable claim that Pachulski breached its duty of loyalty to Plaintiffs in multiple ways. First, Pachulski positioned itself to be retained as debtor's counsel by improperly putting its own self-interest in securing a lucrative engagement over its duty of loyalty to Plaintiffs. *See, e.g.*, Compl. at ¶¶81, 83; *see also Goffney*, 56 S.W.3d at 193 ("placing personal interests over the clients' interests" breaches duty of loyalty). And even though Pachulski's advice regarding the propriety of bankruptcy for HCMLP failed to achieve any of Plaintiffs' stated goals, the advice resulted in Pachulski earning millions in fees from their engagement with HCMLP. *See* Compl. at ¶¶15, 90. This constitutes an improper benefit obtained despite a clear conflict of interest. *See, e.g.*, *Jacobs v. Tapscott,* 2006 WL 2728827, at *6 (N.D. Tex. Sept. 25, 2006), *aff'd*, 277 F. App'x 483 (5th Cir. 2008) ("An attorney's 'pursuit of his own pecuniary interests over the interests of his client . . . can be viewed as claims involving breached fiduciary duties.'" (cleaned up, citation omitted)).

19. Second, Pachulski neither disclosed nor counseled Plaintiffs that the interests of HCMLP might become adverse to Plaintiffs in the future. *See, e.g.*, Compl. at ¶¶81, 82. More importantly, once it became clear that the interests of Pachulski and its client HCMLP were diverging from those of Plaintiffs, Pachulski never advised Plaintiffs to retain independent outside counsel. Compl. at ¶¶69, 91. In fact, facing a court likely to appoint a trustee that would be hostile to Plaintiffs

retaining control of HCMLP, Pachulski continued to advise on legal strategy for HCMLP, Strand, and Dondero—each as seemingly aligned but separate clients with potential conflicts of interest between them. Compl. at ¶¶13, 61. This was improper. *See In re Kuykendahl Place Assocs., Ltd.*, 112 B.R. 847, 850 (Bankr. S.D. Tex. 1989) ("To represent an adverse interest means to serve as an agent or attorney for any individual or entity holding such adverse interest. The firm of Crain, Caton & James has represented Marc S. Geller individually. Mr. Geller is the general partner of Debtor's sole limited partner which is itself a limited partnership. Marc S. Geller has individually guaranteed an indebtedness of the Debtor-in-Possession. The guarantee, by its nature, establishes that Mr. Geller holds an interest which may be adverse to that of the Debtor-in-Possession.").

20. Further, Pachulski advised HCMLP to act adversely to Plaintiffs' interests with respect to the same issues it previously advised Plaintiffs. For example, Pachulski filed claims on behalf of HCMLP against Mr. Dondero, supported a bankruptcy plan that wiped out Strand's interest in HCMLP and resulted in a litigation sub-trust that pursued claims against Plaintiffs, and obtained a temporary restraining order against Mr. Dondero. Compl. at ¶¶14, 80. These actions constitute a breach of fiduciary duty. *See Hoover,* 206 S.W.3d at 560-61 (Tex. 2006) ("The duty is highest when the attorney . . . takes a position adverse to his or her client's interests. . . . a lawyer must conduct his or her business with inveterate honesty and loyalty, *always keeping the client's best interest in mind*." (cleaned up)).

21. Third, once Pachulski knew or should have known that there was a conflict of interest between Plaintiffs and HCMLP, Pachulski failed to secure Plaintiffs' informed consent before continuing to represent HCMLP in the bankruptcy proceeding. Compl. at ¶¶35, 55. "[A]s a general proposition loyalty to a client prohibits undertaking representation directly adverse to the representation of that client in a substantially related matter unless that client's fully informed consent is obtained and unless the lawyer reasonably believes that the lawyer's representation will be reasonably protective of that client's interests." *In re Thetford*, 574 S.W.3d 362, 376 (Tex. 2019); *see In re Blast Fitness Grp., LLC*, 2019 WL 137109 at *7 (Bankr. D. Mass. Jan. 8, 2019) ("the conflict presented by their simultaneous representations of other potentially adverse parties may have breached that [duty of loyalty]"). Pachulski's failure to sufficiently inform Plaintiffs about the potential conflict with Pachulski's representation of HCMLP in time for Plaintiffs to obtain independent outside counsel is colorable claim for breach of fiduciary duty. *See Spera v. Fleming, Hovenkamp & Grayson, P.C.*, 25 S.W.3d 863, 873 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (remanding claim for breach of fiduciary duty because fact issue existed concerning whether lawyers had duty to tell clients about potential conflict of interest in time for clients to obtain other counsel prior to hearings).

C. Pachulski's Breach Damaged Plaintiffs And, Separately, Plaintiffs Are Entitled to Disgorgement

22. Causation is generally an essential element to a client's claim seeking actual damages as a remedy for breach of fiduciary duty. *See Rogers v. Zanetti*, 517 S.W.3d 123, 136 (Tex. App.—Dallas, 2015), *aff'd*, 518 S.W.3d 394 (Tex. 2017). But there is no requirement "to show causation and actual damages as to any equitable remedies [] sought." *Parker*, 514 S.W.3d 214, 221 (Tex. 2017). Thus, "forfeiture of an attorney's fee is an appropriate remedy when an attorney breaches his fiduciary duty to a client even in the absence of actual damages." *See Hernandez v. LaBella*, 2010 WL 431253, at *3 n.2 (Tex. App.—Houston [14th Dist.] Feb. 9, 2010, no pet.) (citing *Burrow v. Arce,* 997 S.W.2d 229, 240 (Tex.1999)).

23. Here, Plaintiffs have a colorable claim that Pachulski's breach of its fiduciary duty entitles Plaintiffs to disgorgement of Pachulski's fees. *See Gregory v. Porter & Hedges, LLP,* 398 S.W.3d 881, 885 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) ("fee forfeiture is a deterrent in that it removes the incentive for an attorney to take personal advantage of her position of trust in every situation, whether the client is injured or not." (citations omitted)); *see also Avco Corp. v. Turner*, 2022 WL 2901015, at *3 (3d Cir. July 22, 2022) (reversing summary judgment because "disgorgement need not be a refund of fees paid" and disgorgement, "after all . . . centers on the wrongdoer's gain, not the plaintiff's loss: it is the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion" (cleaned up)).

24. And though causation is not a necessary element of Plaintiffs' claim, Pachulski's disloyalty clearly caused Plaintiffs' damages. Among other things, Pachulski's actions resulted in (a) HCMLP filing claims against Dondero; (b) the wiping out of Strand's interest in HCMLP and the creation of a litigation sub-trust that has since sued Strand and Dondero (causing them to incur millions of dollars in legal fees); (c) the issuance of a TRO against Dondero ordering him to pay $450,000 to compensate HCMLP for its legal fees incurred in pursuing a subsequent contempt order; and (d) Plaintiffs' loss of control over HCMLP. Compl. at ¶88. That is, Pachulski advised Plaintiffs to voluntarily surrender their governance rights to facilitate a settlement with creditors who harbored animosity toward Mr. Dondero and, as part of the settlement, vested these creditors with standing to sue Mr. Dondero and entities affiliated with him. *Id*. at ¶76.

25. For these reasons, Plaintiffs' can make a prima facie case that their proposed claim for breach of fiduciary duty has foundation and is not without merit. *See* Dkt. 3903 at 91.

CONCLUSION

26. Plaintiffs respectfully request that the Court grant their Motion for Leave.

Dated: December 4, 2023

*/s/*Amy L. Ruhland
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Counsel for James D. Dondero and Strand Advisors, Inc.

CERTIFICATE OF CONFERENCE

Beginning on November 28, 2023, and on December 1, 2023, the undersigned counsel reached out to John A. Morris at the Pachulski firm regarding the relief requested in this Motion. Mr. Morris communicated Pachulski's opposition.

Dated: December 4, 2023

/s/ Amy L. Ruhland
Amy L. Ruhland

CERTIFICATE OF SERVICE

I certify that on December 3, 2023, a true and correct copy of the foregoing Motion was served on all counsel of record through the Court's ECF system, which provides notice to all parties of interest, and on the Pachulski firm directly.

Dated: December 4, 2023

/s/ Amy Ruhland
Amy L. Ruhland

EXHIBIT A

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

In re: HIGHLAND CAPITAL MANAGEMENT, L.P.,[1]	§	**Chapter 11**
	§	**Case No. 19-34054 (SGJ)**
Debtor,	§	
STRAND ADVISORS, INC. AND JAMES DONDERO	§	
Plaintiffs,	§	**Adversary Proceeding No.**
v.	§	_____
PACHULSKI STANG ZIEHL & JONES LLP	§	
Defendant.	§	

PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE COURT:

Plaintiffs Strand Advisors, Inc. ("Strand") and James Dondero ("Dondero") file this Original Complaint against Defendant Pachulski, Stang, Ziehl & Jones ("Pachulski" or "Defendant"), pursuant to section 105(a) of Title 11 of the United States Code (the "Bankruptcy Code") and Rule 7001(1) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and would show the Court as follows:

[1] The Debtor's last four digits of its taxpayer identification number are (6752). The headquarters and service address for the above-captioned Debtor is 300 Crescent Court, Suite 700, Dallas, TX 75201.

I. PARTIES

1. Plaintiff Strand is a Delaware corporation wholly owned by James Dondero. Its members are domiciled in the State of Texas, so it is also a citizen of the State of Texas.

2. Plaintiff James Dondero is a natural person residing in Dallas County, Texas.

3. Plaintiffs are the prior owners of the above-stated Debtor, Highland Capital Management and, thus, are affiliates and/or insiders as defined under the Bankruptcy Code (11 U.S.C. § 101(2), (31)).

4. Defendant Pachulski is a limited liability partnership organized under the laws of California that has partners residing in California, Texas, Delaware, and New York. Accordingly, Pachulski resides in Texas, among other states.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and § 1334 as it is related to a case currently governed by Title 11 of the United States Code. This adversary proceeding is a non-core proceeding.

6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409(a).

7. Plaintiffs consent to the entry of a final order or judgment by the Bankruptcy Court in this matter.

III. SUMMARY OF THIS LAWSUIT

8. ***Overview.*** This lawsuit involves a law firm (Pachulski) that turned against its clients (Strand and Dondero) when it suited the law firm's own economic interests. Having advised Plaintiffs to put the entity they owned and controlled (Highland Capital Management, LP) into bankruptcy and undertake a series of actions designed to avoid appointment of a trustee, Pachulski then turned against those very same clients by representing the debtor entity in a series of actions adverse to them.

Defendant's blatant breach of its fiduciary and ethical duties caused Plaintiffs' significant harm. This lawsuit seeks redress for that damage.

9. ***The Parties' Initial Relationship.*** In 2019, Highland Capital Management, LP ("HCMLP") had a large arbitration award issued against it that had not yet been confirmed. Although HCMLP had assets in excess of the award, it did not have the immediate liquidity to pay the award if confirmed. Accordingly, HCMLP engaged Defendant to advise them regarding a potential restructuring to address the award. Both before and after HCMLP formally engaged Defendant, Plaintiffs Strand (HCMLP's general partner) and Dondero (Strand's sole owner) articulated to Defendant their objectives, regarding a potential bankruptcy—namely, that Strand (and Dondero) retain control over HCMLP and that HCMLP quickly emerge from the bankruptcy.

10. ***Defendant Undermines Bankruptcy.*** Defendant advised Dondero to have HCMLP file for bankruptcy in Delaware, assuring them that Delaware was a better venue; would help avoid the appointment of a trustee; and would be quick. Defendant further advised Dondero to appoint a CRO (Chief Restructuring Officer), which would also help avoid the appointment of a bankruptcy trustee and ensure Plaintiffs remained in control of HCMLP.

11. Defendant's advice quickly proved to be misguided. The Delaware court appointed an unsecured creditor's committee ("UCC"), most of the members of which had a long history of adverse litigation against Plaintiffs. The Delaware court then transferred the case to Texas. Meanwhile, Defendant's supposed "firewall" strategy of voluntarily appointing a CRO failed as the US Trustee filed a motion to appoint a bankruptcy trustee.

12. ***Defendant Advises Dondero and Strand to Give Up Rights in HCMLP.*** Facing a court likely to appoint a hostile trustee, Defendant advised a new legal strategy for HCMLP, Strand, and Dondero—each as seemingly aligned but separate clients with potential conflicts of interest between them. Defendant advised that Strand and Dondero propose a restructuring of HCMLP's

corporate governance to the creditors whereby Dondero would relinquish control over HCMLP's general partner Strand (a non-debtor in the Bankruptcy) to an independent board of directors. In other words, the main goals of Pachulski's representation (*e.g.,* a fast exit from bankruptcy with Plaintiffs still in control) were now imperiled. Facing little alternative due to Pachulski's flawed advice, Plaintiffs followed the recommendation and reached a settlement with the UCC wherein Plaintiffs gave up material rights (including control of Strand) by agreeing to an independent board in hopes of avoiding the appointment of a trustee over HCMLP.

13. Importantly, Defendant advised Plaintiffs to relinquish their own individual rights, not any rights held by HCMLP. The corporate governance of HCMLP was the subject of Pachulski's advice. Plaintiffs were the recipients of such advice. This advice clearly was in conflict between Plaintiffs and HCMLP—while HCMLP benefited from the advice, Plaintiffs followed such advice to their detriment. Nonetheless, Pachulski, the retained counsel for HCMLP, never advised Plaintiffs of the conflict of interest or the need for Plaintiffs to retain their own counsel to evaluate Pachulski's advice.

14. ***Pachulski Breaches its Fiduciary Duty by Turning on Plaintiffs.*** After HCMLP was under the control of an independent board of directors, HCMLP and Pachulski quickly became hostile towards Dondero and Strand. Pachulski breached its fiduciary duty to Plaintiffs by undertaking a series of adverse actions against them on behalf of HCMLP. Those adverse actions included (a) filing claims by HCMLP against Dondero; (b) advocating on behalf of a bankruptcy plan that wiped out Strand's interest in HCMLP and creating a litigation sub-trust that has since pursued claims against Strand and Dondero; and (c) seeking and obtaining a temporary restraining order against Dondero.

15. Despite this sudden direct adversity between its former clients (Strand and Dondero) and current client (HCMLP), Defendant continued to represent HCMLP throughout the Bankruptcy

in breach of duties to its former clients. In the process, Defendant earned millions in legal fees. Meanwhile, Plaintiffs' interest in HCMLP was wiped out and Plaintiffs were left with nothing.

IV. FACTUAL BACKGROUND

A. The Relationship between Dondero, Strand, and HCMLP.

16. James Dondero co-founded HCMLP, a Delaware limited partnership, (together with its affiliates, "Highland") in 1993. Highland operated a diverse investment platform and served institutional and retail investors worldwide. Its investment capabilities included, for example, high yield credit, public equities, real estate, private equity and special situations, structured credit, and sector- and region- specific verticals built around specialized teams.

17. Prior to its bankruptcy filing, HCMLP—an SEC-registered global investment adviser––was one of the principal operating arms of Highland's business. HCMLP directly provided money management and advisory services for approximately $2.5 billion of assets under management and provided subadvisory services to an additional $15 billion of assets under management. During calendar year 2018, HCMLP's stand-alone revenue totaled approximately $50 million.

18. Plaintiff Strand was HCMLP's general partner ("GP") from the company's formation until the confirmation of the HCMLP bankruptcy plan in August 2021. As GP, Strand controlled HCMLP. Strand, in turn, is wholly owned by Dondero.

B. A Protracted Dispute Arises between HCMLP and Investors in one of its Funds, resulting in an Arbitration Award being issued against HCMLP.

19. HCMLP had a dispute with investors related to an investment fund formerly managed by HCMLP (known as the Highland Crusader Fund) which was formed between 2000 and 2002.

20. Specifically, in September and October 2008, as the financial markets in the United States began to fail, HCMLP was flooded with redemption requests from Crusader Fund investors, as the Crusader Fund's assets lost significant value.

21. On October 15, 2008, HCMLP placed the Crusader Fund in wind-down, thereby compulsorily redeeming the Crusader Fund's limited partnership interests. HCMLP also declared that it would liquidate the Crusader Fund's remaining assets and distribute the proceeds to investors.

22. However, disputes concerning the distribution of the assets arose among certain investors. After several years of negotiations, a Joint Plan of Distribution of the Crusader Fund (the "Crusader Plan") and the Scheme of Arrangement between Highland Crusader Fund and its Scheme Creditors (the "Crusader Scheme") were adopted in Bermuda and became effective in August 2011.

23. As part of the Crusader Plan and the Crusader Scheme, a committee called the Redeemer Committee was elected from among the Crusader Fund's investors to oversee HCMLP's management of the Crusader Fund.

24. Between October 2011 and January 2013, in accordance with the Crusader Plan and the Crusader Scheme, HCMLP distributed in excess of $1.2 billion to the Crusader Fund investors. HCMLP distributed a further $315.3 million through June 2016.

25. However, disputes subsequently arose between the Redeemer Committee and HCMLP. On July 5, 2016, the Redeemer Committee (a) terminated and replaced HCMLP as investment manager of the Crusader Fund, (b) commenced an arbitration against it (the "Arbitration"), and (c) commenced litigation in Delaware Chancery Court, inter alia, to obtain a status quo order in aid of the arbitration, which was subsequently entered.

26. In September 2018, HCMLP and the Redeemer Committee participated in a multi-day evidentiary hearing. In March 2019, following post-trial briefing, the arbitration panel issued its Award, as subsequently modified and finalized, finding in favor of the Redeemer Committee on a variety of claims and requiring HCMLP to pay a gross amount of $189 million, which would be partially netted against certain assets and deferred cash to be sent back to HCMLP. After offsets, HCMLP believed the Award would be roughly $110 million.

C. HCMLP Engages Pachulski to Advise the Company concerning a Potential Restructuring.

27. HCMLP possessed substantial assets at the time the Award was issued and believed its net worth was several hundred million dollars in excess of all of its liabilities, including the Award. However, HCMLP lacked the immediate liquidity to satisfy the Award.

28. Against this backdrop, on or about September 26, 2019, HCMLP engaged Pachulski to negotiate with the Redeemer Committee and to advise HCMLP of its options—including regarding the advisability of a potential restructuring.

29. Both before and after HCMLP formally engaged Pachulski, Dondero informed them of his and Strand's objectives for HCMLP—namely, that (a) Strand (and, thus, Dondero, as Strand's sole owner) remain in control of HCMLP and (b) HCMLP emerge from bankruptcy as quickly as possible, preferably within a few months of filing.

30. Dondero and Strand sought advice from Pachulski regarding the advisability of HCMLP filing for bankruptcy in light of those objectives, as well as regarding protections to put in place should HCMLP move forward with a bankruptcy filing.

31. Pachulski understood and accepted the engagement. Pachulski knew it was providing advice *to* Dondero and Strand *about* HCMLP and, as such, that Dondero and Strand were clients of Pachulski. Pachulski also knew and understood that Dondero and Strand were relying on the advice it was providing.

32. Pachulski knew that if HCMLP filed for bankruptcy, a substantial risk would arise that Strand and Dondero would lose control of HCMLP. For example, HCMLP's creditors might seek the appointment of a bankruptcy trustee. Pachulski knew that this risk was particularly acute, here, because of Dondero's acrimonious relationship with certain of HCMLP's creditors, including the Redeemer Committee and other creditors with whom HCMLP had engaged in acrimonious litigation prior thereto.

33. To address these concerns, Pachulski advised Plaintiffs to have HCMLP file for bankruptcy in Delaware. Pachulski further advised that any bankruptcy filing would be quick and that filing in Delaware would provide preferable protections consistent with Plaintiffs goals.

34. Pachulski also advised Plaintiffs cause HCMLP to engage a third-party Chief Restructuring Officer ("CRO") whose qualifications and independence could assuage concerns potential bankruptcy creditors might have over Strand and Dondero retaining control over HCMLP, and thus dissuade them from seeking the appointment of an independent trustee over the company.

35. Defendant failed to advise Dondero or Strand to retain independent counsel to advise them in relation to their goal of retaining control of HCMLP. Instead, Pachulski treated HCMLP and Plaintiffs as their collective clients in advising them on strategy.

36. Pachulski's advice was heeded, and on October 7, 2019, HCMLP engaged Bradley Sharp, Chief Executive Officer of Development Specialists, Inc. ("DSI")—a provider of management consulting and financial advisory services—as its CRO. Unlike the later-installed Independent Board, the CRO did not have the ability to supplant Plaintiffs' legal control of HCMLP.

D. HCMLP Files for Chapter 11 Bankruptcy and Obtains the Bankruptcy Court's Approval to retain Pachulski.

37. Based on Pachulski's advice, on October 16, 2019, HCMLP 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 "Petition").[2]

38. After filing the Petition, HCMLP continued to operate and manage its business as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

[2] On December 4, 2019, the Delaware court granted a motion to transfer venue and the case was transferred to the United States Bankruptcy Court for the Northern District of Texas.

39. On October 29, 2019, HCMLP filed an application to retain Pachulski *nunc pro tunc* to the Petition date as its counsel in the bankruptcy proceeding.[3] (the "Retention Application").

40. The Retention Application was signed on behalf of HCMLP by Frank Waterhouse, Treasurer of Strand Advisors, Inc., as HCMLP's General Partner. Notably, therein, HCMLP stated that, "[t]o the best of [HCMLP's] knowledge…[Defendant] Pachulski has not represented [HCMLP], its creditors, **equity security holders, or any other parties in interest**…in any matter relating to the Debtor or its estate. *See* Retention Application at ¶11 (emphasis added).

41. As previously noted, however, prior to the bankruptcy filing, Dondero and Strand (who were parties in interest) sought and received legal advice from Pachulski related to their objectives, including their goal of retaining control over HCMLP during any bankruptcy.

42. Accordingly, on October 29, 2019, Defendant was—at the very least—aware of Dondero and Strand's objectives and on notice of the fact that Dondero and Strand believed that Pachulski was acting in furtherance of their interests.

43. Indeed, an attorney-client relationship had likely formed between Defendant, on the one hand, and Dondero and Strand by this point in time—notwithstanding the contrary position drafted by Pachulski on HCMLP's behalf. To the extent that an attorney-client relationship did not already exist at the time the Retention Application was filed, the parties' simultaneous and subsequent conduct confirms that one was formed shortly thereafter.

E. HCMLP Implements Pachulski's Advice to seek the Bankruptcy Court's Approval to Appoint a CRO.

44. On October 29, 2019, HCMLP also filed a motion to employ Bradley Sharp as its CRO *nunc pro tunc* as of the Petition Date (the "CRO Motion").

[3] *See* Debtor's Application Pursuant to Section 327(a) of the Bankruptcy Code, Rule 2014 of the Federal Rules of Bankruptcy Procedure and Local Rule 2014-1 for Authorization to Employ and Retain Pachulski Stang Ziehl & Jones LLP as Counsel for the Debtors and Debtors in Possession *Nunc Pro Tunc* to the Petition Date (Dkt. 70).

45. In the motion, it is expressly noted that:

> **The Debtor has been involved in lengthy and acrimonious prepetition litigation with certain of its creditors**. **The Debtor recognizes that such creditors may question the Debtor's ability to act as an independent fiduciary for the benefit of this estate during the case**. The Debtor also notes that its operations are complex, and its business involves the utilization of an interconnected network of subsidiaries, affiliates, and other related entities and managed funds. The Debtor acknowledges that its affiliate relationships and business structure may lead certain creditors and other parties in interest to question the appropriateness of various actions and transactions that the Debtor may enter into during the pendency of this case.[4]

46. The above statement tracks the rationale Pachulski had previously given for its recommendation that HCMLP retain a CRO—namely, that an acrimonious relationship existed between HCMLP and certain stakeholders and that an independent CRO would allay the concerns of those stakeholders regarding Strand and Dondero retaining control over HCMLP during the bankruptcy.

47. The CRO Motion was signed by Dondero in his capacity as President of Strand, GP of HCMLP. In sum, Strand and Dondero followed Pachulski's advice to employ a CRO with the understanding that it would stave off efforts by HCMLP's creditors to take control of HCMLP away from them.

F. Battle for Control of HCMLP.

48. On October 29, 2019, the United States Trustee appointed an Official Committee of Unsecured Creditors (the "UCC"). The creditors appointed to the UCC included the Redeemer Committee, UBS Securities LLC, and UBS AG London Branch (together, "UBS"), Acis Capital Management, L.P. and Acis Capital Management GP, LLP (together, "Acis") and Meta-e Discovery.

49. Unsurprisingly, notwithstanding HCMLP's retention of a CRO, the UCC, whose members included the Redeemer Committee as well as other entities with whom HCMLP (or its

[4] *See* Motion of the Debtor Pursuant to 11 U.S.C. §§ 105(a) and 363(b) to Employ and Retain Development Specialists, Inc. to Provide a Chief Restructuring Officer, Additional Personnel, and Financial Advisory and Restructuring-Related Services, Nunc Pro Tunc as of the Petition Date (Dkt. 74) (emphasis added).

affiliates) had been involved in acrimonious pre-Petition litigation (UBS and Acis), was opposed to Strand and Dondero retaining control over HCMLP during the bankruptcy.

50. Thereafter, on November 12, 2019, the UCC filed an omnibus objection to various motions filed by HCMLP, including the CRO Motion and motions related to cash management and approval of protocols for "ordinary course" transactions.[5] Therein, the UCC expressed its concern with Dondero continuing to manage HCMLP during the bankruptcy.

51. On December 4, 2019—barely a month later—the Delaware Bankruptcy Court granted a creditor's motion to transfer venue from Delaware to Judge Jernigan in the Bankruptcy Court for the Northern District of Texas. Thus, Pachulski's strategy of filing in Delaware was quickly undone and Pachulski pivoted to a new plan – that Plaintiffs' surrender while Pachulski remained in place at HCMLP.

G. Pachulski Advises Plaintiffs to Surrender Control of HCMLP.

52. The day the court entered the venue order, Pachulski advised Dondero and Strand for the first time that they would have to make radical changes to HCMLP's corporate governance to avoid Judge Jernigan in Dallas from entering an order imposing a Chapter 11 Trustee. At this point, Pachulski first recommended that Dondero and Strand make an alternative proposal to the UCC. As part of Defendant's recommended proposal, Dondero would relinquish control over Strand (HCMLP's GP) and an independent board of directors would be appointed over Strand who would control HCMLP.

53. Pachulski advised that under this proposed governance structure, HCMLP would likely emerge from the bankruptcy more quickly than if an independent trustee were appointed over

[5] *See* Omnibus Objection of the Official Committee of Unsecured Creditors to the Debtor's (I) Motion for Final Order Authorizing Continuance of the Existing Cash Management System, (II) Motion to Employ and Retain Development Specialists, Inc. to Provide a Chief Restructuring Officer, and (III) Precautionary Motion for Approval of Protocols for "Ordinary Course" Transactions (Dkt. 130).

HCMLP and that an independent board would be more beneficial to Plaintiffs as equity holders of HCMLP and, in Dondero's case, as the president of affiliated entities relying on HCMLP for back- and front-office services.

54. Essentially, Defendant's advice was to propose a change in control over Strand (a non-debtor) and not HCMLP. While this contrary to their very goals that were part of the original engagement. Plaintiffs followed the recommendation, and they made a proposal to the UCC that included a change in control over HCMLP.

55. On December 6, 2019, a status conference was held before Judge Jernigan. Pachulski represented HCMLP at the status conference. However, neither Strand nor Dondero were represented by independent counsel even as their interests were being affected.

56. At the status conference, Pachulski as counsel for HCMLP apprised the Court of the status of negotiations with the UCC regarding HCMLP's governance, including that Plaintiffs had made a proposal to the UCC related to the same.

57. Specifically, counsel for HCMLP informed the Court that, per that proposal, Mr. Dondero would "resign from any and all positions of the debtor," would "use his authority over [Strand] to appoint an independent board that would be in charge with managing the debtor,"[6] and further informed the Court that Mr. Dondero had already signed documents "effectuating those management changes" which were being held Pachulski's possession and trust.[7]

H. Defendant advises Strand and Dondero to enter into the Governance Settlement.

58. In late December 2019, HCMLP and the UCC reached a compromise for the governance and operation of HCMLP during the bankruptcy (the "Governance Settlement"), as

[6] *See* Dec. 6, 2019, Status Conference Tr. (Dkt. 207) at 13:4-11.

[7] *Id.* at 14:1-4.

reflected in a motion for approval of settlement filed on December 27, 2019, and exhibits thereto (the "Settlement Motion").[8]

59. As contemplated by the Governance Settlement, three independent directors were to be appointed over Strand (the "Independent Directors"). The Independent Directors would have the authority to act on HCMLP's behalf and to appoint an interim Chief Executive Officer ("CEO"), who would manage HCMLP's business. *Id.* at ¶1.

60. Predictably, the UCC rejected all three directors proposed by Plaintiffs. As a result, two of the Independent Directors, James Seery and John Dubel, were provided by the UCC prior to the filing of the Settlement Motion. The third had not yet been selected at that time but, under the terms of the Governance Settlement, was to be selected by or otherwise acceptable to the Committee.[9] *Id.*

61. As reflected in the Settlement Motion, at the time of filing thereof, the parties to the settlement anticipated the possibility, if not the likelihood, that conflict might arise between HCMLP (under the control of the Independent Directors) and Strand and Dondero.

62. Indeed, paragraph three of the motion reads:

> It bears emphasis that the Independent Directors will not be mere figureheads. The Debtor and the Committee envision that the Independent Directors will be actively involved and intimately familiar with all material aspects of the Debtor's business and restructuring efforts. Moreover, with guidance of the CRO and CEO (if appointed), **the Independent Directors will endeavor to prevent any negative influence Mr. Dondero or any of his affiliates or agents may have on [HCMLP] or its affiliates.** Further, as part of the Term Sheet, the Committee will be granted standing to pursue estate claims against Mr. Dondero and other former insiders of the Debtor who were not employed by the Debtor as of the execution of the Term Sheet. The Committee will also retain the right to move for a chapter 11 trustee.

Id. at ¶3 (emphasis added).

[8] *See* 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 (Dkt. 281).

[9] After the filing of the Settlement Motion, but before the Court approved the Governance Settlement, Honorable Russell E. Nelms was selected as the third independent trustee.

63. Pachulski knew at the time that the interests of HCMLP (under the control of the Independent Directors, as contemplated by the Governance Settlement) and Strand and Dondero might diverge,[10] but Pachulski took no actions to protect their clients Strand and Dondero.

64. Pachulski knew that Strand, as a non-debtor in the bankruptcy, was not subject to the bankruptcy court's jurisdiction. This fact is reflected on the face of the Settlement Motion, which states:

> With respect to the Independent Directors, they are being appointed to a new independent board of Strand, the Debtor's general partner, and Strand is not a debtor in this case or subject to this Court's jurisdiction.[11]

65. Nonetheless, Pachulski failed to advise Strand or Dondero to retain independent counsel in connection with the Governance Settlement. Even worse, Pachulski affirmatively advised Strand and Dondero to voluntarily enter into agreements that materially altered *their* rights in connection with the Governance Settlement.

66. Pachulski knew that the appointment of a trustee would likely ensure that their representation of HCMLP would end (as the trustee would hire new counsel). But if an independent board was appointed, Pachulski could likely stay on as counsel to HCMLP.

67. The Governance Settlement negotiated on behalf of HCMLP materially impacted Dondero and Strand's rights. For example, as part of the settlement, Strand agreed to modify its By-Laws to create a board of directors and to place restrictions on when Dondero, as the sole shareholder of Strand, could remove the directors,[12] and Dondero was required to resign as a director and officer of Strand.[13]

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[10] Pachulski's signature block is on the Settlement Motion.

[11] *See Id.* at p.11, n.6.

[12] *See* Preliminary Term Sheet (Dkt. 281-1) at Exhibit D.

[13] *Id.* at p.2.

68. Indeed, Strand and Dondero's agreement to relinquish certain rights was a critical component of the Governance Settlement. This is reflected on the face of the Settlement Motion. For example, paragraph two of the motion states, in pertinent part:

> Pursuant to the Term Sheet, and effective upon entry of the Order, James Dondero will no longer be a director, officer, managing member, or employee of the Debtor or Strand and will have no authority, directly or indirectly, to act on the Debtor's behalf. Going forward, the Independent Directors, through Strand, will have sole and exclusive management and control of the Debtor.

69. Nonetheless, Pachulski advised Plaintiffs to agree to the Governance Agreement, claiming it was in their best interest. Pachulski never advised the Plaintiffs about any potential conflict of interest between HCMLP and the Plaintiffs as a result of the agreement.

I. Strand and Dondero follow Pachulski' Advice and Enter into the Governance Stipulation.

70. On January 9, 2020, as contemplated by the Governance Settlement, HCMLP, the UCC, Strand and Dondero entered into a stipulation in support of the Governance Motion.[14]

71. Therein, Strand and Dondero agreed to the following:

[14] *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 the Ordinary Course (Dkt. 338).

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.

72. Notably, as shown above, the Stipulation materially altered Dondero's rights and obligations, not only with respect to HCMLP, but also as to Strand, a non-debtor who was not subject to the Court's jurisdiction. This is significant because, while the appointment of an independent trustee over HCMLP may have impacted Strand and Dondero's rights with respect to HCMLP, it would **not** have altered their rights unrelated to HCMLP.

73. Again, Pachulski did not advise Dondero or Strand to obtain independent counsel prior to executing the Stipulation on behalf of HCMLP. On information and belief, the Stipulation was drafted by Pachulski.

74. The fact that Dondero and Strand's agreement to enter into the Stipulation was voluntary on their part is expressly acknowledged in HCMLP's briefing in support of the Settlement Motion. For example, in a reply brief in support of the settlement, HCMLP noted the following:

> [T]he Debtor is not seeking authority from this Court to appoint the Independent Directors. Nor is the Debtor seeking this Court's authority, generally, to enter into the Governing Documents. Strand, as a non-debtor entity, is appointing the Independent Directors and executing the Governing Documents to effectuate such appointment **of**

> **its own volition** consistent with Delaware corporate law and its governing documents.[15]
>
> Further, the Debtor recognizes that **this Court would not have the requisite authority to limit Mr. Dondero's right as the sole stockholder of Strand** to remove the Independent Directors or to take any other action that could neuter the settlement embodied in the Term Sheet. To address that issue, the written consent of the sole stockholder of Strand (including in the Governing Documents) contemplates the parties entering into a stipulation…[16]

75. The fact that Pachulski advised Strand and Dondero to *voluntarily* enter into the Stipulation in order to facilitate the Governance Settlement is particularly galling in light of the fact that, as part of the Governance Settlement, HCMLP granted the UCC "standing to pursue estate claims against Mr. Dondero and other former insiders of [HCMLP]."

76. In other words, Pachulski advised Strand and Dondero to voluntarily relinquish material rights so that HCMLP could push through a settlement with creditors who had a known antipathy towards Dondero, and, as part of that settlement, gave those creditors standing to sue Dondero. Dondero and Strand entered into this agreement with the understanding it was the best path offered to them by Pachulski as their counsel.

J. HCMLP, under Control of the Board, Quickly Becomes Hostile to Dondero and Strand.

77. On January 9, 2020, the bankruptcy court entered an order approving the Governance Settlement (the "Settlement Order").[17]

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[15] Debtor's Reply 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 (Dkt. 329) at ¶14 (emphasis added).

[16] *Id.* at ¶16.

[17] Order Approving Settlement with Official Committee of Unsecured Creditors regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course (Dkt. 339).

78. As contemplated by the Governance Settlement, and reflected in the Settlement Order, Dondero was initially to remain an employee of HCMLP and retain his role as portfolio manager for HCMLP's funds.[18]

79. It was not long before the Independent Directors became hostile towards Strand and Dondero. On June 23, 2020, HCMLP filed a motion to retain James Seery (one of the Independent Directors) as Chief Executive Officer of HCMLP.[19] Since that time, HCMLP (under the control of Seery and the Independent Directors) has taken a host of actions adverse to Dondero and Strand.

80. For example, HCMLP took the following actions (among many others) that were directly adverse to Dondero and Strand:

- sought and obtained a temporary restraining order ("TRO") preventing Dondero from contacting HCMLP's employees and from interfering with the Independent Directors' management of HCMLP. HCMLP then successfully moved to have Dondero held in contempt for violating the TRO. Dondero was ordered to pay. $450,000 to compensate HCMLP for its legal fees incurred in pursuing the contempt order;

- filed multiple adversary proceedings against Dondero;

- advocated in favor of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the "Plan"), which was confirmed by the Court on February 22, 2021. The Plan created a Litigation Sub-trust that charged the Litigation Trustee with pursuing Estate Claims. The Litigation Trustee, in turn, has asserted claims against both Strand and Dondero; and

- advocated in favor of the Plan in spite of the fact that the Plan called for the liquidation of HCMLP's assets, wiping out Strand's interest in HCMLP and Dondero's indirect equity interest in HCMLP.

[18] *Id.* at ¶8.

[19] *See* Debtor's Motion under Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative *Nunc Pro Tunc* to March 15, 2020 (Dkt. 774).

K. Pachulski Turns on their Former Clients.

81. Remarkably, Pachulski continued to represent HCMLP throughout the bankruptcy, and, indeed, represent HCMLP to this day. Thus, Pachulski helped HCMLP undertake many of the actions described above that were adverse to and detrimental to Plaintiffs.

82. This adverse representation occurred despite the fact that Pachulski advised Strand and Dondero to sign the agreements facilitating the very governance structure which has now resulted in HCMLP's direct adversity to Pachulski's former clients, Dondero and Strand.

83. Pachulski earned millions in fees from their engagement with HCMLP, which constitutes an improper benefit obtained in defiance of clear conflict of interest.

L. Tolling of Limitations and Discovery Rule.

84. Plaintiffs allege that the claim asserted herein (breach of fiduciary duty) is timely asserted because the wrongful conduct (Pachulski's adverse actions against its former clients) first occurred within four years of the date of filing.

85. In the alternative, Plaintiffs specifically plead that all limitations periods (i) have been tolled during the bankruptcy period due to the inability to assert certain claims; (ii) tolled during the applicable discovery period during which Plaintiffs could not, in the exercise of reasonable diligence, discover the true nature of Pachulski's wrongdoing and/or (iii) equitably tolled.

V. CLAIMS

COUNT ONE: BREACH OF FIDUCIARY DUTY

86. Plaintiffs repeat and reallege each and every allegation made in the previous paragraphs as if fully written herein.

87. A fiduciary relationship exists between Pachulski, on the one hand, and Strand and Dondero by virtue of the attorney-client relationship which arose from the parties' conduct, including, without limitation, through (a) Dondero and Strand seeking legal advice from Pachulski in relation to

their objectives vis-à-vis the Bankruptcy; (b) Pachulski negotiating on behalf of Strand and Dondero with the Committee; and (c) Pachulski rendering legal advice to Dondero and Strand, including to enter into the Stipulation and Governance Settlement.

88. Pachulski owed its fiduciary duties to Plaintiffs, including, without limitation (i) its duty of loyalty to Plaintiffs by, without limitation, representing HCMLP in the Bankruptcy after it became directly adverse to Plaintiffs as detailed above; (ii) failing to provide advice so as to safeguard Plaintiffs' interests; and/or (iii) taking actions directly that promoted Pachulski' self-interest over Plaintiffs.

89. Defendant obtained an improper benefit by failing to disclose a conflict of interest as required by law. Defendant failed to disclose to Plaintiffs that there was a conflict of interest between Plaintiffs and HCMLP in entering into the settlement with the UCC that was memorialized in the Stipulation. Notwithstanding that Defendant knew or should have known about such conflict of interest, Defendant never advised Plaintiffs to retain their own counsel. Instead, Defendant recommended that the Plaintiffs enter into the Stipulation, which supposedly benefited HCMLP but indisputably harmed Plaintiffs.

90. These breaches of fiduciary duty allowed Pachulski to obtain an improper benefit. Defendant reaped millions in fees by taking positions adverse to its former clients.

91. At no time did Pachulski ever, as fiduciaries of Plaintiffs, ever advise Plaintiffs to get independent counsel to protect themselves.

92. Plaintiffs were harmed by Pachulski's breaches in an amount to be proven at trial.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Court enter judgment on Plaintiffs' claims against Defendant:

1. Actual damages, including direct and consequential damages;

2. Disgorgement of fees by Defendant;

3. Pre- and post-judgment interest; and

4. All such other and further relief at law or in equity that the Court may deem just and proper.

Dated: December 4, 2023

Respectfully submitted,

/s/ DRAFT

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Tillotson Johnson & Patton
1201 Main St., Suite 1300
Dallas, Texas 75202
(214) 382-3041 Telephone
(214) 292-6564 Facsimile

ATTORNEYS FOR PLAINTIFFS

Exhibit B

From: "John A. Morris" <jmorris@pszjlaw.com>
Date: December 1, 2023 at 3:35:08 PM CST
To: Amy L Ruhland <aruhland@reichmanjorgensen.com>
Cc: Jeff Pomerantz <jpomerantz@pszjlaw.com>, Jeff Tillotson <jtillotson@tillotsonlaw.com>
Subject: FW: Anticipated Motion/Tolling Agreement

CAUTION: EXTERNAL SENDER

Amy:

The draft complaint is frivolous and lacks any basis in fact or law. If Mr. Dondero pursues it, he and his enablers will be responsible for the consequences.

PSZJ is opposed to the motion.

Regards,

John

John A. Morris
Pachulski Stang Ziehl & Jones LLP
Direct Dial: 212.561.7760
Tel: 212.561.7700 | Fax: 212.561.7777
jmorris@pszjlaw.com
vCard | Bio | LinkedIn

Los Angeles | San Francisco | Wilmington, DE | New York | Houston

From: Amy L Ruhland <aruhland@reichmanjorgensen.com>

Sent: Friday, December 1, 2023 2:43 PM
To: John A. Morris <jmorris@pszjlaw.com>
Cc: Jeff Pomerantz <jpomerantz@pszjlaw.com>; jtillotson@tillotsonlaw.com
Subject: RE: Anticipated Motion/Tolling Agreement

John:

Before we file this motion for leave today, and for purpose of our certificate of conference, I just want to verify that you are opposed to the motion.

I also want to reiterate again that the timing of our filing is driven entirely by the potential statute of limitations issue. We can't risk waiving our clients' rights to pursue this claim, but I continue to believe it to be in everyone's best interest to avoid initiating the dispute, both for the preservation of the estate's resources and to reduce animosity. Even a short tolling would accomplish that purpose if you are willing to reconsider.

Thanks,

Amy

Amy L. Ruhland | 512.739.6420 | Reichman Jorgensen Lehman & Feldberg LLP

From: John A. Morris <jmorris@pszjlaw.com>
Sent: Thursday, November 30, 2023 11:40 AM
To: Amy L Ruhland <aruhland@reichmanjorgensen.com>
Cc: Jeff Pomerantz <jpomerantz@pszjlaw.com>; jtillotson@tillotsonlaw.com
Subject: Anticipated Motion/Tolling Agreement

CAUTION: EXTERNAL SENDER

Amy:

Pachulski Stang Ziehl & Jones LLP ("PSZJ") declines Jim Dondero and Strand Advisors, Inc.'s offer to enter into any tolling agreement.

PSZJ reserves all of its rights at law and in equity, including the right to seek sanctions and/or sue for malicious prosecution.

We will accept service by e-mail of your motion for leave to file suit pursuant to the

Gatekeeper provision.

Regards,

John
John A. Morris
Pachulski Stang Ziehl & Jones LLP
Direct Dial: 212.561.7760
Tel: 212.561.7700 | Fax: 212.561.7777
jmorris@pszjlaw.com
vCard | Bio | LinkedIn

Los Angeles | San Francisco | Wilmington, DE | New York | Houston

---

From: Amy L Ruhland <aruhland@reichmanjorgensen.com>
Sent: Tuesday, November 28, 2023 6:07 PM
To: John A. Morris <jmorris@pszjlaw.com>
Cc: Jeff Pomerantz <jpomerantz@pszjlaw.com>; Jeff Tillotson <jtillotson@tillotsonlaw.com>
Subject: Anticipated Motion/Tolling Agreement

Hi John,

I hope you had a nice Thanksgiving. I'm writing because we are planning to file a motion for leave to file suit against Pachulski pursuant to the Bankruptcy Court's channeling injunction. Jeff Tillotson, copied, has been hired to represent Strand Advisors, Inc. and Jim Dondero in that potential lawsuit, which alleges a single claim for breach of fiduciary duty. For your convenience, I am attaching a draft of the complaint.

For many reasons, including our desire to minimize disputes and additional expense to the estate, I would prefer not to file the motion for leave at this time, but we have reason to believe that we are bumping up against a relevant statute of limitations period and need to act to preserve our clients' rights. As an alternative to pursuing the motion (and lawsuit) at this time, I would propose that the parties enter into a tolling agreement so that we can all avoid the burden and cost of these proceedings. To that end, also attached is a draft tolling agreement for your review and feedback.

Obviously, I am happy to discuss any of the above at your convenience. We intend to file the motion for leave on Friday if we cannot agree on tolling.

Regards,

Amy

Amy L. Ruhland | 512.739.6420 | Reichman Jorgensen Lehman & Feldberg LLP

NOTICE: This transmission is intended only for the use of the addressee and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If you are not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify the sender immediately via reply e-mail, and then destroy all instances of this communication. Thank you.

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

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

ORDER GRANTING LEAVE TO FILE ADVERSARY COMPLAINT AGAINST PACHULSKI STANG ZIEHL & JONES LLP

Upon consideration of Motion of James D. Dondero and Strand Advisors, Inc. for Leave to File Adversary Complaint ("Motion for Leave"), and it appearing that this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and it appearing that venue is proper in this District pursuant to 28 U.S.C. §§ 1408-1409, it is hereby **ORDERED**:

1. The Motion for Leave is **GRANTED**.

End of Order # #

Submitted by:

/s/Amy L. Ruhland
Amy L. Ruhland
Texas Bar No. 24043561
Reichman Jorgensen Lehman & Feldberg LLP
aruhland@reichmanjorgensen.com
101 N. Mopac Expressway
Bldg. 1, Suite 300
Austin, TX 78746
Telephone: (650) 623-1472
Facsimile: (650) 560-3501

Counsel for James D. Dondero
and Strand Advisors, Inc.

Appendix Exhibit 154

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 December 12, 2023

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
Reorganized Debtor.	)	

ORDER DENYING MOTION FOR AN ORDER REQUIRING SCOTT BYRON ELLINGTON AND HIS COUNSEL TO SHOW CAUSE WHY THEY SHOULD NOT BE HELD IN CIVIL CONTEMPT FOR VIOLATING THE GATEKEEPER PROVISION AND GATEKEEPER ORDERS

[1] The Reorganized Debtor's last four digits of its taxpayer identification number are (8357). The headquarters and service address for the Reorganized Debtor is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

Having considered (1) *Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery, Jr.'s Joint Motion for an Order Requiring Scott Byron Ellington and His Counsel to Show Cause Why They Should Not Be Held in Civil Contempt for Violating the Gatekeeper Provision and Gatekeeper Orders* [Docket No. 3910] (the "Motion")[2] filed by Highland Capital Management, L.P. ("HCMLP," or, as applicable, the "Debtor"), the reorganized debtor in the above-referenced action, the Highland Claimant Trust (the "Trust," and together with HCMLP, "Highland"), and James P. Seery, Jr., HCMLP's Chief Executive Officer and the Claimant Trustee of the Trust ("Seery," and collectively with Highland, the "Highland Parties") against Scott Byron Ellington ("Ellington") and his counsel, The Pettit Law Firm ("Pettit") and Lynn Pinker Hurst & Schwegmann, LLP (collectively with Ellington, Pettit, and the Highland Parties, the "Parties"); (2) the exhibits annexed to the *Declaration of Joshua S. Levy in Support of Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery, Jr.'s Joint Motion for an Order Requiring Scott Byron Ellington and His Counsel to Show Cause Why They Should Not Be Held in Civil Contempt for Violating the Gatekeeper Provision and Gatekeeper Orders* [Docket No. 3912]; (3) *Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery, Jr.'s Reply in Further Support of Their Joint Motion for Civil Contempt and in Opposition to Ellington's Counsel's Motion to Strike* [Docket No. 3969]; (4) the exhibits annexed to the *Declaration of Richard L. Wynne in Support of Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery, Jr.'s Joint Motion for an Order Requiring Scott Byron Ellington and His Counsel to Show Cause Why They Should Not Be Held in Civil Contempt for Violating the Gatekeeper Provision and Gatekeeper Orders* [Docket No. 3914]; (5) *Ellington's Response in Opposition to the Joint Motion of Highland Capital Management, L.P., Highland*

[2] Capitalized terms not otherwise defined in this Order shall have the meanings ascribed to them in the Motion.

Claimant Trust, and James P. Seery, Jr. for an Order Requiring Scott Byron Ellington and His Counsel to Show Cause Why They Should Not Be Held in Civil Contempt for Violating the Gatekeeper Provision and Gatekeeper Orders [Docket No. 3958]; (6) the exhibits annexed to the *Declaration of Michelle Hartmann in Support of Ellington's Response in Opposition to the Joint Motion of Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery, Jr. for an Order Requiring Scott Byron Ellington and His Counsel to Show Cause Why They Should Not Be Held in Civil Contempt for Violating the Gatekeeper Provision and Gatekeeper Orders* [Docket No. 3959]; (7) *Lynn Pinker Hurst & Schwegmann, LLP and The Pettit Law Firm's Motion to Strike and Response Subject Thereto Opposing the Movants' Motion Requesting an Order Requiring Lynn Pinker and Pettit to Show Cause Why They Should Not Be Held in Civil Contempt for Violating the Gatekeeper Provision and Gatekeeper Orders* [Docket No. 3957]; and (8) all prior proceedings related to this matter, including the proceedings that led to the entry of each of the Gatekeeper Orders and the Confirmation Order; this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); this Court having found that venue of this proceeding and the Motion in this District is proper pursuant 28 U.S.C. §§ 1408 and 1409; this Court having found that the Highland Parties' 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; this Court having found that, as a result of the consensual resolution reached by the Parties, as set forth on the record during the hearing on the Motion, held on December 4, 2023 (the "Hearing"), the relief sought in the Motion is moot; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is **HEREBY ORDERED THAT**:

1. The Motion is **DISMISSED** with prejudice and the relief requested therein is denied as moot.

2. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Order.

###END OF ORDER###

Appendix Exhibit 155

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 19, 2022
Lyle W. Cayce
Clerk

No. 21-10449

IN THE MATTER OF HIGHLAND CAPITAL MANAGEMENT, L.P.

Debtor,

NEXPOINT ADVISORS,; HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.; HIGHLAND INCOME FUND; NEXPOINT STRATEGIC OPPORTUNITIES FUND; HIGHLAND GLOBAL ALLOCATION FUND; NEXPOINT CAPITAL, INCORPORATED; JAMES DONDERO; THE DUGABOY INVESTMENT TRUST; GET GOOD TRUST,

Appellants,

versus

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee.

Appeal from the United States Bankruptcy Court
for the Northern District of Texas
USDC No. 19-34054
USDC No. 3:21-CV-538

Before WIENER, GRAVES, and DUNCAN, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED IN PART, REVERSED IN PART and REMANDED to the Bankruptcy Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 7, 2022
Lyle W. Cayce
Clerk

No. 21-10449

In the Matter of: Highland Capital Management, L.P.,

Debtor,

NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P.; Highland Income Fund; NexPoint Strategic Opportunities Fund; Highland Global Allocation Fund; NexPoint Capital, Incorporated; James Dondero; The Dugaboy Investment Trust; Get Good Trust,

Appellants,

versus

Highland Capital Management, L.P.,

Appellee.

Appeal from the United States Bankruptcy Court
for the Northern District of Texas
USDC No. 19-34054
USDC No. 3:21-CV-538

Before Wiener, Graves, and Duncan, *Circuit Judges*.

ON PETITION FOR REHEARING

STUART KYLE DUNCAN, *Circuit Judge*:

The petition for panel rehearing is GRANTED. We withdraw our previous opinion, reported at 2022 WL 3571094, and substitute the following:

Highland Capital Management, L.P., a Dallas-based investment firm, managed billion-dollar, publicly traded investment portfolios for nearly three decades. By 2019, however, myriad unpaid judgments and liabilities forced Highland Capital to file for Chapter 11 bankruptcy. This provoked a nasty breakup between Highland Capital and its co-founder James Dondero. Under those trying circumstances, the bankruptcy court successfully mediated with the largest creditors and ultimately confirmed a reorganization plan amenable to most of the remaining creditors.

Dondero and other creditors unsuccessfully objected to the confirmation order and then sought review in this court. In turn, Highland Capital moved to dismiss their appeal as equitably moot. First, we hold that equitable mootness does not bar our review of any claim. Second, we affirm the confirmation order in large part. We reverse only insofar as the plan exculpates certain non-debtors in violation of 11 U.S.C. § 524(e), strike those few parties from the plan's exculpation, and affirm on all remaining grounds.

I. BACKGROUND

A. Parties

In 1993, Mark Okada and appellant James Dondero co-founded Highland Capital Management, L.P. ("Highland Capital") in Dallas. Highland Capital managed portfolios and assets for other investment advisers and funds through a complex of entities under the Highland umbrella. Highland Capital's ownership-interest holders included Hunter Mountain Investment Trust (99.5%); appellant The Dugaboy Investment

Trust, Dondero's family trust (0.1866%);[1] Okada, personally and through trusts (0.0627%); and Strand Advisors, Inc. (0.25%), the only general partner, which Dondero wholly owned.

Dondero also manages two of Highland Capital's clients—appellants Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P. (the "Advisors"). Both the Advisors and Highland Capital serviced and advised billion-dollar, publicly traded investment funds for appellants Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland Global Allocation Fund, and NexPoint Capital, Inc. (collectively, the "Funds"), among others. For example, on behalf of the Funds, Highland Capital managed certain investment vehicles known as collateral loan obligations ("CLOs") under individualized servicing agreements.

B. Bankruptcy Proceedings

Strapped with a series of unpaid judgments, Highland Capital filed for Chapter 11 bankruptcy in the District of Delaware in October 2019. The creditors included Highland Capital's interest holders, business affiliates, contractors, former partners, employees, defrauded investors, and unpaid law firms. Among those creditors, the Office of the United States Trustee appointed a four-member Unsecured Creditors' Committee (the "Committee").[2] *See* 11 U.S.C. § 1102(a)(1), (b)(1). Throughout the

[1] The Dugaboy Investment Trust appeals alongside Dondero's other family trust Get Good Trust (collectively, the "Trusts").

[2] First, Redeemer Committee of the Highland Crusader Fund had obtained a $191 million arbitration award after a decade of litigation against Highland Capital. Second, Acis Capital Management, L.P. and Acis Capital Management GP, LLC had sued Highland Capital after facing an adverse $8 million arbitration award, arising in part from its now-extinguished affiliation. Third, UBS Securities LLC and UBS AG London Branch had received a $1 billion judgment against Highland Capital following a 2019 bench trial in New

bankruptcy proceedings, the Committee investigated Highland Capital's past and current operations, oversaw its continuing operations, and negotiated the reorganization plan. *See id.* § 1103(c). Upon the Committee's request, the court transferred the case to the Northern District of Texas in December 2019.

Highland Capital's reorganization did not proceed under the governance of a traditional Chapter 11 trustee. Instead, the Committee reached a corporate governance settlement agreement to displace Dondero, which the bankruptcy court approved in January 2020. Under the agreed order, Dondero stepped down as director and officer of Highland Capital and Strand to be an unpaid portfolio manager and "agreed not to cause any Related Entity . . . to terminate any agreements" with Highland Capital. The Committee selected a board of three independent directors to act as a quasi-trustee and to govern Strand and Highland Capital: James Seery Jr., John Dubel, and retired Bankruptcy Judge Russell Nelms (collectively, the "Independent Directors"). The order also barred any claim against the Independent Directors in their official roles without the bankruptcy court's authorizing the claim as a "colorable claim[] of willful misconduct or gross negligence." Six months later, at the behest of the creditors, the bankruptcy court appointed Seery as Highland Capital's Chief Executive Officer, Chief Restructuring Officer, and Foreign Representative. The order contained an identical bar on claims against Seery acting in these roles. Neither order was appealed.

Throughout summer 2020, Dondero proposed several reorganization plans, each opposed by the Committee and the Independent Directors.

York. Fourth, discovery vendor Meta-E Discovery had $779,000 in unpaid invoices. The Committee members are not parties on appeal.

Unpersuaded by Dondero, the Committee and Independent Directors negotiated their own plan. When Dondero's plans failed, he and other creditors began to frustrate the proceedings by objecting to settlements, appealing orders, seeking writs of mandamus, interfering with Highland Capital's management, threatening employees, and canceling trades between Highland Capital and its clients. *See Highland Cap. Mgmt., L.P. v. Dondero (In re Highland Cap. Mgmt., L.P.)*, Ch. 11 Case No. 19-34054-SGJ11, Adv. No. 20-03190-SGJ11, 2021 WL 2326350, at *1, *26 (Bankr. N.D. Tex. June 7, 2021) (holding Dondero in civil contempt, sanctioning him $100,000, and comparing this case to a "nasty divorce"). In Seery's words, Dondero wanted to "burn the place down" because he did not get his way. The Independent Directors insisted Dondero resign from Highland Capital, which he did in October 2020.

Highland Capital, meanwhile, proceeded toward confirmation of its reorganization plan—the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (the "Plan"). In August 2020, the Independent Directors filed the Plan and an accompanying disclosure statement with the support of the Committee. *See* 11 U.S.C. §§ 1121, 1125. The bankruptcy court approved the statement as well as proposed notice and voting procedures for creditors, teeing up confirmation. Leading up to the confirmation hearing, the Advisors and the Funds asked the court to bar Highland Capital from trading or disposing of CLO assets pending confirmation. The bankruptcy court denied the request, and Highland Capital declined to voluntarily abstain and continued to manage the CLO assets.

Before confirmation, Dondero and other creditors (including several non-appellants) filed over a dozen objections to the Plan. Like Dondero, the United States Trustee primarily objected to the Plan's exculpation of certain non-debtors as unlawful. Highland Capital voluntarily modified the Plan to resolve six such objections. The Plan proposed to create eleven classes of

creditors and equity holders and three classes of administrative claimants. *See* 11 U.S.C. § 1122. Of the voting-eligible classes, classes 2, 7, and 9 voted to accept the Plan while classes 8, 10, and 11 voted to reject it.

C. Reorganization Plan

The Plan works like this: It dissolves the Committee, and creates four entities—the Claimant Trust, the Reorganized Debtor, HCMLP GP LLC,[3] and the Litigation Sub-Trust. Administered by its trustee Seery, the Claimant Trust "wind[s]-down" Highland Capital's estate over approximately three years by liquidating its assets and issuing distributions to class-8 and -9 claimants as trust beneficiaries. Highland Capital vests its ongoing servicing agreements with the Reorganized Debtor, which "among other things" continues to manage the CLOs and other investment portfolios. The Reorganized Debtor's only general partner is HCMLP GP LLC. And the Litigation Sub-Trust resolves pending claims against Highland Capital under the direction of its trustee Marc Kirschner.

The whole operation is overseen by a Claimant Trust Oversight Board (the "Oversight Board") comprised of four creditor representatives and one restructuring advisor. The Claimant Trust wholly owns the limited partnership interests in the Reorganized Debtor, HCMLP GP LLC, and the Litigation Sub-Trust. The Claimant Trust (and its interests) will dissolve either at the soonest of three years after the effective date (August 2024) or (1) when it is unlikely to obtain additional proceeds to justify further action, (2) all claims and objections are resolved, (3) all distributions are made, and (4) the Reorganized Debtor is dissolved.

[3] The Plan calls this entity "New GP LLC," but according to the motion to dismiss as equitably moot, the new general partner was later named HCMLP GP LLC. For the sake of clarity, we use HCMLP GP LLC.

Anticipating Dondero's continued litigiousness, the Plan shields Highland Capital and bankruptcy participants from lawsuits through an exculpation provision, which is enforced by an injunction and a gatekeeper provision (collectively, "protection provisions"). The protection provisions extend to nearly all bankruptcy participants: Highland Capital and its employees and CEO; Strand; the Independent Directors; the Committee; the successor entities and Oversight Board; professionals retained in this case; and all "Related Persons"[4] (collectively, "protected parties").[5]

The Plan exculpates the protected parties from claims based on any conduct "in connection with or arising out of" (1) the filing and administration of the case, (2) the negotiation and solicitation of votes preceding the Plan, (3) the consummation, implementation, and funding of the Plan, (4) the offer, issuance, and distribution of securities under the Plan before or after the filing of the bankruptcy, and (5) any related negotiations, transactions, and documentation. But it excludes "acts or omissions that constitute bad faith, fraud, gross negligence, criminal misconduct, or willful misconduct" *and* actions by Strand and its employees predating the appointment of the Independent Directors.

Under the Plan, bankruptcy participants are enjoined "from taking any actions to interfere with the implementation or consummation of the

---

[4] The Plan generously defines "Related Persons" to include all former, present, and future officers, directors, employees, managers, members, financial advisors, attorneys, accountants, investment bankers, consultants, professionals, advisors, shareholders, principals, partners, heirs, agents, other representatives, subsidiaries, divisions, and managing companies.

[5] The Plan expressly excludes from the protections Dondero and Okada; NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P; their subsidiaries, managed entities, managed entities, and members; and the Dugaboy Investment Trust and its trustees, among others.

Plan" or filing any claim related to the Plan or proceeding. Should a party seek to bring a claim against any of the protected parties, it must go to the bankruptcy court to "first determin[e], after notice and a hearing, that such claim or cause of action represents a colorable claim of any kind." Only then may the bankruptcy court "specifically authoriz[e]" the party to bring the claim. The Plan reserves for the bankruptcy court the "sole and exclusive jurisdiction to determine whether a claim or cause of action is colorable" and then to adjudicate the claim if the court has jurisdiction over the merits.

D. Confirmation Order

At a February 2021 hearing, the bankruptcy court confirmed the Plan from the bench over several remaining objections. *See* FED R. BANKR. P. 3017–18; 11 U.S.C. §§ 1126, 1128, 1129. In its later-written decision, the bankruptcy court observed that Highland Capital's bankruptcy was "not a garden variety chapter 11 case." The type of debtor, the reason for the bankruptcy filing, the kinds of creditor claims, the corporate governance structure, the unusual success of the mediation efforts, and the small economic interests of the current objectors all make this case unique.

The confirmation order criticized Dondero's behavior before and during the bankruptcy proceedings. The court could not "help but wonder" if Highland Capital's deficit "was necessitated because of enormous litigation fees and expenses incurred" due to Highland Capital's "culture of litigation." Recounting Highland Capital's litigation history, it deduced that Dondero is a "serial litigator." It reasoned that, while "Dondero wants his company back," this "is not a good faith basis to lob objections to the Plan." It attributed Dondero's bad faith to the Advisors, the Trusts, and the Funds, given the "remoteness of their economic interests." For example, the bankruptcy court "was not convinced of the[] [Funds'] independence" from Dondero because the Funds' board members did not testify and had

"engaged with the Highland complex for many years." And so the bankruptcy court "consider[ed] them all to be marching pursuant to the orders of Mr. Dondero." The court, meanwhile, applauded the members of the Committee for their "wills of steel" for fighting "hard before and during this Chapter 11 Case" and "represent[ing] their constituency . . . extremely well."

On the merits of the Plan, the bankruptcy court again approved the Plan's voting and confirmation procedures as well as the fairness of the Plan's classes. *See* 11 U.S.C. §§ 1122, 1125(a)–(c). The court held the Plan complied with the statutory requirements for confirmation. *See id.* §§ 1123(a)(1)–(7), 1129(a)(1)–(7), (9)–(13). Because classes 8, 10, and 11 had voted to reject the Plan, it was confirmable only by cramdown.[6] *See id.* § 1129(b). The bankruptcy court found that the Plan treated the dissenting classes fairly and equitably and satisfied the absolute-priority rule, so the Plan was confirmable. *See id.* § 1129(b)(2)(B)–(C). The court also concluded that the protection provisions were fair, equitable, and reasonable, as well as "integral elements" of the Plan under the circumstances, and were within both the court's jurisdiction and authority. The court confirmed the Plan as proposed and discharged Highland Capital's debts. *Id.* § 1141(d)(1). After confirmation and satisfaction of several conditions precedent, the Plan took effect August 11, 2021.

[6] The bankruptcy court must proceed by nonconsensual confirmation, or "cramdown," 11 U.S.C. § 1129(b), when a class of unsecured creditors rejects a Chapter 11 reorganization plan, *id.* § 1129(a)(8), but at least one impaired class accepts it, *id.* § 1129(a)(10). A cramdown requires that the plan be "fair and equitable" to dissenting classes and satisfy the absolute priority rule—that is, dissenting classes are paid in full before any junior class can retain any property. *Id.* § 1129(b)(2)(B); *see Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441–42 (1999).

E. The Appeal

Dondero, the Advisors, the Funds, and the Trusts (collectively, "Appellants") timely appealed, objecting to the Plan's legality and some of the bankruptcy court's factual findings.[7] Together with Highland Capital, Appellants moved to directly appeal the confirmation order to this court, which the bankruptcy court granted. *See* 28 U.S.C. § 158(d). A motions panel certified and consolidated the direct appeals. *See ibid.* Both the bankruptcy court and the motions panel declined to stay the Plan's confirmation pending appeal. Given the Plan's substantial consummation since its confirmation, Highland Capital moved to dismiss the appeal as equitably moot, a motion the panel ordered carried with the case.

* * *

We first consider equitable mootness and decline to invoke it here. We then turn to the merits, conclude the Plan exculpates certain non-debtors beyond the bankruptcy court's authority, and affirm in all other respects.

II. Standard of Review

A confirmation order is an appealable final order, over which we have jurisdiction. *Bullard v. Blue Hills Bank*, 575 U.S. 496, 502 (2015); *see* 28 U.S.C. §§ 158(d), 1291. This court reviews a bankruptcy court's factual findings for clear error and legal conclusions *de novo*. *Evolve Fed. Credit Union v. Barragan-Flores (In re Barragan-Flores)*, 984 F.3d 471, 473 (5th Cir. 2021) (citation omitted).

[7] The Trusts adopt the Funds' and the Advisors' briefs in full, and Dondero adopts the Funds' brief in full and the Advisors' brief in part. Fed. R. App. P. 28(i).

III. Equitable Mootness

Highland Capital moved to dismiss this appeal as equitably moot. It argues we should abstain from appellate review because clawing back the implemented Plan "would generate untold chaos." We disagree and deny the motion.

The judge-made doctrine of equitable mootness allows appellate courts to abstain from reviewing bankruptcy orders confirming "complex plans whose implementation has substantial secondary effects." *New Indus., Inc. v. Byman (In re Sneed Shipbuilding, Inc.)*, 916 F.3d 405, 409 (5th Cir. 2019) (citing *In re Trib. Media Co.*, 799 F.3d 272, 274, 281 (3d Cir. 2015)). It seeks to balance "the equitable considerations of finality and good faith reliance on a judgment" and "the right of a party to seek review of a bankruptcy order adversely affecting him." *In re Manges*, 29 F.3d 1034, 1039 (5th Cir. 1994) (quoting *First Union Real Estate Equity & Mortg. Inv. v. Club Assocs. (In re Club Assocs.)*, 956 F.3d 1065, 1069 (11th Cir. 1992)); *see In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008); *see also* 7 Collier on Bankruptcy ¶ 1129.09 (16th ed.), LexisNexis (database updated June 2022) (observing "the equitable mootness doctrine is embraced in every circuit").[8]

This court uses equitable mootness as a "scalpel rather than an axe," applying it claim-by-claim, instead of appeal-by-appeal. *In re Pac. Lumber*

[8] The doctrine's atextual balancing act has been criticized. *See In re Pac. Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009) ("Despite its apparent virtues, equitable mootness is a judicial anomaly."); *In re One2One Commc'ns, LLC*, 805 F.3d 428, 438–54 (3rd Cir. 2015) (Krause, J., concurring); *In re UNR Indus., Inc.*, 20 F.3d 766, 769 (7th Cir. 1994) (banishing the term "equitable mootness" as a misnomer); *In re Cont'l Airlines*, 91 F.3d 553, 569 (3d Cir. 1996) (en banc) (Alito, J., dissenting); *see also* Bruce A. Markell, *The Needs of the Many: Equitable Mootness' Pernicious Effects*, 93 Am. Bankr. L.J. 377, 393–96 (2019) (addressing the varying applications between circuits). *But see In re Trib. Media*, 799 F.3d at 287–88 (Ambro, J., concurring) (highlighting some benefits of the equitable mootness doctrine).

Co.(Pacific Lumber), 584 F.3d 229, 240–41 (5th Cir. 2009). For each claim, we analyze three factors: "(i) whether a stay has been obtained, (ii) whether the plan has been 'substantially consummated,' and (iii) whether the relief requested would affect either the rights of parties not before the court or the success of the plan." *In re Manges*, 29 F.3d at 1039 (citing *In re Block Shim Dev. Co.*, 939 F.2d 289, 291 (5th Cir. 1991); and *Cleveland, Barrios, Kingsdorf & Casteix v. Thibaut*, 166 B.R. 281, 286 (E.D. La. 1994)); *see also, e.g.*, *In re Blast Energy Servs.*, 593 F.3d 418, 424–25 (5th Cir. 2010); *In re Ultra Petroleum Corp.*, No. 21-20049, 2022 WL 989389, at *5 (5th Cir. Apr. 1, 2022). No one factor is dispositive. *See In re Manges*, 29 F.3d at 1039.

Here, the bankruptcy court and this court declined to stay the Plan pending appeal, and it took effect August 11, 2021. Given the months of progress, no party meaningfully argues the Plan has not been substantially consummated.[9] *See Pacific Lumber*, 584 F.3d at 242 (observing "consummation includes transferring all or substantially all of the property

[9] Since the Plan's effectuation, Highland Capital paid $2.2 million in claims to a committee member and $525,000 in "cure payments" to other counterparties. The independent directors resigned. The Reorganized Debtor, the Claimant Trust, HCMLP GP LLC, and the Litigation Sub-Trust were created and organized in accordance with the Plan. The bankruptcy court appointed the Oversight Board members, the Litigation Sub-Trust trustee, and the Claimant Trust trustee. Highland Capital assumed certain service contracts, including management of twenty CLOs with approximately $700 million in assets, and transferred its assets and estate claims to the successor entities. Highland Capital's pre-petition partnership interests were cancelled and cease to exist. A third party, Blue Torch Capital, infused $45 million in exit financing, fully guaranteed by the Reorganized Debtor, its operating subsidiaries, the Claimant Trust, and most of their assets. From the exit financing, an Indemnity Trust was created to indemnify claims that arise against the Reorganized Debtor, Claimant Trust, Ligation Sub-Trust, Claimant Trustee, Litigation Trustee, or Oversight Board members. The lone class-1 creditor withdrew its claim against Highland Capital. The lone class-2 creditor has been fully paid approximately $500,000 and issued a note of $5.2 million secured by $23 million of the Reorganized Debtor's assets. Classes 3 and 4 have been paid $165,412. Class 7 has received $5.1 million in distributions from the Claimant Trust, totaling 77% of class-7 claims filed.

covered by the plan, the assumption of business by the debtors' successors, and the commencement of plan distributions" (citing 11 U.S.C. § 1141; and *In re Manges*, 29 F.3d at 1041 n.10)). But that alone does not trigger equitable mootness. *See In re SCOPAC*, 624 F.3d 274, 281–82 (5th Cir. 2010). Instead, for each claim, the inquiry turns on whether the court can craft relief for that claim that would not have significant adverse consequences to the reorganization. Highland Capital highlights four possible disruptions: (1) the unraveling of the Claimant Trust and its entities, (2) the expense of disgorging disbursements, (3) the threat of defaulting on exit-financing loans, and (4) the exposure to vexatious litigation.

Each party first suggests its own all-or-nothing equitable mootness applications. To Highland Capital, Appellants' broad requested remedy with only a minor economic stake demands mooting the entire appeal. To Appellants, the type of reorganization plan categorially bars equitable mootness, or, alternatively, Highland Capital's joining the motion to certify the appeal estops it from asserting equitable mootness. These arguments are unpersuasive and foreclosed by *Pacific Lumber*.

First, Highland Capital contends the entire appeal is equitably moot because Appellants, with only a minor economic stake and questionable good faith, "seek[] nothing less than a complete unravelling of the confirmed Plan." It claims the court cannot "surgically excise[]" certain provisions, as the Funds request, because the Bankruptcy Code prohibits "modifications to confirmed plans after substantial consummation." *See* 11 U.S.C. § 1127(b). Not so.

"Although the Bankruptcy Code . . . restricts post-confirmation plan modifications, it does not expressly limit appellate review of plan confirmation orders." *Pacific Lumber*, 584 F.3d at 240 (footnote omitted) (citing 11 U.S.C. § 1127). This court may fashion "fractional relief" to

minimize an appellate disturbance's effect on the rights of third parties. *In re Tex. Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 328 (5th Cir. 2013) (denying dismissal on equitable mootness grounds because the court "could grant partial relief . . . without disturbing the reorganization"); *cf. In re Cont'l Airlines*, 91 F.3d 553, 571–72 (3d Cir. 1996) (en banc) (Alito, J., dissenting) (observing "a remedy could be fashioned in the present case to ensure that the [debtor's] reorganization is not undermined"). In short, Highland Capital's speculations are farfetched, as the court may fashion the remedy it sees fit without upsetting the reorganization.

Second, Appellants contend that equitable mootness cannot apply—full-stop—because this appeal concerns a liquidation plan, not a reorganization plan. We reject that premise. *See infra* Part IV.A. Even if it were correct, however, this court has conducted the equitable-mootness inquiry for a Chapter 11 liquidation plan in the past. *See In re Superior Offshore Int'l, Inc.*, 591 F.3d 350, 353–54 (5th Cir. 2009). And other circuits have squarely rejected the categorical bar proposed by Appellants. *See In re Abengoa Bioenergy Biomass of Kan., LLC*, 958 F.3d 949, 956–57 (10th Cir. 2020); *In re BGI, Inc.*, 772 F.3d 102, 107–09 (2d Cir. 2014). We do the same.

Finally, Appellants assert that because Highland Capital and NexPoint Advisors, L.P. jointly moved to certify the appeal, it should be estopped from arguing the appeal is equitably moot. They cite no legal support for that approach. We decline to adopt it.

Instead, we proceed with a claim-by-claim analysis, as our precedent requires. Highland Capital suggests only two claims are equitably moot: (1) the protection-provisions challenge and (2) the absolute-priority-rule challenge. Neither provides a basis for equitable mootness.

For the protection provisions, Highland Capital anticipates that, without the provisions, its officers, employees, trustees, and Oversight Board

members would all resign rather than be exposed to Dondero-initiated litigation. Those resignations would disrupt the Reorganized Debtor's operation, "significant[ly] deteriorat[ing] asset values due to uncertainty." Appellants disagree, offering several instances when this court has reviewed release, exculpation, and injunction provisions over calls for equitable mootness. *See, e.g.*, *In re Hilal*, 534 F.3d at 501; *Pacific Lumber*, 584 F.3d at 252; *In re Thru Inc.*, 782 F. App'x 339, 341 (5th Cir. 2019) (per curiam). In response, Highland Capital distinguishes this case because the provisions are "integral to the consummated plans." *See In re Charter Commc'ns, Inc.*, 691 F.3d 476, 486 (2d Cir. 2012). We again reject that premise. *See infra* Part IV.E.1. In any event, Appellants have the better argument.

We have before explained that "equity strongly supports appellate review of issues consequential to the integrity and transparency of the Chapter 11 process." *In re Hilal*, 534 F.3d 498, 500 (5th Cir. 2008). That is so because "the goal of finality sought in equitable mootness analysis does not outweigh a court's duty to protect the integrity of the process." *Pacific Lumber*, 584 F.3d at 252. As in *Pacific Lumber*, the legality of a reorganization plan's non-consensual non-debtor release is consequential to the Chapter 11 process and so should not escape appellate review in the name of equity. *Ibid.* The same is true here. Equitable mootness does not bar our review of the protection provisions.

For the absolute-priority-rule challenge,[10] Highland Capital contends our review requires us to "rejigger class recoveries." *Pacific Lumber* is again instructive. There, the court declined to apply equitable mootness to a secured creditor's absolute-priority-rule challenge, as no other panel had

[10] While the issue is nearly forfeited for inadequate briefing, it fails on the merits regardless. *See Roy v. City of Monroe*, 950 F.3d 245, 251 (5th Cir. 2020).

extended the doctrine so far. *Id.* at 243. Similarly, Highland Capital fails to identify a single case in which this court has declined review of the treatment of a class of creditor's claims resulting from a cramdown. *See id.* at 252. Regardless, Appellants challenge the distributions to classes 8, 10, and 11. According to Highland Capital's own declaration, "Class 8 General Unsecured Claims have received their Claimant Trust Interests." But there is no evidence that classes 10 or 11 have received any distributions. *Contra Pacific Lumber*, 584 F.3d at 251 (holding certain claims equitably moot where "the smaller unsecured creditors" had already "received payment for their claims"). As a result, the relief requested would not affect third parties or the success of the Plan. *See In re Manges*, 29 F.3d at 1039. The doctrine of equitable mootness does not bar our review of the cramdown and treatment of class-8 creditors.

We DENY Highland Capital's motion to dismiss the appeal as equitably moot.

IV. Discussion

As to the merits, Appellants fire a bankruptcy-law blunderbuss. They contest the Plan's classification as a reorganization plan, the Plan's satisfaction of the absolute priority rule, the Plan's confirmation despite Highland Capital's noncompliance with Bankruptcy Rule 2015.3, and the sufficiency of the evidence supporting the court's factual finding that the Funds are "owned/controlled" by Dondero. For each, we disagree and affirm. We do, however, agree with Appellants that the bankruptcy court exceeded its statutory authority under § 524(e) by exculpating certain non-debtors, and so we reverse and vacate the Plan only to that extent.

A. Discharge of Debt

We begin with the Plan's classification as a reorganization plan, allowing for automatic discharge of the debts. The confirmation of a Chapter

11 restructuring plan "discharges the debtor from any [pre-confirmation] debt" unless, under the plan, the debtor liquidates its assets, stops "engag[ing] in [its] business after consummation of the plan," and would be denied discharge in a Chapter 7 case. 11 U.S.C. § 1141(d)(1), (3); *see In re Sullivan*, No. 99-11107, 2000 WL 1597984, at *2 (5th Cir. Sept. 26, 2000) (per curiam). The bankruptcy court concluded Highland Capital continued to engage in business after plan consummation, so its debts are automatically discharged. The Trusts call foul because, in their view, Highland Capital's "wind down" of its portfolio management is not a continuation of its business. We disagree.

Whether a corporate debtor "engages in business" is "relatively straightforward." *Um v. Spokane Rock I, LLC*, 904 F.3d 815, 819 (9th Cir. 2018) (contrasting the more complex question for individual debtors); *see Grausz v. Sampson (In re Grausz)*, 63 F. App'x 647, 650 (4th Cir. 2003) (per curiam) (same). That is, "a business entity will not engage in business post-bankruptcy when its assets are liquidated and the entity is dissolved." *Um*, 904 F.3d at 819 (collecting cases).[11] But even a temporary continuation of business after a plan's confirmation is sufficient to discharge a Chapter 11 debtor's debt. *See In re T-H New Orleans Ltd. P'ship*, 116 F.3d 790, 804 n.15 (5th Cir. 1997) (recognizing a debtor's "conducting business for two years following Plan confirmation satisfies § 1141(d)(3)(B)" (citation omitted)). That is the case here.

[11] *See, e.g.*, *In re W. Asbestos Co.*, 313 B.R. 832, 853 (Bankr. N.D. Cal. 2003) (holding corporate debtor was not engaging in business by merely having directors and officers, rights under an insurance policy, and claims against it); *In re Wood Fam. Ints., Ltd.*, 135 B.R. 407, 410 (Bankr. D. Colo. 1989) (holding corporate debtor was not engaging in business when the plan called for liquidation and discontinuation of its business upon confirmation).

By the plain terms of the Plan, Highland Capital has and will continue its business as the Reorganized Debtor for several years. Indeed, much of this appeal concerns objections to Highland Capital's "continu[ing] to manage the assets of others." Because the Plan contemplates Highland Capital "engag[ing] in business after consummation," 11 U.S.C. § 1141(d)(1), the bankruptcy court correctly held Highland Capital was eligible for automatic discharge of its debts.[12]

B. Absolute Priority Rule

Next, we consider the Plan's compliance with the absolute-priority rule. When assessing whether a plan is "fair and equitable" in a cramdown scenario, courts must invoke the absolute-priority rule. 11 U.S.C. § 1129(b)(1); *see* 7 COLLIER ON BANKRUPTCY ¶ 1129.04. Under that rule, if a class of unsecured claimants rejects a plan, the plan must provide that those claimants be paid in full on the effective date *or* any junior interest "will not receive or retain under the plan . . . any property." 11 U.S.C. § 1129(b)(2)(B).[13]

Because class-8 claimants voted against the Plan, the bankruptcy court proceeded by nonconsensual confirmation. The court concluded the Plan was fair and equitable to class 8 and its distributions were in line with the absolute-priority rule. 11 U.S.C. § 1129(b)(2)(B). The Advisors claim the Plan violates the absolute priority rule by giving class-10 and -11 claimants a

[12] For the same reasons, we reject the Trusts' follow-on argument extending the same logic to the protection provisions.

[13] *See Pacific Lumber*, 584 F.3d at 244 (noting the rule "enforces a strict hierarchy of [creditor classes'] rights defined by state and federal law" to protect dissenting creditor classes); *see also In re Geneva Steel Co.*, 281 F.3d 1173, 1180 n.4 (10th Cir. 2002) ("[U]nsecured creditors stand ahead of investors in the receiving line and their claims must be satisfied before any investment loss is compensated." (citations omitted)).

"Contingent Claimant Trust Interest" without fully satisfying class-8 claimants. We agree the absolute-priority rule applies, and the Plan plainly satisfies it.

The Plan proposed to pay 71% of class-8 creditors' claims with *pro rata* distributions of interest generated by the Claimant Trust and then *pro rata* distributions from liquidated Claimant Trust assets. Classes 10 and 11 received a *pro rata* share of "Contingent Claimant Trust Interests," defined as a Claimant Trust Interest vesting only when the Claimant Trustee certifies that all class-8 claimants have been paid indefeasibly in full and all disputed claims in class 8 have been resolved. Voilà: no interest junior to class 8 will receive any property until class-8 claimants are paid.

But the Advisors point to Highland Capital's testimony and briefs to suggest the Contingent Claimant Trust Interests (received by classes 10 and 11) are property in some sense because they have value. That argument is specious. Of course, the Contingent Claimant Trust Interests have some small probability of vesting in the future and, thus, has some *de minimis* present value. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207-08 (1988) (holding a junior creditor's receipt of a presently valueless equity interest is receipt of property). But the absolute-priority rule has never required us to bar junior creditors from ever receiving property. By the Plan's terms, no trust property vests with class-10 or -11 claimants "unless and until" class-8 claims "have been paid indefeasibly in full." *See* 11 U.S.C. § 1129(b)(2)(B)(ii). That plainly comports with the absolute-priority rule.

C. Bankruptcy Rule 2015.3

We turn to whether the failure to comply with Bankruptcy Rule of Procedure 2015.3 bars the Plan's confirmation. The Independent Directors failed to file periodic financial reports per Federal Rule of Bankruptcy Procedure 2015.3(a) about entities "in which the [Highland Capital] estate

holds a substantial or controlling interest." The Advisors claim the failure dooms the Plan's confirmation because the Plan proponent failed to comply "with the applicable provisions of this title." 11 U.S.C. § 1129(a)(2). We disagree.

Rule 2015.3 cannot be an applicable provision of Title 11 because the Federal Rules of Bankruptcy Procedure are not provisions of the Bankruptcy Code. *See Bonner v. Adams (In re Adams)*, 734 F.2d 1094, 1101 (5th Cir. 1984) ("The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, provides that the Supreme Court may prescribe 'by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure' in bankruptcy courts."); *cf. In re Mandel*, No. 20-40026, 2021 WL 3642331, at *6 n.7 (5th Cir. Aug. 17, 2021) (per curiam) (noting "Rule 2015.3 implements section 419 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," which amended 28 U.S.C. § 2073). The Advisors' attempt to tether the rule to the bankruptcy trustee's general duties lacks any legal basis. *See* 11 U.S.C. §§ 704(a)(8), 1106(a)(1), 1107(a). The bankruptcy court, therefore, correctly overruled the Advisors' objection.

D. Factual Findings

One factual finding is in dispute, but we see no clear error. The bankruptcy court found that, despite their purported independence, the Funds are entities "owned and/or controlled by [Dondero]." The Funds ask the court to vacate the factual finding because it threatens the Funds' compliance with federal law and damages their reputations and values. According to the Funds, the characterization is unfair, as *they* are not litigious like Dondero and are completely independent from him. Highland Capital maintains Dondero has sole discretion over the Funds as their portfolio manager and through his control of the Advisors, so the finding is supported by the record.

"Clear error is a formidable standard: this court disturbs factual findings only if left with a firm and definite conviction that the bankruptcy court made a mistake." *In re Krueger*, 812 F.3d 365, 374 (5th Cir. 2016) (cleaned up). We defer to the bankruptcy court's credibility determinations. *See Randall & Blake, Inc. v. Evans (In re Canion)*, 196 F.3d 579, 587–88 (5th Cir. 1999).

Here, the bankruptcy court drew its factual finding from the testimony of Jason Post, the Advisors' chief compliance officer, and Dustin Norris, an executive vice president for the Funds and the Advisors. Post testified that the Funds have independent board members that run them. But the bankruptcy court found Post not credible because "he abruptly resigned" from Highland Capital at the same time as Dondero and is currently employed by Dondero. Norris testified that Dondero "owned and/or controlled" the Funds and Advisors. The bankruptcy court found Norris credible and relied on his testimony. The bankruptcy court also observed that none of the Funds' board members testified in the bankruptcy case and all "engaged with the Highland complex for many years." Because nothing in this record leaves us with a firm and definite conviction that the bankruptcy court made a mistake in finding that the Funds are "owned and/or controlled by [Dondero]," we leave the bankruptcy court's factual finding undisturbed.

E. The Protection Provisions

Finally, we address the legality of the Plan's protection provisions. As discussed, the Plan exculpates certain non-debtor third parties supporting the Plan from post-petition lawsuits not arising from gross negligence, bad faith, or willful or criminal misconduct. It also enjoins certain parties "from taking any actions to interfere with the implementation or consummation of the Plan." The injunction requires that, before any lawsuit is filed, the plaintiff must seek the bankruptcy court's approval of the claim as

"colorable"—*i.e.*, the bankruptcy court acts as a gatekeeper. Together, the provisions screen and prevent bad-faith litigation against Highland Capital, its successors, and other bankruptcy participants that could disrupt the Plan's effectiveness.

The bankruptcy court deemed the provisions legal, necessary under the circumstances, and in the best interest of all parties. We agree, but only in part. Though the injunction and gatekeeping provisions are sound, the exculpation of certain non-debtors exceeds the bankruptcy court's authority. We reverse and vacate that limited portion of the Plan.

1. *Non-Debtor Exculpation*

We start with the scope of the non-debtor exculpation. In a Chapter 11 bankruptcy proceeding, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). Contrary to the bankruptcy court's holding, the exculpation here partly runs afoul of that statutory bar on non-debtor discharge by reaching beyond Highland Capital, the Committee, and the Independent Directors. *See Pacific Lumber*, 584 F.3d 251–53. We must reverse and strike the few unlawful parts of the Plan's exculpation provision.

The parties agree that *Pacific Lumber* controls and also that the bankruptcy court had the power to exculpate both Highland Capital and the Committee members. Appellants, however, submit the bankruptcy court improperly stretched *Pacific Lumber* to shield other non-debtors from breach-of-contract and negligence claims, in violation of § 524(e). Highland Capital counters that the exculpation provision is a commonplace Chapter 11 term, is appropriate given Dondero's litigious nature, does not implicate § 524(e), and merely provides a heightened standard of care.

To support that argument, Highland Capital highlights the distinction between a concededly unlawful release of all non-debtor liability and the

Plain's limited exculpation of non-debtor post-petition liability. *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 246–47 (3d Cir. 2000) (describing releases as "eliminating" a covered party's liability "altogether" while exculpation provisions "set[] forth the applicable standard of liability" in future litigation). According to Highland Capital, the Third and Ninth Circuits have adopted that distinction when applying § 524(e). *See Blixseth v. Credit Suisse*, 961 F.3d 1074, 1084 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1394 (2021); *In re PWS Holding*, 228 F.3d at 246–47. Under those cases, narrow exculpations of post-petition liability for certain critical third-party non-debtors are lawful "appropriate" or "necessary" actions for the bankruptcy court to carry out the proceeding through its statutory authority under § 1123(b)(6) and § 105(a). *See* 11 U.S.C. § 1123(b)(6) ("[A] plan may . . . include any other appropriate provision not inconsistent with the applicable provisions of this title."); *id* § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

Highland Capital reads *Pacific Lumber* as "in step with the law in [those] other circuits" by allowing a limited exculpation of post-petition liability. *Cf. Blixseth*, 961 F.3d at 1084. We disagree. As the Ninth Circuit acknowledged, our court in *Pacific Lumber* arrived at "a conclusion opposite [the Ninth Circuit's]." 961 F.3d at 1085 n.7. Moreover, the Ninth Circuit expressly disavowed *Pacific Lumber*'s rationale—that an exculpation provision provides a "fresh start" to a non-debtor in violation of § 524(e)—because, in the Ninth Circuit's view, the post-petition exculpation "affects only claims arising from the bankruptcy proceedings themselves." *Ibid.* We are not persuaded, as Highland Capital contends, that the Ninth Circuit was "sloppy" and simply "misread *Pacific Lumber*." *See* O.A. Rec. 19:45–21:38.

The simple fact of the matter is that there is a circuit split concerning the effect and reach of § 524(e).[14] Our court along with the Tenth Circuit hold § 524(e) categorically bars third-party exculpations absent express authority in another provision of the Bankruptcy Code. *Pacific Lumber*, 584 F.3d at 252–53; *Landsing Diversified Props. v. First Nat'l Bank & Tr. Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990) (per curiam). By contrast, the Ninth Circuit joins the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits in reading § 524(e) to allow varying degrees of limited third-party exculpations. *Blixseth*, 961 F.3d at 1084; *accord In re PWS Holding*, 228 F.3d at 246–47 (allowing third-party releases for "fairness, necessity to the reorganization, and specific factual findings to support these conclusions"); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005); *In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir. 1989); *In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002); *In re Airadigm Commc'ns., Inc.*, 519 F.3d 640, 657 (7th Cir. 2008); *In re Seaside Eng'g & Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015).

Our *Pacific Lumber* decision was not blind to the countervailing view, as it twice cites the Third Circuit's contrary holding in other contexts. *See* 584 F.3d at 241, 253 (citing *In re PWS Holding*, 228 F.3d at 236–37, 246). But we rejected the parsing between limited exculpations and full releases that Highland Capital now requests. We are obviously bound to apply our own precedent. *See Hidalgo Cnty. Emergency Serv. Found. v. Carranza (In re Hidalgo Cnty. Emergency Serv. Found.)*, 962 F.3d 838, 841 (5th Cir. 2020)

[14] Amicus's contention that failing to adopt the Ninth Circuit's holding "would generate a clear circuit split" is wrong. There already is one. *See* Petition for Writ of Certiorari, *Blixseth v. Credit Suisse*, 141 S. Ct. 1394 (No. 20-1028) (highlighting the circuits' divergent approaches to the non-debtor discharge bar under § 524(e)).

("Under our well-recognized rule of orderliness, . . . a panel of this court is bound by circuit precedent." (citation omitted)).

Under *Pacific Lumber*, § 524(e) does not permit "absolv[ing] the [non-debtor] from any negligent conduct that occurred during the course of the bankruptcy" absent another source of authority. 584 F.3d at 252–53; *see also In re Zale Corp.*, 62 F.3d 746, 760 (5th Cir. 1995). At oral argument, Highland Capital pointed only to § 1123(b)(6) and § 105(a) as footholds. *See* O.A. Rec. 16:45–17:28. But in this circuit, § 105(a) provides no statutory basis for a non-debtor exculpation. *In re Zale*, 62 F.3d at 760 (noting "[a] § 105 injunction cannot alter another provision of the code" (citing *In re Oxford Mgmt., Inc.*, 4 F.3d 1329, 1334 (5th Cir. 1993))). And the same logic extends to § 1123(b)(6), which allows a plan to "include any other appropriate provision *not inconsistent with the applicable provisions of this title*." 11 U.S.C. § 1123(b)(6) (emphasis added).

Pacific Lumber identified two sources of authority to exculpate non-debtors. *See* 584 F.3d at 252–53. The first is to channel asbestos claims (not present here). *Id.* at 252 (citing 11 U.S.C. § 524(g)). The second is to provide a limited qualified immunity to creditors' committee members for actions within the scope of their statutory duties. *Pacific Lumber*, 584 F.3d at 253 (citing 11 U.S.C. § 1103(c)); *see In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1069 (5th Cir. 2012). And, though not before the court in *Pacific Lumber*, we have also recognized a limited qualified immunity to bankruptcy trustees unless they act with gross negligence. *In re Hilal*, 534 F.3d at 501 (citing *In re Smyth*, 207 F.3d 758, 762 (5th Cir. 2000)); *accord Baron v. Sherman (In re Ondova Ltd.)*, 914 F.3d 990, 993 (5th Cir. 2019) (per curiam). If other sources exist, Highland Capital failed to identify them. So we see no statutory authority for the full extent of the exculpation here.

The bankruptcy court read *Pacific Lumber* differently. In its view, *Pacific Lumber* created an additional ground to exculpate non-debtors: when the record demonstrates that "costs [a party] might incur defending against suits alleging such negligence are likely to swamp either [it] or the consummated reorganization." 584 F.3d at 252. We do not read the decision that way. The bankruptcy court's underlying factual findings do not alter whether it has statutory authority to exculpate a non-debtor. That is the holding of *Pacific Lumber*.

That leaves one remaining question: whether the bankruptcy court can exculpate the Independent Directors under *Pacific Lumber*. We answer in the affirmative. As the bankruptcy court's governance order clarified, nontraditional as it may be, the Independent Directors were appointed to act together as the bankruptcy trustee for Highland Capital. Like a debtor-in-possession, the Independent Directors are entitled to all the rights and powers of a trustee. *See* 11 U.S.C. § 1107(a); 7 COLLIER ON BANKRUPTCY ¶ 1101.01. It follows that the Independent Directors are entitled to the limited qualified immunity for any actions short of gross negligence. *See In re Hilal*, 534 F.3d at 501. Under this unique governance structure, the bankruptcy court legally exculpated the Independent Directors.

In sum, our precedent and § 524(e) require any exculpation in a Chapter 11 reorganization plan be limited to the debtor, the creditors' committee and its members for conduct within the scope of their duties, 11 U.S.C. § 1103(c), and the trustees within the scope of their duties, *see Baron*, 914 F.3d at 993. And so, excepting the Independent Directors and the Committee members, the exculpation of non-debtors here was unlawful.

Accordingly, the other non-debtor exculpations must be struck from the Plan. *See Pacific Lumber*, 584 F.3d at 253.[15]

As it stands, the Plan's exculpation provision extends to Highland Capital and its employees and CEO; Strand; the Reorganized Debtor and HCMLP GP LLC; the Independent Directors; the Committee and its members; the Claimant Trust, its trustee, and the members of its Oversight Board; the Litigation Sub-Trust and its trustee; professionals retained by the Highland Capital and the Committee in this case; and all "Related Persons." Consistent with § 524(e), we strike all exculpated parties from the Plan except Highland Capital, the Committee and its members, and the Independent Directors.

---

[15] Highland Capital, like the bankruptcy court, claims the *res judicata* effect of the January and July 2020 orders appointing the independent directors and appointing Seery as CEO binds the court to include the protection provisions here. We lack jurisdiction to consider collateral attacks on final bankruptcy orders even when it concerns whether the court properly exercised jurisdiction or authority at the time. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137 (2009); *In re Linn Energy, L.L.C.*, 927 F.3d 862, 866–67 (5th Cir. 2019) (quoting *Bailey*, 557 U.S. at 152). To the extent Appellants seek to roll back the protections in the bankruptcy court's January 2020 and July 2020 orders (which is not clear from their briefing), such a collateral attack is precluded.

As a result, the bankruptcy court was correct insofar as *those* orders have the effect of exculpating the Independent Directors and Seery in his executive capacities, but it was incorrect that *res judicata* mandates their inclusion in the Plan's new exculpation provision. Despite removal from the exculpation provision in the confirmation order, the Independent Directors' agents, advisors, and employees, as well as Seery in his official capacities are all exculpated to the extent provided in the January and July 2020 orders, given the orders' ongoing *res judicata* effects and our lack of jurisdiction to review those orders. But that says nothing of the effect of the Plan's exculpation provision.

2. *Injunction & Gatekeeper Provisions*

We now turn to the Plan's injunction and gatekeeper provisions. Appellants object to the bankruptcy court's injunction as vague and the gatekeeper provision as overbroad. We are unpersuaded.

First, Appellants' primary contention—that the Plan's injunction "is broad" by releasing non-debtors in violation of § 524(e)—is resolved by our striking the impermissibly exculpated parties. *See supra* Part IV.E.1.

Second, Appellants dispute the permanency of the injunction for the legally exculpated parties by enjoining conduct "on and after the Effective Date." Even assuming the issue was preserved,[16] permanency alone is no reason to alter a bankruptcy court's otherwise-lawful injunction on appeal. *See In re Zale*, 62 F.3d at 759–60 (recognizing the bankruptcy court's jurisdiction to issue an injunction in the first place allowed it to issue a permanent injunction).

Third, the Advisors argue that the injunction is "overbroad and vague" because it does not define what it means to "interfere" with the "implementation or consummation of the Plan." That is unsupported by the record. As the bankruptcy court recognized, the Plan defined what constitutes interference: (i) filing a lawsuit, (ii) enforcing judgments, (iii) enforcing security interests, (iv) asserting setoff rights, or (v) acting "in any manner" not conforming with the Plan. The injunction is not unlawfully overbroad or vague.

Finally, Appellants maintain that the gatekeeper provision impermissibly extends to unrelated claims over which the bankruptcy court

[16] *See Roy*, 950 F.3d at 251 ("Failure adequately to brief an issue on appeal constitutes waiver of that argument." (citation omitted)).

lacks subject-matter jurisdiction. *See In re Craig's Stores of Tex., Inc.*, 266 F.3d 388, 390 (5th Cir. 2001) (noting a bankruptcy court retains jurisdiction post-confirmation only over "matters pertaining to the implementation or execution of the plan" (citations omitted)). While that may be the case, our precedent requires we leave that determination to the bankruptcy court in the first instance.

Courts have long recognized bankruptcy courts can perform a gatekeeping function. Under the "*Barton* doctrine," the bankruptcy court may require a party to "obtain leave of the bankruptcy court before initiating an action in district court when the action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor's official capacity." *Villegas v. Schmidt*, 788 F.3d 156, 159 (5th Cir. 2015) (emphasis added) (quoting *Carter v. Rodgers*, 220 F.3d 1249, 1252 (11th Cir. 2000)); *accord Barton v. Barbour*, 104 U.S. 126 (1881).[17] In *Villegas*, we held "that a party must continue to file with the relevant bankruptcy court for permission to proceed with a claim against the trustee." 788 F.3d at 158. Relevant here, we left to the bankruptcy court, faced with pre-approval of a claim, to determine whether it had subject matter jurisdiction over that claim in the first instance. *Id.* at 158–59; *see, e.g.*, *Carroll v. Abide*, 788 F.3d 502, 506–07 (5th Cir. 2015) (noting *Villegas* "rejected an argument that the *Barton* doctrine does not apply when the bankruptcy court lacked jurisdiction"). In other words, we need not evaluate whether the bankruptcy court would have

[17] The Advisors also maintain that Highland Capital is neither a receiver nor a trustee, so *Barton* has no application here. We disagree. Highland Capital, for all practical purposes, was a debtor in possession entitled to the rights of a trustee. *See* 7 COLLIER ON BANKRUPTCY ¶ 1101.01 ("The debtor in possession is generally vested with all of the rights and powers of a trustee as set forth in section 1106 . . . ."); *see also Carter*, 220 F.3d at 1252 n.4. (finding no distinction between bankruptcy court "approved" and bankruptcy court "appointed" officers).

jurisdiction under every conceivable claim falling under the widest interpretation of the gatekeeper provision. We leave that to the bankruptcy court in the first instance.[18]

* * *

In sum, the Plan violates § 524(e) but only insofar as it exculpates and enjoins certain non-debtors. The exculpatory order is therefore vacated as to all parties *except* Highland Capital, the Committee and its members, and the Independent Directors for conduct within the scope of their duties. We otherwise affirm the inclusion of the injunction and the gatekeeper provisions in the Plan.[19]

V. Conclusion

Highland Capital's motion to dismiss the appeal as equitably moot is DENIED. The bankruptcy court's judgment is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

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[18] For the same reasons, we also leave the applicability of *Barton*'s limited statutory exception to the bankruptcy and district courts in the first instance. *See* 28 U.S.C. § 959(a) (allowing suit, without leave of the appointing court, if the challenged acts relate to the trustee or debtor in possession "carrying on business connected with [their] property").

[19] Nothing in this opinion should be construed to hinder the bankruptcy court's power to enjoin and impose sanctions on Dondero and other entities by following the procedures to designate them vexatious litigants. *See In re Carroll*, 850 F.3d 811, 815 (5th Cir. 2017) (per curiam). But non-debtor exculpation within a reorganization plan is not a lawful means to impose vexatious litigant injunctions and sanctions.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

September 12, 2022

Mr. Robert P. Colwell
U.S. Bankruptcy Court, Northern District of Texas
1100 Commerce Street
Earle Cabell Federal Building
Room 1254
Dallas, TX 75242-1496

No. 21-10449 NexPoint v. Highland Capital Management
USDC No. 19-34054
USDC No. 3:21-CV-538

Dear Mr. Colwell,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk
504-310-7675

cc:
Mr. Zachery Z. Annable
Mr. Douglas Scott Draper
Mr. Roy Theodore Englert Jr.
Mr. David R. Fine
Ms. Melissa Sue Hayward
Mr. George W. Hicks Jr.
Mr. A. Lee Hogewood
Ms. Emily K. Mather
Mr. Jeffrey N. Pomerantz
Mr. Davor Rukavina
Mr. Julian Preston Vasek

Appendix Exhibit 156

Case No. 3:21-cv-2268-S

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

In re: Highland Capital Management, L.P.,

Reorganized Debtor.

THE DUGABOY INVESTMENT TRUST and THE GET GOOD TRUST,

Appellants

v.

HIGHLAND CAPITAL MANAGEMENT, L.P.,

Appellee

On Appeal from the
United States Bankruptcy Court, Northern District of Texas, Dallas Division
Case No. 19-34054-sgj11 (Hon. Stacey G.C. Jernigan)

APPELLEE'S MOTION TO DISMISS APPEAL AS MOOT

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Counsel for Appellee

Appellee Highland Capital Management, L.P. ("**Highland**") respectfully moves this Court for an order dismissing as constitutionally moot Appellants' appeal from the Bankruptcy Court's *Order Denying Motion to Compel Compliance with Bankruptcy Rule 2015.3* (the "**Order**"). Because neither Appellant possesses a claim against Highland's bankruptcy estate, neither Appellant is an adverse party with sufficient legal interest to maintain this appeal, which is now moot, presenting no Article III case or controversy and leaving this Court with no constitutional jurisdiction to hear this appeal. This Court should dismiss this appeal as moot.[1]

Background Regarding Appellants

Each Appellant is a family "trust" controlled by James Dondero (Highland's founder and ousted former CEO).[2] Dondero owns no equity in Highland directly, but owns Highland's general partner, Strand Advisors Inc., which owned 0.25% of the total pre-bankruptcy equity in Highland. Dugaboy owned a 0.1866% pre-bankruptcy limited partnership interest in Highland. The Bankruptcy Court previously found that it "is not clear what economic interest the Get Good Trust has, but it seems to be related to Mr. Dondero." [3]

[1] *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994).
[2] *Order (I) Confirming the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (As Modified) and (II) Granting Related Relief*, entered on February 22, 2021, Bankruptcy Court Docket No. 1943, designated in *Amended Designation of Record*, ROA vol. 1 at 5(a) (the "**Confirmation Order**").
[3] Confirmation Order ¶¶ 18–19.

Disallowance of Dugaboy's Claims

Appellant Dugaboy filed three proofs of claim in the bankruptcy case below: (a) proof of claim no. 177, filed on April 23, 2020; (b) proof of claim no. 131, filed on April 8, 2020; and (c) proof of claim no. 113, filed on April 8, 2020, allegedly held by the Canis Major Trust, to which Dugaboy purported to be a "successor in interest." On October 27, 2021, with Dugaboy's consent, the Bankruptcy Court entered orders withdrawing Claim 177 and Claim 131 with prejudice.[4] On November 10, 2021, the Bankruptcy Court entered an order approving a stipulation between the Dugaboy and Highland withdrawing Claim 113 with prejudice.[5] Dugaboy did not appeal any of these orders. They are now final.

Consequently, Dugaboy has no claims against Highland or Highland's bankruptcy estate. Its only interest in the estate is a pre-bankruptcy 0.1866% equity interest, which was canceled under the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)* (the "**Plan**"), which became effective on August 11, 2021. *Dugaboy has no pecuniary interest in Highland or the bankruptcy estate.*

[4] Bankruptcy Docket Nos. 2965, 2966.
[5] Bankruptcy Docket No. 3007.

Disallowance of Get Good's Claims

On April 8, 2020, Appellant Get Good filed proof of claim no. 120. On November 10, 2021, the Bankruptcy Court entered an order approving a stipulation between Highland and Get Good withdrawing Claim 120 with prejudice.[6] Get Good was also a purported "successor in interest" to claims allegedly held by the Canis Major Trust for which it filed proofs of claim nos. 128 and 129 on April 8, 2020. With Get Good's consent, Claims 128 and 129 were each deemed withdrawn with prejudice under Bankruptcy Court orders entered on November 10, 2021.[7] Get Good did not appeal any of these orders. They are now final. Consequently, *Get Good has no pecuniary interest in Highland or the bankruptcy estate.*

Appellants Lack Standing; Appeal Is Now Constitutionally Moot

Standing to appeal a bankruptcy court decision is a question of law.[8] The standard for determining appellate standing in the bankruptcy context is governed by the "person aggrieved" test, which requires a showing that the appellant was aggrieved by the order being challenged.[9] "The 'person aggrieved' test is an even more exacting standard than traditional constitutional standing."[10] In other words, "Because bankruptcy cases typically affect numerous parties, the 'person aggrieved'

[6] Bankruptcy Docket No. 3008.
[7] Bankruptcy Docket Nos. 3009 and 3010.
[8] *Furlough v. Cage (In re Technicool Sys.)*, 896 F.3d 382, 385 (5th Cir. 2018).
[9] *See Harriman v. Vactronic Sci, Inc. (In re Palmaz Sci., Inc.)*, 262 F. Supp. 3d 428, 432 (W.D. Tex. 2017).
[10] *Gibbs & Bruns LLP v. Coho Energy, Inc. (In re Coho Energy Inc.)*, 395 F.3d 198, 202 (5th Cir. 2004).

test demands a higher causal nexus between act and injury ….”[11] Appellants “must show that [they] were ‘directly and adversely affected pecuniarily by the order of the bankruptcy court.’”[12] Appellants bear the burden of alleging facts sufficient to demonstrate that they have standing to appeal.[13]

The Fifth Circuit Court of Appeals has strictly limited appellant standing:

> Bankruptcy courts are not Article III creatures bound by traditional standing requirements. But that does not mean disgruntled litigants may appeal every bankruptcy court order willy-nilly. Quite the contrary. Bankruptcy cases often involve numerous parties with conflicting and overlapping interests. Allowing each and every party to appeal each and every order would clog up the system and bog down the courts. Given the specter of such sclerotic litigation, standing to appeal a bankruptcy court order is, of necessity, quite limited.[14]

In *Technicool*, the debtor’s equity holder, Robert Furlough, opposed the debtor’s employment of special counsel to pursue litigation. After the bankruptcy court overruled his objection, Furlough appealed, first to the district court and, when he did not prevail there, to the Fifth Circuit Court of Appeals.[15] The circuit court also affirmed, explicitly rejecting Furlough’s argument that additional administrative expenses for special counsel would make a recovery on his equity

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[11] *Id.*

[12] *Id*. (quoting *In re Fondiller*, 707 F.2d 441, 443 (9th Cir. 1983)); *see also Dish Network Corp. v. DBSD N. Am. (In re DBSD N. Am.)*, 634 F.3d 79, 88-89 (2d Cir. 2010) (“an appellant must be ‘a person aggrieved’ …. An appellant … must show not only ‘injury in fact’ under Article III but also that the injury is ‘direct[]’ and ‘financial’”), quoting *Kane v. Johns Manville Corp.*, 843 F.3d 636, 642 & n.2 (2d. Cir. 1988); *see also Edwards Family P’ship v. Johnson (In re Cmty. Home Fin. Servs.)*, 990 F.3d 422, 426 (5th Cir. 2021) (same).

[13] *See Rohm & Hass Tex., Inc. v. Ortiz Bros. Insulation*, 32 F.3d 205, 208 (5th Cir. 1994).

[14] *Technicool*, 896 F.3d at 385 (citations omitted).

[15] *Id.* at 384–85.

less likely because it could reduce recoveries by creditors, whose claims had priority over equity. Significantly, the court further held that some theoretical possibility relating to out-of-the-money equity interest did not accord him standing to appeal: "This speculative prospect of harm is far from a direct, adverse, pecuniary hit. Furlough must clear a higher standing hurdle: *The order must burden his pocket before he burdens a docket.*"[16] The Fifth Circuit reasoned that the bankruptcy court order that was the subject of Furlough's appeal—the appointment of a professional under Bankruptcy Code § 327(a)—did not *directly* affect Furlough's pecuniary interests despite his out-of-the-money equity interests. In other words, just because Furlough "feels grieved by [the professional's] appointment does not make him a 'person aggrieved' for purposes of bankruptcy standing."[17]

The Fifth Circuit's reason for adopting the "pecuniary interest" test for bankruptcy appeals speaks directly to the circumstances under which Appellants Dugaboy and Get Good have burdened this Court's docket:

> In bankruptcy litigation, the mishmash of multiple parties and multiple claims can render things labyrinthine, to say the least. To dissuade umpteen appeals raising umpteen issues, courts impose a stringent-yet-prudent standing requirement: *Only those directly, adversely, and financially impacted by a bankruptcy order may appeal it.*[18]

[16] *Id.* (emphasis added).
[17] *Id.*
[18] *Id.* at 384 (emphasis added).

Here, as in *Technicool* and the other cases cited above, Appellants cannot show any direct adverse financial impact from the Bankruptcy Court's entry of the Order. Neither Appellant has a claim against Highland or the bankruptcy estate, since all claims were withdrawn with prejudice. Even Dugaboy's infinitesimal pre-bankruptcy equity interest in Highland has been canceled.[19]

With no pecuniary interest in the bankruptcy estate, these Appellants lack standing under Fifth Circuit law. Even under Appellants' best-case scenario (where this Court reversed the Order and the Bankruptcy Court granted the Motion to Compel) would not "put any money [Appellants'] pocket," as required by the Fifth Circuit.[20] Highland would merely be required to retroactively file reports on its ownership interests in non-debtor subsidiaries as of the bankruptcy petition date. Severely out-of-date reports of years-old facts cannot conceivably lead to additional creditor recoveries. Even if they could, *Appellants aren't creditors*.[21]

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[19] Among more than a dozen appeals Dondero and his entities are currently prosecuting from this one bankruptcy case alone is an appeal of the Confirmation Order. It is, of course, theoretically possible that the Confirmation Order could be reversed on appeal, technically reinstating Dugaboy's pre-bankruptcy equity interest in Highland. But even in that circumstance, there is no nexus between the reports the Order excused and a miniscule 0.1866% limited partnership interest Dugaboy would arguably have. Even that interest would be insufficient to preserve Dugaboy's standing under the Fifth Circuit's formulation.

[20] *Technicool*, 896 F.3d at 386.

[21] Even were Appellants creditors, reversing the Order could not affect creditor recoveries. The Plan has already been solicited to and accepted by over 99% of the amount of Highland's unsecured creditors. The Plan was confirmed in February 2021 and became effective in August 2021. All Highland's former assets were revested in the Reorganized Debtor and the Claimant Trust under the Plan and Bankruptcy Code § 1141(c). Appellants were not "directly and adversely affected pecuniarily" by the Order because the Plan dictates and controls the disposition of all Highland's former assets. This is why Bankruptcy Rule 2015.3(b) only requires the filing of reports "until the effective date of a plan" because, at that point, the debtor is no longer a debtor-in-possession and the Plan dictates the provisions, reporting requirements, and duties of the reorganized debtor.

The Fifth Circuit requires a bankruptcy appellant to be a creditor with a direct pecuniary interest in the outcome of the appeal and in the relief sought in the District Court hearing the appeal. Neither Appellant is a creditor. Neither Appellant has any direct pecuniary interest in anything having to do with this appeal.

But, it must be noted, Appellants once did, at least arguably. Appellants took this appeal in September 2021, several weeks before the Bankruptcy Court entered orders withdrawing with prejudice all of Appellants' claims (the last of which was entered on November 10, 2021). At least arguably, Appellants possessed standing as holders of claims against the bankruptcy estate when they commenced this appeal. Appellants *lost* that standing, however, when all their claims were withdrawn—that is, when they irrevocably lost their position as creditors.

This appeal has been rendered moot—not justiciable under the "Cases and Controversies" Clause of Article III of the U.S. Constitution—because Appellants have lost their standing during the pendency of this appeal. The U.S. Supreme Court has described mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)."[22]

[22] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997), quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

The Fifth Circuit Court of Appeals, in addressing a bankruptcy appeal in which the appellant lost standing after the appeal began, held thus: "A controversy is mooted when there are no longer adverse parties with sufficient legal interests to maintain the litigation."[23] A mooted appeal must be dismissed because a "moot case presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issues it presents."[24]

Here, when all of Appellants' claims were withdrawn with prejudice on November 10, 2021, Appellants lost whatever standing they may have had when they commenced this appeal. This appeal, in the words of *Goldin*, no longer has any appellant with a sufficient legal interest to maintain the appeal. As such, this appeal is moot. Respectfully, when the Appellants lost their status as creditors of the Highland bankruptcy estate, this Court lost its Article III jurisdiction over this appeal. All that remains is for this Court to dismiss this appeal for lack of jurisdiction.

[23] *Goldin v. Bartholow*, 166 F.3d 710, 717 (5th Cir. 1999), citing *Chevron, U.S.A. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993).

[24] *Goldin*, 166 F.3d at 717–18, citing *Hogan v. Mississippi University for Women*, 646 F.2d 1116, 1117 n.1 (5th Cir. 1981). Mootness in this sense is distinct from the concept of "equitable mootness," which this Court may have seen in bankruptcy contexts before, particularly with respect to appeals of orders confirming a fully-consummated plan of reorganization. Constitutional mootness is a matter of Article III jurisdiction, whereas "equitable mootness" addresses the concern that an appellate court with unquestioned jurisdiction can only render relief that could inequitably harm third parties not before the court. *See, e.g., Manges v. Seattle-First Nat'l Bank (In re Manges)*, 29 F.3d 1034, 1039 (5th Cir. 1994) (comparing constitutional mootness with equitable mootness).

Conclusion

Because both Appellants have lost their standing to prosecute this appeal, and because a loss of both Appellants' standing renders this appeal constitutionally moot, this Court should dismiss this appeal.

Dated: December 15, 2021

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Counsel for Highland Capital Management, L.P.

CERTIFICATE OF COMPLIANCE WITH RULE 8013

The undersigned hereby certifies that this Motion complies with the type-volume limitation set by Rule 8013(f)(3) of the Federal Rules of Bankruptcy Procedure. This Motion contains 2,176 words.

/s/ Zachery Z. Annable
Zachery Z. Annable

CERTIFICATE OF SERVICE

I hereby certify that, on December 15, 2021, a true and correct copy of the foregoing Motion was served electronically upon all parties registered to receive electronic notice in this case via the Court's CM/ECF system.

/s/ Zachery Z. Annable
Zachery Z. Annable

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

THE DUGABOY INVESTMENT TRUST and GET GOOD TRUST, Appellants, vs. HIGHLAND CAPITAL MANAGEMENT, L.P., Appellee.	§ § § § § § § § § § §	Case No. 3:21-cv-02268-S

ORDER GRANTING APPELLEE'S MOTION TO DISMISS APPEAL AS MOOT

Before the Court is *Appellee's Motion to Dismiss Appeal as Moot* [Docket No. __] (the "Motion")[1] filed by Highland Capital Management, L.P., appellee ("Appellee" or "Highland") in the above-captioned appeal (the "Appeal"). Having considered (a) the Motion; (b) any responses to the Motion; (c) any reply in support of the Motion; and (d) the arguments made by parties on the record of any hearing on the Motion, the Court finds and concludes that (i) it has jurisdiction over this matter pursuant to 28 U.S.C. § 158; (ii) Highland's notice of the Motion was appropriate under the circumstances and no other notice need be provided; and (iii) the legal and factual bases set forth in the Motion establish good cause for the relief granted herein. Accordingly, it is **HEREBY ORDERED THAT**:

1. The Motion is **GRANTED**.

2. The Appeal is hereby **DISMISSED** as being constitutionally moot.

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

It is so ordered this _____ day of _____, 202__.

_____
The Honorable Karen G. Scholer
United States District Judge

Appendix Exhibit 157

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Counsel for James P. Seery, Jr.

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
Reorganized Debtor.	)	

HIGHLAND CAPITAL MANAGEMENT, L.P., HIGHLAND CLAIMANT TRUST, AND JAMES P. SEERY, JR.'S JOINT OPPOSITION TO HUNTER MOUNTAIN INVESTMENT TRUST'S MOTION FOR LEAVE TO FILE VERIFIED ADVERSARY PROCEEDING

[1] Highland's last four digits of its taxpayer identification number are (8357). The headquarters and service address for Highland is 100 Crescent Court, Suite 1850, Dallas, TX 75201.

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Highland Capital Management, L.P. ("HCMLP" or, as applicable, the "Debtor"), the reorganized debtor in the above-referenced bankruptcy case, the Highland Claimant Trust (the "Trust"; together with HCMLP, "Highland"), and James P. Seery, Jr., HCMLP's Chief Executive Officer and the Claimant Trustee of the Trust ("Seery"; together with Highland, the "Highland Parties"), by and through their undersigned counsel, hereby file this opposition (the "Opposition") to *Hunter Mountain Investment Trust's* ("HMIT") *Emergency Motion for Leave to File Verified Adversary Petition* ("Initial Motion" or "Mot."; Docket No. 3699) and *Hunter Mountain Investment Trust's Supplement to Emergency Motion for Leave to File Verified Adversary Proceeding* ("Supplemental Motion" or "Supp. Mot."; Docket No. 3760; collectively, the "Motion"). In support of their Opposition, the Highland Parties state as follows:

PRELIMINARY STATEMENT[1]

1. This Motion is the latest attempt by James Dondero ("Dondero") to make good on his threat to "burn down the place." This iteration involves baseless and personal attacks against the Proposed Defendants,[2] harassing those individuals charged with maximizing value for creditors while (perversely) wasting Highland's resources. Dondero's demonstrated hostility to Highland's legitimate goals is precisely why this Court entered the Gatekeeper Provision at issue here, and the current Motion vividly illustrates the wisdom of installing that prophylaxis. HMIT's Motion should be denied.

[1] Capitalized terms not defined in this Preliminary Statement shall have the meanings ascribed to them below.

[2] "Proposed Defendants" refers to, collectively, Seery, Muck Holdings, LLC ("Muck"), Jessup Holdings, LLC ("Jessup"), Farallon Capital Management, LLC ("Farallon"), Stonehill Capital Management, LLC ("Stonehill"; collectively with Muck, Jessup, and Farallon, the "Claims Purchasers"), and John Doe Defendant Nos. 1–10.

2. HMIT's proposed Complaint ("Compl."; Docket No. 3760-1) is long on rhetoric, unsupported conspiracy theories, and conclusory statements, but short on actual factual allegations. For all its bluster, the Complaint rests entirely on the following assertions:

- On December 17, 2021, Dondero sent an unsolicited email to Seery regarding a potential acquisition of Metro-Goldwyn-Mayer Studios, Inc. ("MGM"). At the time, the Debtor owned MGM stock directly and managed an entity that owned, among numerous other assets, subordinated debt in other entities that owned MGM stock (Compl. ¶¶ 44–45);

- Seery purportedly communicated with principals at Farallon and Stonehill, entities with which Seery allegedly did "substantial business" more than a decade before he assumed his roles at Highland. (*Id*. ¶ 48.) The Complaint contains no allegations regarding ***when*** these communications supposedly occurred, but speculates that Seery provided "material non-public information" about MGM and vague "assurances of great profits" on Highland claims (*id.* ¶¶ 3, 13–14, 47, 50);

- In April 2021 (four months after Dondero's unsolicited email), Farallon and Stonehill purchased "approved unsecured claims" of Highland at a 65% discount to face value. Based on the "publicly projected" estimates in Debtor's November 30, 2020, Disclosure Statement—which the Complaint touts as the only public source of information regarding the claims' potential value—Farallon and Stonehill stood to earn at least an 18% return on those purchases (*id.* ¶¶ 3, 37, 42); and

- In August 2021 (eight months after Dondero's unsolicited email), Farallon and Stonehill became members of the Claimant Oversight Board ("COB"). Under the Court-approved Chapter 11 Plan, Seery earned a set base salary and a performance-based bonus. The Complaint speculates that negotiations over the latter component "were not arm's-length," but contains no allegations about the negotiation process or the terms of Seery's final compensation package (*id.* ¶¶ 4, 13, 54.

The remainder of the Complaint consists of rhetorical rehash of these basic contentions, *ad hominem* attacks, or a self-serving (and utterly unsupported) claim by Dondero that a Farallon principal confessed this purported scheme to Dondero.

3. The Motion should be denied for three, independently sufficient reasons. ***First***, as a threshold legal matter, HMIT, as a holder of unvested, contingent interests, lacks standing to bring derivative claims on behalf of the Trust or HCMLP under applicable state law and the

Claimant Trust Agreement ("Trust Agreement" or "Trust Agmt."). HMIT cannot escape this reality by alternatively asserting its claims as nonexistent direct claims.

4. ***Second***, HMIT's claims are not "colorable" as that term is used in the Court-approved Plan and the Gatekeeper Provision included in this Court's Confirmation Order. (Plan Art. IX.F; Confirmation Order ¶¶ 72, 76, 81.) As the Confirmation Order expressly stated, the Gatekeeper Provision requires Dondero to make a threshold showing consistent with the (i) "the Supreme Court's 'Barton Doctrine,' *Barton v. Barbour*, 104 U.S. 126 (1881))," and (ii) "the notion of a prefiling injunction to deter vexatious litigants, that has been approved by Fifth Circuit." (*Id.* ¶¶ 76–81.) The Fifth Circuit confirmed as much when it rejected (in relevant part) Dondero's confirmation appeal, holding that the Gatekeeper Provision "screen[s] and prevent[s] bad-faith litigation against Highland Capital, its successors, and other bankruptcy participants that could disrupt the Plan's effectiveness." *NexPoint Advisors, L.P. v. Highland Cap. Mgmt., L.P.* (*In re Highland Cap. Mgmt., L.P.*), 48 F.4th 419, 435 (5th Cir. 2022).

5. It is well-settled that "colorability" in this context requires HMIT to demonstrate ***more*** than the bare-bones Fed. R. Civ. P. 12(b)(6) "plausibility" standard. HMIT must demonstrate the "foundation" for its "*prima facie* case." *In re VistaCare Grp., LLC*, 678 F.3d 218, 232 (3d Cir. 2012). Accordingly, and contrary to HMIT's contention, evidentiary hearings are routinely conducted in this setting—particularly where (as here) the movant has larded its complaint with unsupported, conclusory assertions that cannot withstand even passing scrutiny and has attached hundreds of pages of exhibits and two self-serving declarations in support of its motion. HMIT's proffered gatekeeping standard, by contrast, would impose no hurdle at all and would render the threshold entirely duplicative of the motion to dismiss standard that every litigant already faces. In addition to ignoring the stated purposes and intent of the Gatekeeper Provision (which are long

since beyond collateral attack) and the factual bases upon which it was adopted, HMIT offers no reason why litigants whose serial abuses earned the imposition of the Gatekeeper Provision should be subject to the same standard as everyone else. To state that absurd contention is to refute it, and would essentially nullify this Court's authority to police its own docket.

6. ***Third***, even if the Rule 12(b)(6) standard applied, HMIT's bare-bones Complaint would fail. Even accepting the sparse factual allegations as true for purposes of this Motion, its central conclusions collapse under their own weight. For example, assuming that Dondero's unsolicited December 17, 2020 email, which violated this Court's TRO, included confidential information regarding MGM, the Complaint does not allege that such information remained nonpublic at the unidentified time Seery supposedly communicated with Farallon and Stonehill—and the Complaint acknowledges that neither entity purchased claims before April 2021. Likewise, although the Complaint's central thesis is that Farallon and Stonehill would not have purchased the Highland claims without knowing the supposedly secret MGM information, the Complaint acknowledges that the November 30, 2020 Disclosure Statement predicted a recovery ***significantly above*** what Farallon and Stonehill allegedly paid for the claims in April 2021.

7. While such self-contradictory and sparse allegations ordinarily might counsel in favor of denying the Motion under the Rule 12(b)(6) standard (*i.e.*, obviating the need to decide whether the *Barton*/vexatious-litigant standard applies), the Highland Parties respectfully request that this Court conduct the Rule 12(b)(6) analysis only in the alternative. Given the litigiousness of Dondero and his affiliated entities, who inevitably will appeal any adverse decision, the Fifth Circuit will benefit from a full record. Applying the correct heightened standard will also serve important interests going forward. This Motion is unlikely to be the last to require application of

the Gatekeeper Provision, and significant interests of judicial economy will be served by definitively establishing the threshold standard and propriety of an evidentiary hearing.

RELEVANT FACTUAL BACKGROUND

A. The Gatekeeper Provision Was Adopted To Prevent Baseless Litigation.

8. HMIT was required to file the Motion in accordance with a provision in Highland's confirmed Plan known as the "gatekeeper" (the "Gatekeeper Provision"). (Morris Dec. Ex. 1 at 51–52.)[3] The Gatekeeper Provision states, in pertinent part, that:

> [N]o 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 . . . ***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 such Protected Party.

(*Id*. (emphasis added).)[4]

9. The Gatekeeper Provision is not a garden-variety plan provision. Rather, as this Court stated in its order confirming the Plan,[5] the Gatekeeper Provision was adopted as a direct result of Dondero's history of harassing, costly litigation. In describing the factual support for the Gatekeeper Provision, this Court observed that "prior to the commencement of the Debtor's

[3] References to the "Plan" are to the *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P. (as Modified)*. (Morris Dec. Ex. 1.) Citations to "Morris Dec. Ex. __" are to the exhibits attached to the *Declaration of John A. Morris In Support of Highland Capital Management, L.P., Highland Claimant Trust, and James P. Seery, Jr.'s Joint Opposition to Hunter Mountain Investment Trust's Motion for Leave to File Verified Adversary Proceeding* accompanying this Opposition.

[4] Under the Plan, HMIT is an "Enjoined Party," and HCMLP, the Trust, Seery (in various capacities), Farallon, and Stonehill (in their capacities as members of the COB approving Seery's compensation) are "Protected Parties." (Plan Arts. I.B.56, I.B.105.)

[5] (Morris Dec. Ex. 2 (the "Confirmation Order").)

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 . . . . 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." (Confirmation Order ¶ 77.)

10. The Court further found that the "Dondero Post-Petition Litigation [as defined] 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.'" (*Id*. ¶ 78.)

11. These findings of fact—all of which the Fifth Circuit left undisturbed while affirming, in relevant part, the Confirmation Order—were the foundation upon which the Gatekeeper Provision was adopted:

> 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.

(*Id*. ¶ 79 (emphasis added).)

B. Dondero, Patrick, And HMIT Unsuccessfully Search For Allegations To Manufacture A Complaint.

12. HMIT's proposed Complaint is premised on two primary allegations emanating from Dondero: (i) Seery supposedly shared with the Claims Purchasers "material, non-public inside information" that he had obtained from Dondero as part of a *quid pro quo* pursuant to which the Claims Purchasers would someday return the favor by joining the COB and "rubber-stamping" Seery's compensation package, and (ii) a representative of Farallon essentially confessed to the arrangement in one or more phone calls with Dondero in the late Spring of 2021. Despite knowing

of these alleged "facts," Dondero, Mark Patrick ("Patrick"),[6] HMIT's purported manager, and HMIT did not bring any claims but instead sought discovery—which two different Texas state courts denied.

1. The First Rule 202 Petition

13. On July 22, 2021, Dondero filed a petition in Texas state court seeking pre-suit discovery against Farallon and Alvarez & Marsal pursuant to Tex. R. Civ. P. 202 (the "First Rule 202 Petition"). (Morris Dec. Ex. 3.) The First Rule 202 Petition was based, in part, on Dondero's allegations that (i) Seery possessed "non-public, material information" that "[u]pon information and belief . . . was the basis for instructing Farallon to purchase the Claims," and that (ii) he had a telephone call with Michael Linn ("Linn"), a representative of Farallon, in which Linn allegedly told Dondero that "Farallon had purchased the claims sight unseen—relying entirely on Mr. Seery's advice solely because of their prior dealings." (*Id*. ¶¶ 21, 23.)[7]

14. After the targets of the First Rule 202 Petition removed it to the Bankruptcy Court, this Court held a hearing, after which it entered an Order remanding the proceeding back to Texas state court despite having "grave misgivings." (Morris Dec. Ex. 6 at 20.) In doing so, the Court noted that it was "familiar with the concept of claims-trading in bankruptcy (including the fact that, for decades now, since a rule change in the last century, no court approval and order is necessary unless the transferor objects)" and that it appeared that Dondero's motives were "highly suspect." (*Id*. at 21.)

[6] Patrick has worked closely with Dondero for over a decade. Patrick was hired by Highland in 2008 and now serves as manager of the "Charitable DAF," which is controlled by Dondero. On August 3, 2021, this Court held Patrick "in civil contempt of court" after "basically abdicating responsibility" for "executing the litigation strategy" to Dondero. (Aug. 3, 2021 Order at 20–21, 30, Docket No. 2660.)

[7] As described in more detail below, Dondero later amended the First Rule 202 Petition (Morris Dec. Ex. 4) to, among other things, modify his description of his conversation with Linn and, several weeks after doing so, offered his third sworn version of his purported communication(s) with Farallon (*id.* Ex. 5).

15. After remand, the Texas state court slammed the gate closed, denying the First Rule 202 Petition (as amended) and dismissing Dondero's case. (Morris Dec. Ex. 7.)

2. The Second Rule 202 Petition

16. Seven months later, in January 2023, HMIT filed another petition in a different Texas state court again seeking pre-suit discovery regarding, among other things, alleged wrongdoing in connection with the Claims Purchasers' acquisition of claims in the Debtor's bankruptcy case. (Morris Dec. Ex. 8 (the "Second Rule 202 Petition").) While the Second Rule 202 Petition was embellished and contained a few more speculative and conclusory assertions, it was based on many of the same allegations contained in the First Rule 202 Petition. Indeed, Dondero submitted yet another sworn statement, this one in support of the Second Rule 202 Petition, which included the fourth version of his purported communication(s) with Farallon. (Morris Dec. Ex. 9.)

17. On March 8, 2023, the Texas state court again slammed the gate closed, denying the Second Rule 202 Petition and dismissing HMIT's case. (Morris Dec. Ex. 10.)

18. Having been refused entry by two different Texas state courts, HMIT finally knocked on this Court's door on March 28, 2023 by filing the Motion, on an emergency basis, and contending that its 18-month detour in the Texas state court system left it at risk of blowing the statute of limitations on certain claims. The Motion is largely based on the same threadbare facts and speculative and conclusory statements that were insufficient to obtain discovery in both the First Rule 202 Petition and the Second Rule 202 Petition.

C. The Premise Of HMIT's Proposed Complaint—An Alleged *Quid Pro Quo* Between Seery And The Claims Purchasers—Is Demonstrably False.

19. HMIT asserts various legal theories resting on the assertion that Seery passed on material, non-public information concerning MGM to his purportedly "past business partners and close allies" Farallon and Stonehill, so that they could buy claims on the cheap and later reward

Seery by "rubber-stamp[ing]" an oversized compensation package. (Mot. ¶¶ 22, 24; *see also* Compl. ¶¶ 3–4, 16, 47, 54, 71, 77.)

20. HMIT primarily relies on: (i) an email Dondero sent to Seery on December 17, 2020, in which Dondero purportedly disclosed material, non-public inside information; (ii) Dondero's prior sworn statements concerning, among other things, his supposed recollection of one or more telephone calls he had with one or more representatives of Farallon in the late Spring of 2021; and (iii) two letters summarizing "investigations" commissioned by Dondero, the results of which were apparently delivered to the Executive Office of the United States Trustee ("EOUST"). (Mot. ¶ 1 ("This Motion is separately supported by . . . the declarations of James Dondero, dated May 2022 (Ex. 2), James Dondero, dated February 2023 (Ex. 3), and Sawnie A. McEntire with attached evidence (Ex. 4).").)

21. Based on the facts set forth below, and as will further be demonstrated at the upcoming hearing, HMIT cannot meet its burden of establishing that there is a good faith basis for the allegations concerning the "*quid pro quo.*"

D. The Allegations Concerning MGM and Insider Trading Have No Basis In Fact.

22. As a member of MGM's Board, Dondero was admittedly the source of the so-called material, non-public inside information. (Compl. ¶ 45.) On December 17, 2020, Dondero—in violation of an existing temporary restraining order—sent an email to Seery and others with the subject line "Trading Restriction re MGM – material non public information" stating:

> Just got off a pre board call, board call at 3:00. Update is as follows: Amazon and Apple actively diligencing in Data Room. Both continue to express material interest. Probably first quarter event, will update as facts change. Note also any sales are subject to a shareholder agreement.

(Morris Dec. Ex. 11 (the "MGM E-Mail").)[8]

1. Dondero Had An Axe To Grind When He Sent The MGM E-Mail.

23. By December 17, 2020, Dondero viewed Seery as his enemy. The MGM E-Mail was initially just another clumsy and improper attempt to impede the Debtor's asset sales (*see infra* ¶ 25), but when that failed, Dondero shifted gears and began peddling the "inside information" angle, in multiple forums, hoping to make life difficult for Seery and anyone Dondero perceived to be supporting him.[9] But viewed in context, the MGM E-Mail and related allegations provide no basis for the assertion of "colorable" claims.

24. After causing the Debtor to file for bankruptcy protection in October 2019, Dondero was forced to surrender his control positions at the Debtor—including his positions as President and Chief Executive Officer—in January 2020 as part of a broader corporate governance settlement entered into to avoid the appointment of a Chapter 11 trustee. (Morris Dec. Ex. 12.) He remained an unpaid employee of the Debtor, including maintaining his title as portfolio manager for all funds and investment vehicles for which he then held titles, subject to the authority of the newly-appointed independent board of directors (the "Independent Board").[10]

25. By the Fall of 2020, however, the Independent Board demanded (and obtained) Dondero's resignation, and the Debtor had (1) reached proposed settlements with certain of its larger creditors, (2) proposed an asset-monetization plan, (3) obtained court approval of its

[8] Notably, the MGM E-Mail is internally inconsistent because it simultaneously purports to impose a "[t]rading [r]estriction" while also stating that "sales are subject to a shareholder agreement," which permits sales in certain circumstances.

[9] Neither Dondero nor HMIT ever explain how Dondero could have disclosed "material non-public inside information" that he purportedly obtained as a member of the MGM Board without violating his own fiduciary duties to MGM. The absence of any explanation is further indication that Dondero did not believe that the MGM E-Mail contained "material non-public inside information."

[10] In July 2020, Seery was appointed Chief Executive Officer and Chief Structuring Officer of the Debtor. (Morris Dec. Ex. 36.)

Disclosure Statement, and (4) begun to solicit votes in support of its proposed Plan. In response to these developments and others, Dondero began disrupting preparations for the implementation of the proposed Plan. The events in the weeks leading up to the MGM E-Mail are as follows:

- October 9: In accordance with the Independent Board's demand, made after threats and disruptions to the Debtor's operations, Dondero is forced to resign from all positions with the Debtor and its affiliates (Morris Dec. Ex. 13);
- October 16: Dondero's affiliates attempt to impede the Debtor's trading activities by demanding—with no legal basis—that Seery cease selling certain assets (*id.* Ex. 14; *id.* Ex. 15 at 13–15);
- November 24: This Court enters an Order approving the Debtor's Disclosure Statement, scheduling the confirmation hearing on the Debtor's Plan for January 13, 2021, and granting related relief (*id.* Ex. 16);
- November 24–27: Dondero personally interferes with certain securities trades ordered by Seery (*id*. Ex. 15 at 30–36);
- November 30: The Debtor provides written notice of termination of shared services agreements with Dondero's affiliates, NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P. ("HCMFA"; together with NexPoint, the "Advisors") (*id.* Ex. 17);
- December 3: The Debtor makes written demands to Dondero and certain affiliates for payment of all amounts due under certain promissory notes that had an aggregate face amount of more than $60 million (*id.* Exs. 18–21);
- December 3: Dondero responds by threatening Seery in a text message: "***Be careful what you do -- last warning***" (*id.* Ex. 22 (emphasis added));
- December 10: Dondero's interference and threat cause the Debtor to seek and obtain a temporary restraining order ("TRO") against Dondero (*id.* Ex. 23);
- December 16: The Court denies as "frivolous" a motion filed by certain Dondero affiliates in which they sought "temporary restrictions" on certain asset sales (*id.* Ex. 24); and
- December 17: After exhausting other avenues to curtail the asset sales Debtor conducted in furtherance of the proposed Plan, Dondero sends the MGM E-Mail to Seery (*id.* Ex. 11).

2. Dondero Had No Duty To Send The MGM E-Mail To Seery And He Violated An Existing TRO When He Did So.

26. With his efforts to disrupt the proposed Plan stymied, Dondero sent the MGM E-Mail to Seery. While HMIT alleges that Dondero disclosed "material non-public information regarding Amazon and Apple's interest in acquiring MGM" to Seery on December 17, 2020 (Compl. ¶ 45), HMIT does not state or suggest why Dondero did so.

27. That failure is unsurprising. As of December 17, 2020, Dondero owed no duty of any kind to the Debtor or any entity controlled by the Debtor because (i) in January 2020, he surrendered direct and indirect control of the Debtor to the Independent Board as part of the corporate governance settlement (*see* Docket Nos. 339, 354-1 (Term Sheet)), and (ii) in October 2020, he resigned from all roles at the Debtor and affiliates.

28. Notably, Dondero admitted elsewhere that his goal in sending the MGM E-Mail was to impede the Debtor and Seery from engaging in any transactions involving MGM:

> On December 17, 2020, I sent an email to employees at HCM, including the then Chief Executive Officer and Chief Restructuring Officer Jim Seery, containing non-public information regarding Amazon and Apple's interest in acquiring MGM. I became aware of this information due to my involvement as a member of the board of MGM. ***My purpose was to alert Mr. Seery and others that MGM stock, which was owned either directly or indirectly by HCM, should be on a restricted list and not be involved in any trades***.

(Morris Dec. Ex. 9 ¶ 3 (emphasis added).)

29. Dondero had no relationship of any kind with the Debtor when he sent the MGM E-Mail, and he directly violated the TRO by sending it to Seery without copying Debtor's counsel.[11] Particularly against the backdrop of Dondero's attempted interference with the Debtor's

[11] The TRO enjoined Dondero from, among other things, "communicating… with any Board member" (including Seery) without including Debtor's counsel. (Morris Dec. Ex. 23 ¶ 2(a).)

trading activities just weeks before and just days after December 17, 2020,[12] the MGM E-Mail was another transparent attempt to impede asset sales and undermine Seery's efforts to bring the Debtor's bankruptcy to a close.

3. The MGM E-Mail Did Not Disclose Material, Non-Public Inside Information.

30. HMIT's contention that the MGM E-Mail contained "material non-public inside information" is belied by press reports issued ***before*** December 17, 2020.

31. For example, as early as January 2020, Apple and Amazon were identified as being among a new group of "Big 6" global media companies and MGM was identified as being a leading media acquisition target. Indeed, according to at least one media report, "MGM, in particular, seems like a logical candidate to sell this year" having already held "preliminary talks with Apple, Netflix and other larger media companies." (Morris Dec. Ex. 25.)

32. In October 2020, the Wall Street Journal reported that MGM's largest shareholder, Anchorage Capital Group ("Anchorage"), was facing mounting pressure to sell the company. Anchorage was led by Kevin Ulrich, who also served as Chairman of MGM's Board. The article reported that "[i]n recent months, Mr. Ulrich has said he is working toward a deal," and he specifically named Amazon and Apple as being among four possible buyers. (*Id.* Ex. 26.)

33. The forgoing is a small sample of publicly available information showing that MGM and Anchorage faced substantial pressure in 2020 and were contemplating a sale, and that Amazon and Apple were expected to be among interested bidders. No one following the MGM story would have been surprised to learn in December 2020 that Apple and Amazon were conducting due diligence and had expressed "material interest" in acquiring MGM.

[12] (Morris Dec. Ex. 15 at 30–36.)

34. Even if the MGM E-Mail contained "material non-public information" when Dondero sent it on December 17, 2020 (which it did not), its substance was fully and publicly disclosed to the market in the days and weeks that followed.

35. For example, on December 21, 2020, a Wall Street Journal article titled *MGM Holdings, Studio Behind 'James Bond,' Explores a Sale* (the "Wall Street Journal Article"), reported that MGM had "tapped investment banks Morgan Stanley and LionTree LLC and begun a formal sale process," and had "a market value of around $5.5 billion, based on privately traded shares and including debt." The Wall Street Journal Article reiterated that (i) Anchorage "has come under pressure in recent years from weak performance and defecting clients, and its illiquid investment in MGM has become a larger percentage of its hedge fund as it shrinks," and (ii) "Mr. Ulrich has told clients in recent months he was working toward a deal for the studio and has spoken of big technology companies as logical buyers." (*Id.* Ex. 27.)

36. The Wall Street Journal article thus contained more information than the MGM E-Mail, insofar as the former (i) disclosed that investment bankers had been retained; (ii) disclosed the identity of the investment bankers; (iii) reported that MGM had commenced a "formal sales process"; (iv) provided an indication of market value; and (v) reiterated that Anchorage, MGM's largest shareholder, was under pressure to sell its illiquid position and was actively "working toward a deal for the studio."

37. The Wall Street Journal's reporting was picked up and expanded upon in other publications soon after. For example:

- On December 23, 2020, Business Matters published an article specifically identifying Amazon as a potential suitor for MGM. The article, titled *The World is net enough! Amazon Joins other Streaming services in £4bn Bidding war for Bond films as MGM Considers Selling Back Catalogue*, cited the Wall Street Journal Article and further reported that MGM "hopes to spark a battle that could interest streaming services such as Amazon Prime" (*id.* Ex. 28);

- On December 24, 2020, an article in iDropNews specifically identified Apple as entering the fray. In an article titled *Could Apple be Ready to Gobble Up MGM Studios Entirely?*, the author observed that "it's now become apparent that MGM is actually up on the auction block," noting that the Wall Street Journal was "reporting that the studio has begun a formal sale process" and that Apple—with a long history of exploratory interest in MGM—would be a likely bidder (*id.* Ex. 29); and

- On January 15, 2021, Bulwark published an article entitled *MGM is For Sale (Again)* that identified attributes of MGM likely to appeal to potential purchasers and handicapped the odds of seven likely buyers—with Apple and Amazon named as two of three potential buyers most likely to close on an acquisition (*id.* Ex. 30).

4. Dondero's Conduct Confirms That He Did Not Believe He Disclosed Material, Non-Public Inside Information To Seery; The MGM E-Mail Played No Role In The HarbourVest Settlement.

38. Dondero's conduct further demonstrates that he did not believe he disclosed material, non-public information to Seery in December 2020.

39. HMIT contends that, upon receipt of the MGM E-Mail, "Seery should have halted all transactions involving MGM stock, yet just six days later Seery filed a motion in the Bankruptcy Court seeking approval of the Debtor's settlement with HarbourVest – resulting in a transfer to the Debtor's Estate of HarbourVest's interest in a Debtor-advised fund, Highland CLO Funding, Ltd. ("HCLOF"), which held substantial MGM debt and equity." (Compl. ¶ 46.) These allegations do not withstand scrutiny for several reasons.

40. ***First***, the Debtor and HarbourVest had already reached an agreement in principle—including the core question of consideration—to settle their disputes on December 10, 2020, ***a week before*** Dondero sent the MGM E-Mail to Seery. (*See* Morris Dec. Ex. 31.)[13] Thus, even assuming that the MGM E-Mail contained "material non-public inside information" (which it did

[13] In its motion for approval of the HarbourVest settlement, Highland valued the interest in HCLOF that it was receiving as part of the settlement of HarbourVest's claim at $22.5 million. Dondero and other affiliates ostensibly controlled by Patrick have previously alleged that the valuation was "stale." It was not; rather, it was based on the then most recent report made available to holders of interests in HCLOF, including Dondero. (Morris Dec. Ex. 31-a.) In any event, HCLOF did not directly own any "MGM debt and equity."

not), the substance of that communication played no role in Seery's negotiations, which had concluded before he received the MGM E-Mail.

41. ***Second,*** *neither Dondero nor any of his affiliates ever raised this issue with the Court when lodging objections to the HarbourVest settlement*, which were filed just weeks after Dondero sent the MGM E-Mail to Seery. In fact, Dondero contended that the Debtor was ***overpaying*** HarbourVest via the settlement to buy votes and that the settlement was neither reasonable nor in the best interests of the Debtor's estate. (Morris Dec. Ex. 32.)

42. Dondero and HMIT cannot reconcile their current assertion that Seery misused allegedly "material, non-public inside information" with their failure to object to the HarbourVest settlement on that basis.

5. The Texas State Securities Board Has Determined That No Action Is Warranted.

43. In its Motion, HMIT claimed that the Texas State Securities Board (the "TSSB") "opened an investigation into the subject matter of the insider trades at issue," and argued that the "continuing nature of this investigation underscores HMIT's position that the claims described in the attached Adversary Proceeding are plausible and certainly far more than merely 'colorable.'" (Mot. ¶ 37.)

44. HMIT's characterization is misleading because the TSSB never "opened an investigation"; rather, the TSSB reviewed a "complaint" (undoubtedly filed at Dondero's direction). That review is now complete. On May 9, 2023, the TSSB issued the following statement:

> The staff of the Texas State Securities Board (the "Staff") has completed its review of the complaint received by the Staff against Highland Capital Management, L.P. The issues raised in the complaint and information provided to our Agency were given full consideration, and a decision was made that no further regulatory action is warranted at this time.

(Morris Dec. Ex. 33.)

45. The TSSB's decision that no further action is warranted underscores the Highland Parties' position that the claims described in the proposed Complaint are neither plausible nor "colorable."

E. HMIT's Allegations Concerning Seery's Alleged Relationships With The Claims Purchasers Are Unsupported And Provide No Foundation For The Purported Inferences.

46. HMIT asserts that Seery and the Claims Purchasers had substantial pre-existing relationships that provided the foundation for the alleged "*quid pro quo*." (*See*, *e.g.*, Compl. ¶¶ 14, 47–48.) These allegations appear to be based solely on a review of Seery's resume and some internet searches conducted as part of the "investigation" commissioned by Dondero, the results of which were presented to the EOUST in an unsuccessful effort to convince that agency to investigate further. (*See* Mot. Ex. 2 ¶ 4 & Exs. A–B.) As HMIT's pleadings and the documents presented to the EOUST show, and as will be further established at the hearing, these conclusory allegations have no basis in fact.

1. HMIT's Allegations Concerning Stonehill

47. HMIT's conclusory allegation that Seery and Stonehill had a "close business relationship" is based on two alleged "facts."

48. ***First***, HMIT contends that Seery "joined a hedge fund, River Birth Capital," that "served on the creditors committee in other bankruptcy proceedings" with Stonehill. (Compl. ¶ 48.) But HMIT fails to (i) identify those proceedings or when they occurred; (ii) allege that Seery was aware of, let alone participated in, any "bankruptcy proceedings" with Stonehill; or (iii) suggest how the unidentified "bankruptcy proceedings" resulted in a relationship close enough to support the wide-ranging conspiracy HMIT imagines.

49. HMIT tries to bolster this supposed connection by pointing to a decade-old court filing showing that the law firm for which Seery worked (Sidley Austin LLP) represented a "Steering Group of Senior Secured Noteholders" in the Blockbuster bankruptcy, and that, at some point, Stonehill was one of five members of that group. (Mot. Ex. 2 at A-66.)[14] There is no evidence or non-conclusory allegation that Seery (or his then-firm) ever represented Stonehill individually or that any individual involved in the Blockbuster bankruptcy on Stonehill's behalf had any involvement in Stonehill's decision to purchase claims in the Highland bankruptcy.

50. ***Second***, HMIT alleges that (i) a global asset management firm called GCM Grovesnor held four seats on the Redeemer Committee; (ii) "upon information and belief" GCM Grovesnor "is a significant investor in Stonehill and Farallon"; (iii) Grovesnor "through Redeemer, played a large part in appointing Seery as a director of Strand Advisors"; and (iv) Seery was therefore "beholden to Grovesnor from the outset, and, by extension, Grovesnor's affiliates Stonehill and Farralon [*sic*]." (*Id.*)

51. These allegations, however, are based on unsupported speculation and tortured inferences, and certain of them make no sense.[15]

2. HMIT's Allegations Concerning Farallon

52. Likewise, the speculative and unsupported allegations concerning Seery's alleged relationship with Farallon cannot withstand scrutiny.

[14] The Complaint incorrectly claims that "Seery represented Farallon as its legal counsel" (Compl. ¶ 48), but its Motion appends a court filing referring to Stonehill (Mot. Ex. 2 at A-66).

[15] For example, HMIT alleges that Grovesnor is a "significant investor" in Stonehill and Farallon and that Grovesnor is an "affiliate" of Stonehill and Farallon, while also effectively alleging that Stonehill and Farallon fleeced the Redeemer Committee by buying its claim while in possession of "material, non-public inside information." Notably, the Redeemer Committee—the actual party that would have been harmed if HMIT's allegations had any merit (which they do not)—has never sought to intervene in this matter even though Dondero first floated these allegations in 2021 as part of the First Rule 202 Petition (nor, for that matter, has Acis, UBS, or HarbourVest ever voiced any concerns about supposedly being victimized by the Claims Purchasers).

53. HMIT alleges "upon information and belief" that Seery "conducted substantial business with Farallon" while he was the Global Head of Fixed Income Loans at Lehman Brothers. (Compl. ¶ 48.) But the only "fact" supposedly supporting this broad allegation is a single page taken from (what appears to be) a Lehman Brothers real estate group promotional document stating that Farallon participated in a secured real estate loan in 2007. (Mot. Ex. 2 at A-65.) HMIT does not allege that Seery knew of, let alone participated in, this transaction, nor does it identify any other business (let alone "substantial business") that Seery allegedly conducted with Farallon while at Lehman Brothers.

F. HMIT's "Insider Trading" Allegations Are Unsupported And Provide No Foundation For The Purported Inferences.

54. One of HMIT's principal allegations is that, as part of the purported *quid pro quo*, Seery disclosed to the Claims Purchasers "material non-public inside" information concerning MGM that he obtained from Dondero to entice them to buy claims in Highland's bankruptcy case. (*See, e.g.*, Compl. ¶¶ 13, 47, 50, 83, 89.)

1. Dondero's Description Of His Communication(s) With Farallon Have Changed Over Time.

55. HMIT's Motion is based in substantial part on Dondero's description of communication(s) he purportedly had with one or two representatives of Farallon in the "late spring" of 2021 concerning Farallon's acquisition of certain claims in the Highland bankruptcy. (Mot. ¶ 1 & Ex. 3; Morris Dec. Ex. 9.)

56. Because (i) Dondero's description of his communication(s) with Farallon has substantially changed over time, (ii) neither HMIT nor Dondero offer any rational reason why Farallon would voluntarily confess to improprieties to a third party with a well-earned reputation

for using overly aggressive litigation tactics, and (iii) certain aspects of his various descriptions are contradicted by documentary evidence, they cannot be the basis for any claim.[16]

57. In the First Rule 202 Petition filed in July 2021, Dondero swore, among other things, that:

> [Seery] has an age-old connection to Farallon and, upon information and belief, advised Farallon to purchase the claims.
>
> On a telephone call between [Dondero] and a representative of Farallon, Michael Lin [*sic*], Mr. Lin [*sic*] informed [Dondero] that Farallon had purchased the claims sight unseen—relying entirely on Mr. Seery's advice solely because of their prior dealings.
>
> As Highland's current CEO, Mr. Seery had non-public, material information concerning Highland. Upon information and belief, such non-public, material information was the basis for instructing Farallon to purchase the Claims.

(Morris Dec. Ex. 3 ¶¶ 20–21, 23 ("Version 1").)

58. Version 1 is notable because it (i) did not state what Dondero said, if anything, (ii) referred to a single phone call, (iii) made no mention of MGM, (iv) made no mention of Raj Patel (who features later); and (v) stated only "upon information and belief" that Farallon purchased the Claims based on "non-public, material information."[17]

59. On May 2, 2022, Dondero amended the First Rule 202 Petition. In his new verified pleading, Dondero swore, among other things, that:

> [Seery] has an age-old connection to Farallon and, upon information and belief, advised Farallon to purchase the claims.

[16] Notably, there is no allegation that anyone ever communicated with Stonehill about its claims purchases (let alone obtained a "confession"); thus, HMIT's "conspiracy" theory against Stonehill rests on nothing but rank speculation based on unsupportable inferences.

[17] Later in 2021, Dondero "commissioned an investigation by counsel" who produced written reports to the EOUST. The first such report was prepared by Douglas Draper, counsel to Dondero's family trusts, and delivered to the EOUST on October 5, 2021. Draper provided several reasons to support his speculation that "Farallon and Stonehill may have been provided material, non-public information to induce their purchase of claims" and to justify his request for further investigation—but conspicuously failed to mention Dondero's telephone call(s) with Farallon. (Mot. Ex. 2-A at 7.)

> On a telephone call between [Dondero] and Michael Lin [*sic*], a representative of Farallon, Mr. Lin [*sic*] informed [Dondero] that Farallon had purchased the claims sight unseen ***and with no due diligence—100% relying on Mr. Seery's say-so because they had made so much money in the past when Mr. Seery told them to purchase claims***.
>
> In other words, ***Mr. Seery had inside information on the price and value of the claims that he shared with no one but Farallon for their benefit***.

(*Id.* Ex. 4 ¶¶ 22–24 ("Version 2") (emphasis added).)

60. Like Version 1, Version 2 also (i) did not state what Dondero said, if anything; (ii) referred to a single phone call; (iii) made no mention of MGM; and (iv) made no mention of Raj Patel. But in contrast to Version 1, Version 2 embellished Linn's alleged comments and—more importantly—now expressly asserted that Seery "shared" inside information with "no one but Farallon" rather that adopting Version 1's statement that "upon information and belief," Farallon purchased the Claims based on "non-public, material information."[18]

61. About four weeks later, Dondero provided yet another version of his discussion with Linn. In a declaration sworn to on May 31, 2022, Dondero stated, among other things, that:

> Last year, I called Farallon's Michael Lin [*sic*] about purchasing their claims in the bankruptcy. ***I offered them 30% more than what they paid***. I was told by Michael Lin [*sic*] of Farallon that they purchased the interests ***without doing any due diligence other than what Mr. James Seery—the CEO of Highland—told them, and that he told them that the interests would be worth far more than what Farallon paid***.

(*Id.* Ex. 5 ¶ 2 ("Version 3") (emphasis added).)

62. Version 3 introduces several new topics. For example, Dondero asserts for the first time that he called Linn because he was interested in purchasing Farallon's claims. Dondero also

[18]If, as Dondero contends, Seery "shared" inside information with "no one but Farallon," then he did not share the inside information with Stonehill.

asserts that he offered "30% more than what they paid."[19] Finally, and significantly, Dondero asserts for the first time that Linn reported Seery telling him that the "interests would be worth far more than what Farallon paid."

63. On February 15, 2023, Dondero filed yet another sworn statement concerning his 2021 discussion(s) with Farallon, this time in support of HMIT's Verified Rule 202 Petition. (*Id.* Ex. 9.) In this version, Dondero stated that:

> In late Spring of 2021, I had phone calls with two principals at Farallon Capital Management, LLC ("Farallon"), ***Raj Patel*** and Michael Linn. During these phone calls, Mr. Patel and Mr. Linn informed me that Farallon had a deal in place to purchase the ***Acis and HarbourVest claims***, which I understood to refer to claims that were a part of settlements in the HCM Bankruptcy Proceedings. Mr. Patel and Mr. Linn stated that Farallon agreed to purchase these claims based solely on conversations with Mr. Seery because they had made significant profits when Mr. Seery told them to purchase other claims in the past. ***They also stated that they were particularly optimistic because of the expected sale of MGM***.

(*id*. Ex. 9 ¶ 4 ("Version 4") (emphasis added).)

64. Version 4 introduces still more new topics. For example, Dondero asserted for the first time that (i) more than one telephone call occurred; (ii) Raj Patel also participated in these calls on Farallon's behalf; (iii) he was told that "Farallon had a deal in place to purchase the Acis and HarbourVest claims"; and (iv) he learned that Farallon was "***particularly optimistic because of the expected sale of MGM***."

65. Finally, in its Motion, HMIT attributes statements to Farallon that even Dondero never described. For example, HMIT contends that "Farallon bragged about the value of its investment referencing non-public information regarding Amazon, Inc.'s ('Amazon') interest in

[19] Ironically, Dondero appears to have offered to purchase Farallon's claims without conducting any due diligence because (i) he provides no indication that he knew at that time how much Farallon paid for its claims yet he blindly offered to pay "30% more than what" Farallon paid, and (ii) HMIT alleges that the Debtor was not transparent. (*See* Compl. ¶¶ 51–53.)

acquiring Metro-Goldwyn-Mayer Studios Inc." (Mot. ¶ 32.)[20] While HMIT cites Version 4 as support, neither that version nor any prior version is consistent with HMIT's description of Dondero's purported communication(s) with Farallon.[21]

2. Dondero's Offer to Purchase Farallon's and Stonehill's Claims In 2022 Contradicts HMIT's Allegations.

66. According to HMIT, Dondero offered to buy Farallon's claims in the Highland bankruptcy for 30% more than what Farallon was paid, but that Farallon insisted it would not sell at any price. (Morris Dec. Ex. 5 ¶ 2.)

67. Yet, on October 14, 2022, before the Second Rule 202 Petition was filed, HCMFA (one of Dondero's advisory firms) made written offers to Stonehill and Farallon to purchase their claims at cost "plus a five percent (5%) return." (Morris Dec. Ex. 35.) Dondero's offer to purchase claims at 5% above cost is inconsistent with his purported knowledge that Farallon would not sell at any price.

G. A Rational Basis Exists For the Claims Purchases—Although Only the Claim Sellers Could Have Been Harmed in Any Event.

68. HMIT insists that it "made no sense" for the Claims Purchasers to buy claims because "the publicly available information [] did not offer a sufficient potential profit to justify the publicly disclosed risk," and "their investment was projected to yield a small return with

[20] This purported statement that HMIT attributes to Farallon makes little sense because the MGM-Amazon deal was publicly announced on May 26, 2021 (Morris Dec. Ex. 34), before Dondero and Farallon ever spoke.

[21] Conspicuously absent from HMIT's pleadings is any evidence corroborating any of the five versions of Dondero's conversation(s) with Farallon. Given the importance of the Farallon's alleged confessional, one would have expected Dondero to contemporaneously (i) send a confirming e-mail to Farallon to make sure there was a written record of the discussion, (ii) send an e-mail to a colleague so that others were informed, (iii) make notes to himself; or (iv) tell someone what happened. Yet, no such corroborating evidence was presented or referred to in the First Rule 202 Petition, either of the EOUST Letters, the Second Rule 202 Petition, the Motion, the original proposed Complaint, the Supplement, or the amended proposed Complaint.

virtually no margin for error." (Compl. ¶ 3.) HMIT's arguments are belied by the publicly available facts and its own allegations.

69. In advance of Plan confirmation, the Debtor projected that Class 8 general unsecured creditors would recover 71.32% on their allowed claims. (Docket No. 1875 Ex. A.) In its proposed Complaint, HMIT sets forth the amounts the Claims Purchasers purportedly paid for their claims. (Compl. ¶ 42.) Taking into account the face amount of the allowed claims, the Claims Purchasers' projected profits (in millions of dollars) were as follows:

Creditor	Class 8	Class 9	Ascribed Value[22]	Purchaser	Purchase Price	Projected Profit
Redeemer	$137.0	$0.0	$97.71	Stonehill	$78.0	$19.71
Acis	$23.0	$0.0	$16.4	Farallon	$8.0	$8.40
HarbourVest	$45.0	$35.0	$32.09	Farallon	$27.0	$5.09
UBS	$65.0	$60.0	$46.39	Stonehill & Farallon	$50.0	($3.61)

70. As HMIT acknowledges, by the time Dondero spoke with Farallon in the "late spring" of 2021, the Claims Purchasers had acquired the allowed claims previously held by Acis, Redeemer, and HarbourVest. (Compl. ¶ 41 n.12.)[23] Based on an aggregate purchase price of $113 million, the Claims Purchasers would have expected to net over $33 million in profits, or nearly 30% on their investment, had Highland met its projections. The Claims Purchasers would make even more money if Highland beat its projections because they also purchased the Class 9 claims, and would therefore capture any upside. In this context, HMIT assertions in its proposed Complaint lack any rational basis.

[22] "Ascribed Value" is derived by multiplying the Class 8 amount by the projected recovery of 71.32% for that class.

[23] The UBS claims were not acquired until August 2021, long after the alleged "*quid pro quo*" was supposedly agreed upon and the MGM-Amazon deal was announced. (Morris Dec. Ex. 34.)

71. Notably, none of the selling claimholders—all of which are sophisticated parties that were represented by sophisticated counsel—have raised any objections or complaints. In fact, three of the four selling claimholders (Redeemer, Acis, and UBS) were members of the Official Committee of Unsecured Creditors.

72. Finally, even if HMIT's allegations had any merit (they do not), only the selling claimholders would have cause to complain. The estate (and HMIT) would not have been harmed because it made (and may in the future make) the exact same distributions to claimholders regardless of what entity owns the claims.

H. Seery's Compensation Structure Is Consistent With The Plan And The Trust Agreement, And Was The Product Of Arms'-Length Negotiations.

73. According to HMIT, Seery provided "material non-public information" to the Claims Purchasers so that he could someday "plant friendly allies onto the [COB] to rubber stamp compensation demands." (Mot. ¶ 22; *see also id.* ¶¶ 3, 24, 48.) HMIT alleges in its revised Complaint:

> As part of the scheme, the Defendant Purchasers obtained a position to approve Seery's ongoing compensation – to Seery's benefit and also to the detriment of the Claimant Trust, the Reorganized Debtor, and HMIT. Initially, Seery's compensation package was composed of a flat monthly pay [sic]. Now, however, it is also performance based. This allows the Defendant Purchasers to satisfy the *quid pro quo* at the heart of the scheme. Seery would help the Defendant Purchasers make large profits and they would help enrich Seery with big pay days.

(Compl. ¶ 4.)

74. Notably, these allegations (i) describe a compensation structure that is ***entirely consistent with*** the incentive compensation plan structure in the Court-confirmed Plan and set forth in the Trust Agreement; and (ii) are devoid of any actual facts (*e.g.*, the terms of Seery's compensation plan or how it was calculated or negotiated). In reality, Seery's compensation

package was the product of arm's-length negotiations with the COB (including the active participation of the COB's independent member) over a four-month period, the result of which was an incentive compensation plan that aligned Seery's interests with those of the Claimant Trust Beneficiaries (*i.e.*, to maximize value and creditor recoveries).

75. As a threshold matter, HMIT's allegation that "[i]nitially, Seery's compensation package was composed of a flat monthly pay [*sic*]" (Compl. ¶ 4]) is plainly wrong. Seery was appointed Highland's Chief Executive Officer (effective as of March 15, 2020) pursuant to a Bankruptcy Court order entered on July 16, 2020 without objection. (Morris Dec. Ex. 36 (the "July Order").) The July Order approved the terms of a separate employment agreement (a copy of which was included in the Debtor's motion (Docket No. 774 Ex. A-1) and attached to the July Order) (the "Original Employment Agreement").

76. Under the Original Employment Agreement, Seery was to receive (i) Base Compensation in the amount of $150,000 per month, ***plus*** (ii) a Restructuring Fee, the amount of which would be determined by whether a Case Resolution Plan (*i.e.*, a plan with substantial creditor support) or a Monetization Vehicle Plan (*i.e.*, a plan lacking substantial creditor support) was achieved (as those terms are defined in the Original Employment Agreement).

77. On November 24, 2020, after notice and a hearing, the Bankruptcy Court entered an Order (Docket No. 1476) approving the adequacy of *The Disclosure Statement of the Fifth Amended Plan of Reorganization of Highland Capital Management, L.P.* (Morris Dec. Ex. 37 (the "Disclosure Statement").) The Disclosure Statement provided in pertinent part that:

> The salient terms of each Trustee's employment, including such Trustee's duties and compensation shall be set forth in the Claimant Trust Agreement . . . . The Trustees shall each be entitled to reasonable compensation in an amount consistent with that of similar functionaries in similar types of bankruptcy cases.

(*Id.* Art. III.F.2(e); *see* Plan Art. IV.B.6 (incorporating identical language).)

78. The Trust Agreement was part of a Plan Supplement (as amended) filed in advance of the confirmation hearing (Morris Dec. Ex. 38), and provided in pertinent part:

> 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, (b) a success fee, and (c) severance.

(Trust Agmt. § 3.13(a)(i).)[24]

79. The Plan went effective on August 11, 2021, and, as a result, the COB was formed. The COB ultimately had three members: a representative of Farallon (Michael Linn), a representative of Stonehill (Christopher Provost), and an independent member (Richard Katz).

80. On August 26, 2021, the COB held a regularly scheduled meeting during which it discussed the incentive compensation program ("ICP"). The minutes of this meeting reflect that:

> Mr. Seery also presented the Board with an overview of his Incentive Compensation Program proposal which would include not only Mr. Seery but the current HCMLP team. (The terms and structure of the proposal had been previewed with the Board in prior operating models presented by Mr. Seery.) Mr. [Seery] reviewed the proposal and stated his view that the proposal was market based and was designed to align incentives between himself and the HCMLP team on the one hand and the Claimant Trust [B]eneficiaries on the other. ***The Board asked questions regarding proposal and determined that is [sic] would consider the proposal and revert to Mr. Seery with a counter proposal***.

(Morris Dec. Ex. 39 (emphasis added).)

[24] Seery was designated as the "Claimant Trustee" under the Trust Agreement. (Trust Agmt. 38 §1.1(e).

81. Far from being a "rubber stamp," the minutes show that the COB did not simply accept Seery's initial proposed ICP but "asked questions" and indicated that it would provide a "counter proposal."

82. On August 30, 2021, the COB convened for "an off-cycle (non-regular) meeting." As reflected in the minutes of this meeting, the COB again discussed the ICP:

> Mr. Katz began the meeting by walking the Oversight Board and Mr. Seery through the Oversight Board's counter-proposal to the HCMLP incentive compensation proposal, including the review of a spreadsheet and summary of the counter-proposal. Discussion was joined by Mr. Linn and Mr. Stern. Mr. Seery asked numerous questions and received detailed responses from the Oversight Board. ***Mr. Seery and the Oversight Board agreed to continue the discussion and negotiations regarding the proposed incentive compensation plan for the Claimant Trustee and the HCMLP [employees]***.

(*Id.* Ex. 40 (emphasis added).)

83. Seery and the COB continued to exchange and discuss additional proposals and counter-proposals over the coming months.[25] Finally, on December 6, 2021, Seery and the COB executed a Memorandum of Agreement stating that:

> In accordance with the provisions of the Highland Claimant Trust Agreement and the Highland Capital Management, L.P. ("HCMLP") Plan of Reorganization, ***the Oversight Board of the Highland Claimant Trust and the Claimant Trustee/Chief Executive Officer of HCMLP engaged in robust, arm's length and good faith negotiations regarding the incentive compensation program for the Claimant Trust/CEO*** and the HCMLP post-effective date operating team ("HCMLP Team"). ***After considering various structures and incentives to motivate performance on behalf of the Claimant Trust***, the parties reached the binding

[25] In particular, (i) Seery delivered another proposal to the COB on October 9, 2021, which he further revised later in the month; (ii) Katz (the independent COB member) responded on behalf of the COB on October 26 and proposed that the parties agree upon the structure of the proposal before addressing the specific numbers; (iii) Seery responded on November 3; (iv) further discussions were held on November 9; (v) on November 17, Linn provided a "wholesome response" in which he "updated the term sheet" and raised certain issues that he did not believe would have "much a difference for this negotiation"; (vi) Seery wrote to the COB indicating that he wanted to "finalize the ICP" but had "a couple of asks and one question"; and (vii) still further negotiations took place thereafter.

> agreement reflected in the attached HCMLP and Claimant Trust Management Incentive Compensation Program.

(Morris Dec. Ex. 41 (emphasis added).)

84. Notably, in November 2021, one of the "investigative reports" commissioned by Dondero incorrectly speculated that "Mr. Seery's success fee presumably will be based on whether the Plan outperforms what was disclosed in the Plan Analysis." (Mot. Ex. 2-B at 14.) In fact, Seery's bonus is tied to creditor recoveries so that the interests of stakeholders are aligned.

85. Dondero's commissioned report also incorrectly "estimate[d] that, based on the estate's [alleged] $600 million value today, ***Mr. Seery's success fee could be approximate [sic] $50 million***." (*Id*.) In reality, under the negotiated terms of the ICP (Morris Dec. Ex. 41), the maximum bonus Seery can receive is approximately $8.8 million—which would require all Class 8 and 9 claimholders to receive cash distributions for the full amount of their claims plus interest—82.4% less than the baseless success fee presented to the EOUST on Dondero's behalf.

RELEVANT PROCEDURAL HISTORY

86. To avoid the appointment of a Chapter 11 trustee, on January 9, 2020, this Court approved a settlement (the "January Order"; Docket No. 339) removing Dondero from control of Highland and appointing an Independent Board consisting of John Dubel, Russell Nelms, and Seery (the "Independent Directors"). The January Order prohibited litigation against the Independent Directors without this Court's prior authorization and limited claims to those arising from willful misconduct or gross negligence.[26]

[26] (January Order ¶ 10 ("No entity may commence or pursue a claim or cause of action of any kind against any Independent Director . . . relating in any way to the Independent Director's role as an independent director . . . 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 . . . .").)

87. Highland later moved to have Seery appointed its Chief Executive Officer and Chief Restructuring Officer. This Court approved his appointment in the July Order (Morris Dec. Ex. 36), which like the January Order, prohibited litigation against Seery without this Court's prior authorization and limited claims to those arising from willful misconduct or gross negligence.[27]

88. On February 22, 2021, this Court issued the Confirmation Order confirming the Plan. The confirmed Plan included the Gatekeeper Provision prohibiting Enjoined Parties, including HMIT, from bringing claims against Protected Parties, including Seery, unless, after notice and a hearing, this Court found the claims "colorable." (Plan Art. IX.F.) The Gatekeeper Provision was affirmed by the Fifth Circuit. *NexPoint*, 48 F.4th at 425–26, 435–39. The detail factual findings in the Confirmation Order supporting the Gatekeeper Provision were not challenged or disturbed on appeal.

89. On August 11, 2021, the Plan became effective (Docket No. 2700), and pursuant to the Plan:

- All prepetition partnership interests in the Debtor, including HMIT's, were cancelled;
- HCMLP was reorganized as a Delaware limited liability partnership;
- The Trust, a Delaware statutory trust, was established pursuant to the Trust Agreement;
- HCMLP's limited partnership interests were issued to the Trust;
- HCMLP's general partnership interests were issued to HCMLP GP LLC, a newly-established Delaware limited liability company;

[27] (July Order ¶ 5 ("No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery . . . .").)

- The majority of HCMLP's assets, including its "Causes of Action,"[28] were transferred to the Trust;

- Seery was appointed reorganized HCMLP's Chief Executive Officer and trustee of the Trust (the "Claimant Trustee");

- "Estate Claims" (*i.e.*, Causes of Action against HCMLP's insiders)[29] were transferred to the newly-established Highland Litigation Sub-Trust (the "Litigation Trust"), a Delaware statutory trust and subsidiary of the Trust;

- An oversight board was appointed to oversee the management of the Trust, reorganized HCMLP, and the Litigation Trust;

- Holders of allowed general and subordinated unsecured claims (*i.e.*, Class 8 and 9) received interests in the Trust (collectively, the "Trust Interests") and became "Claimant Trust Beneficiaries" (as defined in the Plan); and

- Holders of the Debtor's prepetition partnership interests (*i.e.*, Class 10 and 11) were allocated unvested contingent interests (the "Contingent Interests") in the Trust that vest if, and only if, the Claimant Trustee certifies that all Claimant Trust Beneficiaries (*i.e.*, Class 8 and 9) have been paid in full, Class 8 have received post-petition interest, and all disputed claims in Class 8 and 9 have been resolved.

(*See* Plan Art. IV.)

90. On October 8, 2021, the Trust irrevocably transferred and assigned to the Litigation Trust "any and all Causes of Action not previously transferred or assigned by operation of the Plan, the Litigation Sub-Trust Agreement, or otherwise" except for causes of action then being

[28] "Causes of Action" are defined in the Plan as: "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." (Plan Art. I.B.19.)

[29] "Estate Claims" are defined in the Plan as "estate claims and causes of action against Dondero, Okada, other insiders of the Debtor, and each of the Related Entities, including any promissory notes held by any of the foregoing" other than causes of action against any current employee of Highland other than Dondero. (Plan Art. I.B.61.)

pursued by the Trust or which the Trust intended to pursue on behalf of entities managed by reorganized HCMLP. (*See* Morris Dec. Ex. 42.)[30]

91. On March 28, 2023, HMIT filed its Initial Motion with a proposed Verified Adversary Complaint totaling 387 pages with exhibits. This Court scheduled a conference for Monday, April 24, 2023. (Docket No. 3751.) On Friday, April 21, 2023, HMIT filed objections to any evidentiary hearing or briefing on its Initial Motion. ("Objs."; Docket No. 3758.) On Sunday, April 23, 2023, HMIT filed a Supplemental Motion with an amended proposed Verified Adversary Complaint, which added HCMLP and the Trust as nominal defendants and dropped a claim for "fraud by misrepresentation and material nondisclosure." (Docket No. 3760.) On April 24, 2023, this Court held a conference, set a briefing schedule on the Motion, and scheduled a hearing for June 8, 2023. (Docket Nos. 3763–64.)

LEGAL STANDARD

92. HMIT concedes, as it must, that its proposed lawsuit is subject to this Court's "gatekeeping protocol," and "the injunction and exculpation provision in the Plan." (Mot. ¶¶ 1, 4, 14; Supp. Mot. ¶ 11.) But HMIT fundamentally misunderstands the threshold showing it must make to clear that hurdle.

A. HMIT Misconstrues The "Colorability" Standard Established In The Gatekeeper Provision.

93. This Court made extensive factual findings and approved the Gatekeeper Provision on two grounds: (i) "the Supreme Court's 'Barton Doctrine,' *Barton v. Barbour*, 104 U.S. 126 (1881))," and (ii) "the notion of a prefiling injunction to deter vexatious litigants[] that has been approved by Fifth Circuit." (Confirmation Order ¶¶ 76–81.) Those doctrines operate to "prevent

[30] The October 8, 2021 transfer was publicly disclosed by the Litigation Trust in its litigation with HMIT, among others. *Kirschner v. Dondero*, Adv. Proc. No. 21-03076-sgj, Docket No. 211 (Bankr. N.D. Tex. Sept. 9, 2022).

baseless litigation designed merely to harass the post-confirmation entities," "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." (*Id.* ¶ 79.) The Fifth Circuit confirmed that "the injunction and gatekeeping provisions are sound," explaining that "[c]ourts have long recognized bankruptcy courts can perform a gatekeeping function," including "[u]nder the '*Barton*' doctrine." *NexPoint*, 48 F.4th at 435, 438–39 (collecting cases). The Fifth Circuit further recognized that the Gatekeeper Provision here was necessary to prevent "bad-faith litigation" from consuming the resources of the reorganized debtor and those working to maximize claims of legitimate stakeholders. *Id.*

94. Under the *Barton* doctrine, "[a] party seeking leave of court to sue a trustee must make a prima facie case against the trustee, showing that its claim is not without foundation." *VistaCare*, 678 F.3d at 232 (cleaned up) (citing *Anderson v. United States*, 520 F.2d 1027, 1029 (5th Cir. 1975); *Kashani v. Fulton (In re Kashani)*, 190 B.R. 875, 885 (B.A.P. 9th Cir 1995)); *see also, e.g.*, *CFTC v. Hunter Wise Commodities, LLC*, 2020 WL 13413703, at *1 (S.D. Fla. Mar. 5, 2020) ("Under the *Barton* doctrine, . . . before leave to sue a receiver or trustee is granted, the plaintiff must demonstrate that he has a *prima facie* case against the trustee or receiver.") (citing *Anderson*, 520 F.2d at 1029); *Fin. Indus. Assoc. v. SEC*, 2013 WL 11327680, at *4 (M.D. Fla. July 24, 2013) (same). Contrary to HMIT's contention, this standard "involves a greater degree of flexibility" than a "Rule 12(b)(6) motion to dismiss," because "the bankruptcy court, which, ***given its familiarity with the underlying facts and the parties***, is uniquely situated to determine whether a claim against the trustee has merit," and "[t]he bankruptcy court is also uniquely situated to determine the potential effect of a judgment against the trustee on the debtor's estate." *VistaCare*, 678 F.3d at 233 (emphasis added).

95. To satisfy the "*prima facie* case standard," "the movant must do more than meet the liberal notice-pleading requirements of Rule 8." *In re World Mktg. Chi., LLC*, 584 B.R. 737, 743 (Bankr. N.D. Ill. 2018) (cleaned up; collecting cases). "[I]f the [bankruptcy] court relied on mere notice-pleading standards rather than evaluating the merits of the allegations, the leave requirement would become meaningless." *Leighton Holdings, Ltd. v. Belofsky (In re Kids Creek Partners, L.P.)*, 2000 WL 1761020, at *2 (N.D. Ill. Nov. 30, 2000). "To apply a less stringent standard would eviscerate the protections" of the Gatekeeper Provision. *World*, 584 B.R. at 743 (quoting *Leighton*, 2000 WL 1761020, at *2).

96. Similarly, courts in the vexatious litigant context require the movant to "show that the claims sought to be asserted have sufficient merit," including that "the proposed filing is both procedural and legally sound," and "that the claims are not brought for any improper purpose, such as harassment." *Silver v. City of San Antonio*, 2020 WL 3803922, at *1 (W.D. Tex. July 7, 2020) (denying leave to file lawsuit); *see also Silver v. Perez*, 2020 WL 3790489, at *1 (W.D. Tex. July 7, 2020) (same). "[T]o protect courts and innocent parties from abusive and vexatious litigation[,] . . . courts may apply whatever standard deemed warranted when reviewing the proposed complaint." *Silver*, 2020 WL 3803922, at *6. "For a prefiling injunction to have the intended impact, it must not merely require a reviewing official to apply an already existing level of review," such as the "plausibility" standard for a Rule 12(b)(6) motion. *Id.* Rather, courts apply "an additional layer of review," and "may appropriately deny leave to file when even part of the pleading fails to satisfy the reviewer that it warrants a federal civil action" or that the "litigant's allegations are unlikely," especially "when prior cases have shown the litigant to be untrustworthy or not credible . . . ." *Id.*

97. HMIT argues that "a claim is colorable if it is 'plausible' and could survive a motion to dismiss" under Rule 12(b)(6). (Mot. ¶¶ 38–42.) But HMIT's motion does not even mention the specific bases this Court invoked in the Confirmation Order—the *Barton* doctrine and vexatious-litigant provisions—as supporting the Gatekeeper Provision, much less has HMIT identified a single case in the *Barton* doctrine or vexatious litigant context that supports its interpretation. (*Id.*; *see also* Morris Dec. Ex. 43 at 15:25–16:4 (THE COURT: "[D]id you find any legal authority in the *Barton* doctrine context that you think sheds light? Because that seems to me the most analogous context, right?" MR. MCENTIRE: "Specifically to answer -- to respond to your question directly, the answer is no.").) HMIT relies instead on cases from inapposite contexts, such as whether a bankruptcy court should grant a creditor's committee derivative standing after a trustee or debtor-in-possession declined to pursue a claim.[31] None of those cases, of course, involves gatekeeping orders entered in response to a pattern of abusive conduct that specifically rely on *Barton* and vexatious-litigant authorities. Moreover, and as discussed below, even those cases recognize that a claim must not only be likely to survive a motion to dismiss, but also that the debtor has "unjustifiably" refused to pursue it. *La. World*, 858 F.2d at 247–48**.** That requirement demands that the proposed claims be subjected to a realistic cost-benefit analysis, which here would be fatal to HMIT's speculative, Hail Mary conspiracy theory.

98. HMIT also relies on a series of cases that are even farther afield from the Gatekeeper Provision here. Those include benefits coverage disputes under ERISA, Medicare

[31] *See La. World Expo. v. Fed. Ins. Co.*, 858 F.2d 233, 247–48 (5th Cir. 1988); *PW Enters. v. N.D. Racing Comm'n (In re Racing Servs., Inc.)*, 540 F.3d 892, 900 (8th Cir. 2008); *Larson v. Foster (In re Foster)*, 516 B.R. 537, 542 (B.A.P. 8th Cir. 2014); *Canadian Pac. Forest Prods. v. J.D. Irving, Ltd. (In re Gibson Grp.)*, 66 F.3d 1436, 1446 (6th Cir. 1995); *Official Comm. v. Hudson United Bank (In re America's Hobby Ctr.)*, 225 B.R. 275, 282 (Bankr. S.D.N.Y. 1998).

coverage disputes, and constitutional challenges.[32] None of those cases implicate the *Barton* doctrine and vexatious-litigant concerns. (*See* Mot. ¶¶ 39–41; Objs. ¶¶ 9–13.)

B. Evidentiary Hearing

99. Courts in the *Barton* doctrine context regularly conduct an evidentiary hearing to determine whether a proposed complaint meets the necessary threshold. "Whether to hold a hearing is within the sound discretion of the bankruptcy court." *VistaCare*, at 232 n.12 "[T]he decision whether to grant leave may involve a 'balancing of the interests of all parties involved," which will ordinarily require an evidentiary hearing. *Id.* at 233 (quoting *Kashani*, 190 B.R. at 886–87). In *VistaCare*, for example, the bankruptcy court "held a hearing on CGL's motion for leave" in which "the sole owner of CGL, and the Trustee, testified." *Id.* at 223, 232. The Fifth Circuit has affirmed a colorability analysis in the *Barton* context, which involved an evidentiary hearing, without any concern that the inquiry was somehow improper. *See Foster v. Aurzada (In re Foster)*, 2023 WL 20872, at *1 (5th Cir. Jan. 3, 2023) (affirming dismissal of an action to sue a trustee under *Barton* "[a]fter a hearing [by] the bankruptcy court"); *Howell v. Adler (In re Grodsky)*, 2019 WL 2006020, at *4 (Bankr. E.D. La. Apr. 11, 2019) (dismissing an action under *Barton* after "a

[32] *See Gonzales v. Columbia Hosp. at Med. City Dallas Subsidiary, L.P.*, 207 F. Supp. 2d 570, 577 (N.D. Tex. 2002) (assessing whether an employee has "a colorable claim to vested benefits" such that the employee may be considered a "participant" under ERISA); *Abraham v. Exxon Corp.*, 85 F.3d 1126, 1129 (5th Cir. 1996) (same); *Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 790 (7th Cir. 1996) (same); *Lake Eugenie Land & Dev., Inc. v. BP Expl. & Prods. (In re Deepwater Horizon)*, 732 F.3d 326, 340 (5th Cir. 2013) (holding that claims administrator incorrectly interpreted class settlement agreement by permitting "claimants [with] no colorable legal claim" to receive awards); *Richardson v. United States*, 468 U.S. 317, 326 n.6 (1984) (discussing whether criminal defendant's double jeopardy claim was "colorable" such that it could be appealed before final judgments); *Trippodo v. SP Plus Corp.*, 2021 WL 2446204, at *3 (S.D. Tex. June 15, 2021) (assessing whether plaintiff stated a "colorable claim" against proposed additional defendants in determining whether plaintiff could amend complaint); *Reyes v. Vanmatre*, 2021 WL 5905557, at *3 (S.D. Tex. Dec. 13, 2021) (same); *Family Rehab., Inc. v. Azar*, 886 F.3d 496, 504 n.15 (5th Cir. 2018) (assessing whether plaintiff raised a "colorable claim" to warrant the district court's exercise of jurisdiction over a Medicare coverage dispute); *Am. Med. Hospice Care, LLC v. Azar*, 2020 WL 9814144, at *5 (W.D. Tex. Dec. 9, 2020) (same); *Harry v. Colvin*, 2013 WL 12174300, at *5 (W.D. Tex. Nov. 6, 2013) (considering whether plaintiff asserted a "colorable constitutional claim" such that the court could exercise jurisdiction); *Sabhari v. Mukasey*, 522 F.3d 842, 844 (8th Cir. 2008) (same); *Stanley v. Gonzales*, 476 F.3d 653, 657 (9th Cir. 2007) (same).

close examination" of the evidence revealed only that the trustee "acted within the scope of [his] duties"), *aff'd* 799 F. App'x 271 (5th Cir. 2020).

100. Recognizing that the *Barton* doctrine requires more than a mere Rule 12(b)(6) analysis, courts of appeals routinely review "a bankruptcy court's decision to grant a motion for leave to sue a trustee under the deferential abuse of discretion standard." *VistaCare*, 678 F.3d at 224 (citing *In re Linton*, 136 F.3d 544, 546 (7th Cir. 1998); *In re Beck Indus., Inc.*, 725 F.2d 880, 889 (2d Cir. 1984)).[33] Application of the Rule 12(b)(6) standard, of course, is subject to *de novo* review. Indeed, as this Court noted at the April 24, 2023 status conference, HMIT's "original motion for leave attached something like 387 pages of not just Dondero affidavits, but other evidentiary support," which is inconsistent with HMIT's position that this Court "just need[ed] to look at the four corners and apply a 12(b)(6) standard." (Morris Dec. Ex. 43 at 43:16–18, 44:4–7.) Although HMIT's belatedly counsel suggested it might seek to "withdraw the Dondero affidavits" (*id.* at 22:17–18), HMIT has filed no such motion and "reserve[d] the opportunity to revisit the issue of withdrawing Mr. Dondero's declarations" (*id.* at 55:1–5). As this Court noted, "parties are always given the chance to cross-examine an affiant or a declarant." (*Id.* at 22:2–3.) This Court should exercise its discretion to hold an evidentiary hearing to permit the parties to present evidence, including through cross-examination of Dondero—even if HMIT now engages in gamesmanship by seeking to withdraw the Dondero declarations before the hearing.

[33] Although the Fifth Circuit has not squarely addressed this issue, all nine Circuits that have considered this issue have also adopted an abuse-of-discretion standard. *See In re Bednar*, 2021 WL 1625399, at *3 (B.A.P. 10th Cir. Apr. 27, 2021) ("[T]he Bankruptcy Court's decision to decline leave to sue the Trustee under the *Barton* doctrine is reviewed for abuse of discretion . . . .") (citing *VistaCare*); *SEC v. N. Am. Clearing, Inc.*, 656 F. App'x 969, 973–74 (11th Cir. 2016) ("Although we have never determined the standard of review for a challenge to the denial of a *Barton* motion, other Circuits that have considered the issue review a lower court's ruling on a *Barton* motion for an abuse of discretion.") (citing *VistaCare*); *In re Lupo*, 2014 WL 4653064, at *3 (B.A.P. 1st Cir. Sept. 17, 2014) ("Appellate courts review a bankruptcy court's decision to deny a motion for leave to sue under the abuse of discretion standard.") (citing *VistaCare*); *Grant, Konvalinka & Harrison, PC v. Banks (In re McKenzie)*, 716 F.3d 404, 422 (6th Cir. 2013) (holding that abuse-of-discretion standard applies to *Barton* doctrine); *Alexander v. Hedback*, 718 F.3d 762 (8th Cir. 2013) (applying abuse-of-discretion standard to *Barton* doctrine).

C. Exculpation and Release

101. This Court's January Order and July Order exculpated Seery from all claims except "those alleging willful misconduct and gross negligence." (January Order ¶ 10; July Order ¶ 5.) The Plan's exculpation provision also limited claims against Seery, in his role as an Independent Director, to those arising "from willful misconduct, criminal misconduct…or gross negligence." (Plan Art. IV.D; Confirmation Order ¶¶ 72–73.) The Trust Agreement similarly limits claims against Seery to "fraud, willful misconduct, or gross negligence." (Trust Agmt. § 8.1; *see also id.* §§ 8.3–8.4.) Thus, HMIT cannot assert claims other than those expressly permitted under these Orders and court-approved documents.

ARGUMENT

102. HMIT lacks standing to bring the derivative claims alleged in the Complaint (*see infra* Sections I–II), did not satisfy the procedural requirements to bring derivative claims (*see infra* Section III), and cannot bring derivative claims under the guise of direct claims (*see infra* Section IV). Even if HMIT could assert claims (which it cannot), they fail under any standard (*see infra* Section V).

I. HMIT Lacks Standing To Bring Derivative Claims Under Delaware Law.

103. HMIT acknowledges that any "fiduciary duties and claims involving breaches of those duties" with respect to HCMLP and the Claimant Trust are "governed by Delaware law" under the "Internal Affairs Doctrine." (Motion ¶ 21 & n.24; *see also* Plan Art. XII.M ("corporate governance matters . . . shall be governed by the laws of the state of organization" of the respective entity)); *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1081–82 (Del. 2011) ("In American corporation law, the internal affairs doctrine is a dominant and overarching choice of law principle."). HMIT lacks standing to bring any such claims under Delaware law.

A. HMIT Lacks Standing To Bring Derivative Claims On Behalf Of The Trust.

104. The Trust is a Delaware statutory trust governed by the Delaware Statutory Trust Act, 12 Del. C. §§ 3801–29. (Compl. ¶ 26.) "[T]o proceed derivatively against a Delaware statutory trust, a plaintiff has the burden of satisfying the continuous ownership requirement" such that "the plaintiff must be a beneficial owner" continuously from "the time of the transaction of which the plaintiff complains" through "the time of bringing the action." *Hartsel v. Vanguard Grp., Inc.*, 2011 WL 2421003, at *19 n.123 (Del. Ch. June 15, 2011), *aff'd* 38 A.3d 1254 (Del. 2012); 12 Del C. § 3816(b). This requirement is "mandatory and exclusive" and only "a beneficial owner" "has standing to bring a derivative claim on behalf of the Trust." *In re Nat'l Coll. Student Loan Tr. Litig.*, 251 A.3d 116, 191 (Del. Ch. 2020) (citing *CML V, LLC v. Bax*, 28 A.3d 1037, 1042 (Del. 2011)).

105. HMIT is not a "beneficial owner" of the Trust and therefore lacks standing to bring derivative claims on its behalf. The "beneficial owners" of the Trust are the "Claimant Trust Beneficiaries." (*See* Trust Agmt. § 2.8 ("The Claimant Trust Beneficiaries shall be the sole beneficiaries of the Claimant Trust . . . .").) The Claimant Trust Beneficiaries are "the Holders of Allowed General Unsecured Claims" and "Holders of Allowed Subordinated Claims." (Plan Art. I.B.44; *see also* Trust Agmt. § 1.1(h).)[34] HMIT is neither. HMIT was an "equity holder in the

[34] (*See* Morris Dec. Ex. 1, Plan Art. I.B.44 ("'*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."); Trust Agmt. at 1 n.2 ("For the avoidance of doubt, and as set forth in the Plan, Holders of Class A Limited Partnership Interests and Class B/C Limited Partnership Interests will be Claimant Trust Beneficiaries only upon certification by the Claimant Trustee that the Holders of such Claims have been paid indefeasibly in full plus, to the extent applicable, post-petition interest in accordance with the terms and conditions set forth herein and in the Plan.").)

Original Debtor" and now holds only an unvested "Contingent Trust Interest in the Claimant Trust." (Compl. ¶ 24.) HMIT argues, without justification, that it "should be treated as a vested Claimant Trust Beneficiary." (*Id.*) But, under the Trust Agreement, "Contingent Trust Interests" "shall not have any rights under this Agreement" and will not "be deemed 'Beneficiaries' under this Agreement," "unless and until" they vest in accordance with the Plan and Trust Agreement. (Trust Agmt. § 5.1(c).) Because it is undisputed that the Contingent Trust Interests have not vested, HMIT is not a "beneficial owner" and lacks standing to bring derivative claims under Delaware law. *See Nat'l Coll.*, 251 A.3d at 190–92 (dismissing creditors' derivative claims because they were not "beneficial owners of the Trusts"); *Hartsel*, 2011 WL 2421003, at *19 n.123 (dismissing derivative claims by investors that "no longer own shares" because "those investors no longer have standing to pursue a derivative claim").[35]

B. HMIT Lacks Standing To Bring Derivative Claims On HCMLP's Behalf.

106. Reorganized HCMLP is a Delaware a limited liability partnership governed by the Delaware Limited Partnership Act, 6 Del. C. § 17-101, *et seq.* (Compl. ¶ 25.) To bring "a derivative action" on behalf of a limited partnership, "the plaintiff must be a partner or an assignee of a partnership interest" continuously from "the time of the transaction of which the plaintiff complains" through "the time of bringing the action." 6 Del. C. § 17-1002; *see Tow v. Amegy Bank, N.A.*, 976 F. Supp. 2d 889, 904 (S.D. Tex. 2013) ("The [Delaware] partnership act facially bars any party other than a limited partner from suing derivatively. . . . Delaware courts historically have interpreted the provisions as giving the partners exclusive rights to sue for breach of another

[35] If HMIT were a Claimant Trust Beneficiary (which it is not), its claims must be brought in this Court and it has "waived any right to a trial jury." (Trust Agmt. § 5.10(d).) HMIT would also be required to reimburse the Claimant Trustee and any member of the COB if its suit fails (*id.* § 5.10(b)), and this Court could require HMIT "to post a bond ensuring that the full costs of a legal defense can be reimbursed" (*id.* § 5.10(c)). The Highland Parties reserve the right to seek reimbursement and posting of a bond commensurate with the enormous burdens this litigation would impose.

party's fiduciary duties to them.") (quoting *CML V, LLC v. Bax*, 6 A.3d 238, 245 (Del. Ch. 2010), *aff'd* 28 A.3d 1037 (Del. 2011)); *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1265 n.87 (Del. 2016) ("The statutory foundation for the continuous ownership requirement in the corporate realm is echoed in the limited partnership context.") (citing 6 Del. C. § 17-211(h)).

107. HMIT is not a partner of reorganized HCMLP and therefore lacks standing to bring derivative claims on its behalf. "HMIT held a 99.5% limited partnership in Highland Capital Management, L.P., the Original Debtor." (Compl. ¶ 6; *see id.* ¶¶ 12, 15, 24.) But that limited partnership interest was extinguished by the Plan on August 11, 2021 (the Effective Date of the Plan) and HMIT does not own any partnership interest in reorganized HCMLP. (Plan Art. IV.A.) Because HMIT would not hold a partnership interest at "the time of bringing the action," it "lacks derivative standing" to bring claims "on the partnership's behalf." *Tow*, 976 F. Supp. 2d at 904 (dismissing derivative claims by creditor on behalf of partnership for lack of standing).

108. HMIT also cannot satisfy "the continuous ownership requirement." When HMIT's partnership interest was extinguished on the Plan's Effective Date, HMIT "los[t] standing to continue a derivative suit" on behalf of the Debtor.[36] *El Paso*, 152 A.3d at 1265 (cleaned up) (dismissing derivative action for lack of standing where plaintiff's partnership interest was extinguished by a merger transaction); *see also Schmermerhorn v. CenturyTel, Inc. (In re SkyPort Global Commcn's, Inc.)*, 2011 WL 111427, at *25–26 (Bankr. S.D. Tex. Jan. 13, 2011) (holding that pre-petition shareholders "lack standing to bring a derivative claim" under Delaware law because they "had their equity interests in the company extinguished pursuant to the merger under the Plan"); *In re WorldCom, Inc.*, 351 B.R. 130, 134 (Bankr. S.D.N.Y. 2006) ("[T]he cancellation

[36] Even before its partnership interest was extinguished, HMIT would have been required to obtain the Debtor's consent or court approval before it could have brought a derivative suit on behalf of the estate.

of WorldCom shares under the Plan … prevents the required continuation of shareholder status through the litigation.") (cleaned up).

C. HMIT Lacks Standing To Bring A "Double Derivative" Action.

109. "[A] double derivative suit is one brought by a shareholder of a parent corporation to enforce a claim belonging to a subsidiary that is either wholly owned or majority controlled." *Lambrecht v. O'Neal*, 3 A.3d 277, 282 (Del. 2010). Under "Delaware's 'double derivative' standing jurisprudence," "parent level standing is required to enforce a subsidiary's claim derivatively." *Sagarra*, 34 A.3d at 1079–81 (capitalization omitted) (citing *Lambrecht*, 3 A.3d at 282).

110. To the extent HMIT seeks to bring a double derivative action on behalf of the Trust based on claims purportedly held by its wholly owned subsidiary, HCMLP, HMIT lacks standing. Because HMIT lacks derivative standing to bring claims on behalf of the parent Trust, it also lacks standing to bring a double derivative action. (*See supra* Section I.A.)

111. The Trust also lacks standing to bring these claims on behalf of HCMLP. The Claimant Trust received limited partnership interests in Highland on August 11, 2021, the Effective Date of the Plan. (*See supra* ¶ 79.) HMIT challenges trades that occurred in April and August 2021 (Compl. ¶ 41 & n.12), which predate the Effective Date of the Plan. Because the Trust did not hold limited partnership interests "[a]t the time of the transaction of which the plaintiff complains," 6 Del. C. § 17-1002, it cannot bring a derivative action based on these trades, and HMIT lacks standing to bring a double derivative action.

II. HMIT Lacks Standing To Bring Derivative Claims Under Federal Bankruptcy Law.

112. HMIT ignores its inability to proceed derivatively under Delaware law and instead insists it has derivative standing as a matter of federal bankruptcy law. (Mot. ¶¶ 9–14.) HMIT also

lacks derivative standing under federal bankruptcy law because (i) HMIT's lack of standing under Delaware law is dispositive regardless of forum, and (ii) HMIT, in any event, cannot meet the requirements for suing on behalf of a debtor under the federal bankruptcy case law it cites.

A. Federal Law Does Not Confer Standing Prohibited By Delaware Law.

113. HMIT's invocation of federal bankruptcy law cannot remedy HMIT's lack of derivative standing under Delaware law. HMIT cites Fed. R. Civ. P. 23.1, which "applies to this proceeding pursuant to" Fed. R. Bankr. P. 7023.1. (Mot. ¶ 10.) But Rule 23.1 "speaks only to the adequacy of the . . . pleadings," and "cannot be understood to 'abridge, enlarge, or modify any substantive right.'" *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 96 (1991) (quoting 28 U.S.C. § 2072(b)). Thus, the question of whether HMIT has a right to proceed derivatively is governed not by Rule 23.1, but by the "source and content of the substantive law" governing the requirements for derivative actions, which is Delaware law. *Id.* at 96–97.

114. HMIT's own authority (*see* Mot. ¶¶ 12–13) further supports that Delaware law governs the standing analysis and precludes HMIT's suit. *Louisiana World Exposition v. Federal Insurance Co.*, 858 F.2d 233 (5th Cir. 1988), on which HMIT relies, "is the leading case from the Fifth Circuit . . . articulating when a creditors committee may be permitted standing to pursue estate causes of action." *Reed v. Cooper (In re Cooper)*, 405 B.R. 801, 809 (Bankr. N.D. Tex. 2009). To the extent *Louisiana World* applies post-Effective Date,[37] it does not supersede state law requirements for derivative standing. Before addressing the requirements a creditors' committee must meet to sue derivatively as a matter of federal bankruptcy law (discussed below), the Fifth Circuit conducted a lengthy analysis to determine "as a threshold issue" whether the creditors'

[37] *Louisiana World*, in certain circumstances, allows creditors to "file suit on behalf of a debtor-in-possession or a [bankruptcy] trustee." *La. World*, 858 F.2d at 247. HCMLP is no longer a debtor-in-possession; it has been reorganized.

committee in that case could assert its claims under Louisiana law. 858 F.2d at 236–45. The court specifically addressed whether the creditors' committee could pursue a derivative action under Louisiana law and concluded that "there is no bar in Louisiana law to actions brought by or in the name of a corporation against the directors and officers of the corporation which benefit only the creditors of the corporation; indeed, Louisiana law specifically recognizes such actions." *Id.* at 243. The opposite is equally true: where state law imposes such a bar, a creditor cannot flout that prohibition because it is in bankruptcy court. *See In re Dura Automotive Sys., LLC*, No. 19-123728 (Bankr. D. Del. June 10, 2020), Docket No. 1115 at 46 ("To determine that the third party may bring the claim under the derivative basis and, thus, step into the shoes of the debtor to pursue them, the Court must look to the law of the debtors' state of incorporation or formation.") (denying creditors' committee standing to sue derivatively on behalf of a Delaware LLC because the committee lacked standing under the Delaware LLC Act).

115. Because HMIT lacks standing to bring derivative claims under Delaware law (*see supra* Section I), it cannot satisfy the "threshold issue" to proceed derivatively, whether in state or federal court.

B. HMIT Cannot Meet The *Louisiana World* Standard Governing Derivative Actions By Creditors In Bankruptcy.

116. Even if Delaware law did not preclude HMIT from suing derivatively (it does), HMIT still would lack standing under federal bankruptcy law. Under Fifth Circuit precedent, a bankruptcy court may authorize a creditor to proceed derivatively only if: (i) the creditor's claims are "colorable"; (ii) the trustee or debtor-in-possession "refused unjustifiably to pursue the claim"; and (iii) the creditor "first receive[d] leave to sue from the bankruptcy court." *La. World*, 858 F.2d at 247; *see also, e.g.*, *PW Enters.*, 540 F.3d at 899 (same). "These requirements ensure that derivative standing does not risk interfering with the debtor or trustee and prevents creditors from

pursuing weak claims." *In re On-Site Fuel Serv., Inc.*, 2020 WL 3703004, at *9 (Bankr. S.D. Miss. May 8, 2020). HMIT does not and cannot satisfy these requirements.

117. HMIT focuses solely on the first of these three requirements—asserting that its claims are "colorable." (*See* Mot. ¶¶ 12–14, 38–42; Objs. ¶¶ 3–4, 7–15; Supp. Mot. ¶ 13.) Even if HMIT could satisfy the "colorable claim" requirement under *Louisiana World*, which it cannot (*see infra* Section V), it does not even try to satisfy the second requirement—that Highland "refused unjustifiably to pursue the claim"—because it cannot.

118. To assess whether a debtor's refusal was unjustified, courts "must look to whether the interests of creditors were left unprotected as a result" by conducting a "cost-benefit analysis" that takes into account whether the potential action is "valid and profitable." *La. World*, 858 F.2d at 253 n.20; *see also Reed*, 405 B.R. at 810 (same); *Canadian Pac.*, 66 F.3d at 1442 ("[I]f a creditor pleads facts to support the conclusion that it has a colorable claim . . . and if the bankruptcy court finds that the claim will likely benefit the estate based on a cost-benefit analysis, then the creditor has raised a rebuttable presumption that the debtor-in-possession's failure to bring that claim is unjustified."). This requirement is not easily met. Under HMIT's own authority (*see* Mot. ¶ 40) "the real challenge for the creditor will be to persuade the bankruptcy court that the trustee unjustifiably refuses to bring its claim." *PW Enters.*, 540 F.3d at 900. As the Eighth Circuit explained:

> To satisfy its burden, the creditor, at a minimum, must provide the bankruptcy court with *specific* reasons why it believes the trustee's refusal is unjustified. A creditor thus does not meet its burden with a naked assertion that 'the trustee's refusal is unjustified.' . . . The creditor, *not the bankruptcy court*, has the onus of establishing the trustee unjustifiably refuses to bring the creditor's claim.

Id. (emphasis in original).

119. In conducting the "cost/benefit" analysis required to determine if a debtor's refusal to sue is unjustified, courts consider (i) the probability of success on the claims and the financial recovery to the estate, (ii) the proposed cost of the litigation, and (iii) the delay and expense of bringing the litigation. *PW Enters.*, 540 F.3d at 901; *see also Official Comm.*, 225 B.R. at 282 ("The mandated cost/benefit analysis involves the weighing of the probability of success and financial recovery, whether it is preferable to appoint a trustee to bring suit instead of the creditors' committee, and 'the terms relative to attorneys' fees on which suit might be brought.'") (quoting *In re STN Enterps.*, 779 F.2d 901, 905 (2d Cir. 1985)). A creditor seeking to proceed derivatively must establish "a sufficient likelihood of success" to "'justify the anticipated delay and expense to the bankruptcy estate that the initiation and continuation of litigation will likely produce.'" *Official Comm.*, 225 B.R. at 282 (quoting *STN*, 779 F.2d at 906. If the creditor carries its burden, it shifts to the debtor to refute by a preponderance of the evidence. *PW Enters.*, 540 F.3 at 900 n.9; *Canadian Pac.*, 66 F.3d at 1442; *see also La. World*, 858 F.2d at 248 n.15 (noting that an "evidentiary hearing was unnecessary under the circumstances," where the debtor-in-possession's officers and directors "neither refuted any of the Committee's claims nor objected to them").

120. HMIT does not even attempt to meet its burden to establish that HCMLP or the Trust unjustifiably refused to pursue HMIT's claims, or to present facts to enable the Court to conduct a cost-benefit analysis and conclude that HMIT's proposed claims are "valid and profitable." *La. World*, 858 F.2d at 253 n.20. Under HMIT's own authority (*see* Mot. ¶¶ 39–41), courts permitted creditors to sue derivatively on behalf of debtors ***only*** after conducting such an evidentiary analysis. For example, in *Louisiana World*, the court found that "the Committee demonstrated"—and the debtor-in-possession did not "refute[]" or "rebut[]"—"the existence of a potential cause of action, a demand on the debtor-in-possession, a refusal or inability on the part

of the debtor-in-possession to bring suit, the possibility of a sizeable monetary recovery and, given the contingent nature of the attorney's fee schedule, a limited cost factor." 858 F.2d at 248 n.15.

121. Here, as discussed at length above, the evidence shows that HMIT's "claims" are spurious, would be a waste of time, money, and effort, and have no purpose but to further Dondero's crusade to burn Highland down, and make good on his explicit thread against Seery. (*See supra* ¶¶ 8–85.)

122. HMIT's vague assertion that the COB has "conflicts of interest" does not excuse HMIT from having to ask HCMLP and/or the Trust to pursue HMIT's alleged claims or from proving that any refusal to do so was "unjustified." (Mot. ¶¶ 12–14.) In *Louisiana World*, the court conducted the cost-benefit analysis even though the directors and officers of the debtor-in-possession were conflicted. *La. World*, 858 F.2d at 234.[38]

C. HMIT Lacks Standing To Bring Derivative Claims Challenging Pre-Confirmation Conduct.

123. "When a Chapter 11 plan is confirmed," the debtor loses "its authority to pursue claims as through it were trustee," unless it makes a "specific and unequivocal" "reservation of claims." *Wooley v. Haynes & Boone, L.L.P. (In re SI Restructuring, Inc.)*, 714 F.3d 860, 864 (5th Cir. 2013) (cleaned up; collecting cases). "Without an effective reservation, the debtor has no standing to pursue a claim that the estate owned before it was dissolved." *Id.* (cleaned up).

124. HCMLP did not reserve any claims against Seery or any other Proposed Defendant. (Docket No. 1875-3.) Therefore, neither HCMLP nor the Trust has standing to bring claims against Seery based on conduct occurring before August 11, 2021, the Effective Date of the Plan. *Wooley*, 714 F.3d at 864. Because HMIT seeks to bring derivative claims on behalf of both HCMLP and

[38] Moreover, HMIT did not ask the COB's independent member to pursue its proposed "claims," even though the independent member is empowered to make decisions on behalf of the COB if the other members are conflicted. (Trust Agmt. § 4.6(c).)

the Trust, HMIT's "standing is contingent upon" HCMLP's and the Trust's standing." *Id.* ("[A] creditor can derive standing to bring a debtor's claim only if the debtor itself could bring the claim."). HMIT therefore lacks standing to challenge any pre-confirmation conduct. Other than the "success fee" portion of Seery's compensation, every single allegation against Seery, including the alleged breaches of fiduciary duties, is based on pre-effective date conduct.[39]

III. HMIT Did Not Satisfy The Procedural Requirements To Bring A Derivative Action.

A. HMIT Failed To Include The Litigation Trust As A Party.

125. It is settled law that "[a]n action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a); *see BCC Merch. Sols., Inc. v. Jet Pay, LLC*, 129 F. Supp. 3d 440, 450 (N.D. Tex. 2015) ("The Rule 17(a) requirement is in essence a codification of the prudential standing requirement that a litigant cannot sue in federal court to enforce the rights of third parties.") (cleaned up; collecting cases). "The real party in interest is the person with the right to sue under substantive law, and the determination whether one is the real party in interest with respect to a particular claim is based on the controlling state or federal substantive laws." *BCC*, 129 F. Supp. 3d at 453 (cleaned up; collecting cases).

126. HMIT seeks to bring a "derivative action benefitting and on behalf of the Reorganized Debtor [HCMLP] and the [] Claimant Trust." (Compl. ¶¶ 1, 11.) But the Claimant Trustee transferred to the Litigation Trust "any and all Causes of Action," with limited exceptions not relevant here. (*See supra* ¶ 89.) The Litigation Trust is therefore the "real party in interest,"

[39] The movant in *Wooley* also alleged that (i) the complained-of breaches of fiduciary duty were kept "secret," (ii) the movant did not discover the claims until after confirmation, and (iii) it would therefore be inequitable to preclude its lawsuits. 714 F.3d at 865–66. The Fifth Circuit denied standing, notwithstanding later discovered "facts," because "[a]llowing [movant] to assert these claims simply because some of the underlying facts were unknown at the time the Plan was confirmed would be inconsistent with the 'nature of a bankruptcy which is designed primarily to secure prompt, effective administration and settlement of all debtor's assets and liabilities within a limited time." *Id.* at 866. Here, HMIT had knowledge of at least some of the "facts," including Dondero's alleged disclosure of MGM's inside information to Seery, before confirmation and did not object.

and HMIT lacks prudential standing to bring derivative claims on behalf of Highland. *See, e.g.*, *BlackRock Allocation Target Shares: Series S Portfolio v. Wells Fargo Bank, N.A.*, 247 F. Supp. 3d 377, 414–15 (S.D.N.Y. 2017) (holding that plaintiff "lacks standing to bring a derivative claim against Defendant" because it "transferred all rights to such claim").

127. The Litigation Trust is likewise "an indispensable party to a [beneficiary's] derivative suit," so HMIT cannot bring a derivative action without including the Litigation Trust. *Schwab v. Oscar (In re SII Liquidation Co.)*, 2012 WL 4327055, at *8 (Bankr. S.D. Ohio Sept. 20, 2012) (cleaned up) (dismissing derivative action); *see also* Fed. R. Civ. P. 19(a)(1) (requiring joinder of indispensable party); Fed. R. Bankr. P. 7019; Fed. R. Civ. P. 12(b)(7) (permitting dismissal for "failure to join a party under Rule 19"); Fed. R. Bankr. P. 7012(b).

128. HMIT's footnoted assertion that it "seeks standing to bring this action as a derivative action on behalf of the Litigation Sub-Trust" (Compl. ¶ 1 n.1) fails because, as discussed above, HMIT lacks standing to bring such "double derivative" claims (*see supra* Section I.C). The Litigation Trust is wholly owned by the Trust and, as matter of Delaware law, HMIT must demonstrate "parent level standing" to bring a "double derivative" claim that belongs to the Litigation Trust. *Sagarra*, 34 A.3d at 1079–81; *Lambrecht*, 3 A.3d at 282. Because HMIT lacks standing to bring a derivative claim on behalf of the Trust (*see supra* Section I.A), it also lacks standing to bring a double derivative claim.

B. HMIT Failed To Make Any Demand To The Litigation Trustee And Fails To Plead Demand Futility With Particularity.

129. HMIT's failure to include the Litigation Trust as a party was no accident. The Litigation Trust is a Delaware statutory trust and wholly-owned subsidiary of the Trust. (Litigation Sub-Trust Agmt. § 1.1(e).) Even if HMIT had standing under Delaware law to bring a derivative action on behalf of the Litigation Trust, which it does not (*see supra* ¶ 128), HMIT can proceed

derivatively only "if (i) [HMIT] demanded that the [Trustee] pursue the corporate claim and [he] wrongfully refused to do so or (ii) demand is excused because the [Trustee is] incapable of making an impartial decision regarding the litigation." *United Food & Comm. Workers Union v. Zuckerberg*, 250 A.3d 862, 876 (Del. Ch. 2020) (collecting cases). Accordingly, to allege a derivative action under Rule 23.1, which HMIT claims governs (*see* Compl. ¶ 6), HMIT must "state with particularity: (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and (B) the reasons for not obtaining the action or not making the effort." Fed. R. Civ. P. 23.1(b)(3); Fed. R. Bankr. P. 7023.1. HMIT failed to do so.

130. This Court approved Marc Kirschner ("Kirschner") as Litigation Trustee. (Confirmation Order ¶ 45; *see also* Morris Dec. Ex. 44 (the "Litigation Sub-Trust Agreement") § 1.1(r).) HMIT admits that it did not make any effort to make a pre-filling demand to Kirschner regarding this action. (Compl. ¶ 1 n.1.) Instead, HMIT asserts that "[a]ny demand on the Litigation Sub-Trust would be [] futile" because "the Litigation Trustee serves at the direction of the Oversight Board." (*Id.* ¶ 1 n.1; Mot. ¶ 11 n.13.) This conclusory assertion does not allege a single fact casting "reasonable doubt" on Kirschner's objectivity or showing that he was "dominate[d]" by interested parties, let alone with particularity. *Zuckerberg*, 250 A.3d at 877–91 (surveying Delaware demand futility law); (Mot. ¶ 11).[40] Because HMIT has not satisfied either the demand requirement or demand futility, it cannot bring a derivative action. *See, e.g.*, *Zuckerberg*, 250 A.3d at 900–901 (granting "motion to dismiss under Rule 23.1"); *In re Six Flags Ent. Corp. Deriv. Litig.*, 2021 WL 1662466, at *8 (N.D. Tex. Apr. 28, 2021) (dismissing derivative action with

[40] As discussed *supra* note 38, HMIT also does not explain its failure to make any pre-filing demand to the independent member of the COB, who it does not allege is conflicted. (Compl. ¶ 10.)

prejudice for failure to plead demand futility under Delaware law "under Rule 23.1's heightened standard").

C. HMIT Cannot "Fairly And Adequately" Represent The Interests of Claimant Trust Beneficiaries.

131. Rule 23.1 provides that a "derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association." Fed. R. Civ. P. 23.1(a); Fed. R. Bankr. P. 7023.1. To be an adequate representative, "a plaintiff in a [] derivative action must not have ulterior motives and must not be pursuing an external personal agenda." *Energytec, Inc. v. Proctor*, 2008 WL 4131257, at *6 (N.D. Tex. Aug. 29, 2008) (cleaned up) (quoting *Smith v. Ayres*, 977 F.2d 946, 949 (5th Cir. 1992)). To determine adequacy, courts evaluate, *inter alia*, "economic antagonisms between representative and class," "other litigation pending between the plaintiff and defendants," "plaintiff's vindictiveness towards the defendant," and "the degree of support plaintiff was receiving from the [beneficiaries] he purported to represent." *Id.* *6–7 (quoting *Davis v. Comed, Inc.*, 619 F.2d 588, 593–94 (6th Cir. 1980)).

132. HMIT is an inadequate representative. HMIT is effectively controlled by Dondero, and the Plan recognizes HMIT as a Dondero Related Entity (Plan Art. I.B.110). This Court found that "Mr. Dondero and the Dondero Related Entities have harassed the Debtor," including with "substantial, costly, and time-consuming litigation." (Confirmation Order ¶ 77.) This Court also found that Dondero threatened to "burn down the place" if he did not get his way and that "Mr. Dondero and his related entities," including HMIT, "will likely commence litigation against the Protected Parties," including Seery. (*Id.* ¶ 78.) This Court has even referred to Dondero as an "antagonist" whose conduct has made this bankruptcy "contentious, protracted, and unpleasant," and akin to a "corporate divorce." *In re Highland Cap. Mgmt., L.P.*, 2021 WL 2326350, at *1, *25

(Bankr. N.D. Tex. June 7, 2021) (holding Dondero in "civil contempt of court"). The Fifth Circuit similarly recognized that Dondero and his related entities sought to "frustrate the proceedings by objecting to settlements, appealing orders, seeking writs of mandamus, interfering with Highland Capital's management, threatening employees, and canceling trades between Highland Capital and its clients." *NexPoint*, 48 F.4th at 426; *see also id.* at 427–28. Dondero's own written threats confirm these findings: "Be careful what you do -- last warning." (*See supra* ¶ 25.) Dondero-controlled HMIT is pursuing this derivative action for "ulterior motives" of "antagonism" and "vindictiveness," cannot "fairly and adequately the interests" of the Claimant Trust Beneficiaries, and should be not be permitted to "bring a derivative suit on their behalf." *Energytec*, 2008 WL 4131257, at *6–7 (dismissing derivative action by former CEO on adequacy grounds because he sought to "revers[e] the events leading to his removal" and was in litigation with other shareholders).[41]

IV. HMIT Has No Direct Claims Against The Highland Parties.

133. Throughout its Motion and Complaint, HMIT makes vague references to unspecified direct claims against the Proposed Defendants. (*See, e.g.*, Motion ¶ 10 ("HMIT has individual standing to bring this action because Seery owed fiduciary duties directly to HMIT at that time . . . ."); *id.* ¶ 67 (arguing that "HMIT has [d]irect [s]tanding"); Compl. ¶ 24 ("HMIT has constitutional standing and capacity to bring these claims both individually and derivatively.").) But "a claim is not 'direct' simply because it is pleaded that way." *Schmermerhorn*, 2011 WL 111427, at *26 (quoting *Gatz v. Ponsoldt*, 2004 WL 3029868 at *7 (Del. Ch. Nov. 5, 2004)). "Fifth

[41] HMIT and Dondero also have a "personal economic interest" and other claimants "do not share this interest." *Energytec*, 2008 WL 4131257, at *7. Specifically, HMIT has asserted in another proceeding that Highland has sufficient assets "to pay class 8 and class 9 creditors 100 cents on the dollar." (Docket No. 3662 ¶ 5.) If true, HMIT's proposed claims will benefit only HMIT and, potentially, The Dugaboy Investment Trust (controlled by Dondero) and Mark Okada (HCMLP's co-founder) as the holders of Class 11 interests. Proposed Defendants reserve the right to contest HMIT's assertion.

Circuit precedent [] dictates that," to determine whether claims are direct or derivative, "this Court look at the substance of the Petition, and the nature of the wrongs alleged therein, rather than the Plaintiffs' characterization." *Id.* (citing *Armstrong v. Capshaw, Goss & Bowers LLP*, 404 F.3d 933, 936 (5th Cir. 2005)).

134. Under Delaware law, "whether a claim is solely derivative or may continue as a dual-natured claim 'must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?'" *El Paso*, 152 A.3d at 1260 (quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004)) (emphasis in original). "In addition, to prove that a claim is direct, a plaintiff 'must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.'" *Id.* (quoting *Tooley*, 845 A.2d at 1033); *see also Schmermerhorn*, 2011 WL 111427, at *24 (same).

135. Similarly, in the bankruptcy context, "[i]f the harm to the creditor comes about only because of harm to the debtor, then its injury is derivative, and the claim is property of the estate." *Meridian Cap. CIS Fund v. Burton (In re Buccaneer Res., L.L.C.)*, 912 F.3d 291, 293 (5th Cir. 2019) (citing 11 U.S.C. § 541(a)(1)). "In that situation, only the bankruptcy trustee has standing to pursue the claim for the estate . . . ." *Id.* "To pursue a claim on its own behalf, a creditor must show this direct injury is not dependent on injury to the estate." *Id.*

136. Even if HMIT had viable claims (it does not), they would be derivative, not direct, under both Delaware law and federal bankruptcy law. HMIT argues that the Proposed Defendants' "alleged actions devalued HMIT's interest in the Debtor's Estate, including, without limitation, payment of excessive compensation to Seery." (Mot. ¶ 67.) Thus, by its own admission, any

alleged harm to HMIT "comes about only because of harm to the debtor," so the alleged "injury is derivative." *Meridian*, 912 F.3d at 293–94 ("The creditors' injury (reduced bankruptcy recovery) derived from injury to the debtor (the loss of estate assets), so only the estate could sue the third parties."); *see also El Paso*, 152 A.3d at 1260–61 & n.60 (holding that claim "claims of corporate overpayment are normally treated as causing harm solely to the corporation and, thus, are regarded as derivative") (collecting cases); *Gerber v EPE Holdings, LLC*, 2013 WL 209658, at *12 (Del. Ch. Jan. 18, 2013) (holding that claims were derivative because plaintiff had "not identified any independent harm suffered by the limited partners"; "the partnership suffered all the harm at issue—it paid too much").

137. HMIT's reliance on *Pike v. Texas EMC Management, LLC*, 610 S.W.3d 763 (Tex. 2020), is misplaced. The fact that "a partner or other stakeholder in a business organization has ***constitutional*** standing to sue for an alleged loss in the value of its interest in the organization" (Mot. ¶ 67 (quoting *Pike*, 610 S.W.3d at 778) (emphasis added)) is irrelevant. As the Court explained, it is "the statutory provisions that define and limit a stakeholder's ability to recover certain measures of damages, which protect the organization's status as a separate and independent entity," and therefore considered the matter under Texas partnership law. *Pike*, 610 S.W.3d at 778–79. Here, HMIT admits that both the Trust and HCMLP are governed by Delaware law, which does not recognize any direct (or derivative) claims by HMIT.

138. Even assuming, *arguendo*, that HMIT could bring direct claims (it cannot), the Highland Parties cannot be held liable for them. "Under the Delaware Statutory Trust Act, 'a trustee, when acting in such capacity, shall not be personally liable to any person other than the statutory trust or a beneficial owner for any act, omission or obligation of the statutory trust or any trustee thereof' except 'to the extent otherwise provided' by the trust's governing document."

Athene Life & Annuity Co. v. Am. Gen. Life Ins. Co., 2020 WL 2521557, at *8 (Del. Super. May 18, 2020) (quoting 12 Del C. §§ 3803(b)–(c)). The Trust Agreement likewise limits "personal liability" "to the fullest extent provided under Section 8303 of the Delaware Statutory Trust Act." (Trust Agmt. § 8.3.) Because, as discussed above, HMIT is not a "beneficial owner" of the Claimant Trust (*see supra* Section I.A), it cannot bring direct claims against Proposed Defendants under Delaware law.

V. HMIT's Proposed Complaint Fails To Plausibly Allege Any Claims Against The Proposed Defendants.

139. Because HMIT lacks standing, this Court need not reach the merits of HMIT's proposed Adversary Complaint. As a matter of judicial economy, however, the Highland Parties respectfully request that this Court address the lack of merit as an alternative basis to deny the Motion. HMIT fails to adequately allege its claims under any standard. HMIT's claims are not colorable because they lack foundation, and HMIT's "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," fail to "[]cross the line from conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 679–80 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)).

A. HMIT Does Not Adequately Allege Any Breach Of Fiduciary Duties (Count I).

140. HMIT alleges that Seery breached his fiduciary duties (i) "[b]y disclosing material non-public information to Stonehill and Farallon" before their purchase of certain Highland claims, and (ii) by receiving "compensation paid to him under the terms of the [Trust Agreement] since the Effective Date of the Plan in August 2021." (Compl. ¶¶ 64–67.) Under Delaware law, which HMIT admits governs (*see* Mot. ¶ 21 n.24), "[t]o bring a claim for breach of fiduciary duty, a plaintiff must allege '(1) that a fiduciary duty existed and (2) that the defendant breached that duty.'" *Brooks v. United Dev. Funding III, L.P.*, 2020 WL 6132230, at *30 (N.D. Tex. Apr. 15,

2020) (quoting *Joseph C. Bamford & Young Min Ban v. Penfold, L.P.*, 2020 WL 967942, at *8 (Del. Ch. Feb. 28, 2020)). HMIT fails to plausibly allege either element.

141. ***First***, HMIT's "legal conclusion[]" that Seery "owed fiduciary duties to HMIT, as equity, and to the Debtor's Estate" (Compl. ¶ 63) "do[es] not suffice" to plausibly allege the existence of any actionable fiduciary relationship. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). Officers and directors generally owe fiduciary duties only to the entity and its stakeholders as a whole, not to individual shareholders. *See Gilbert v El Paso Co.*, 1988 WL 124325, at *9 (Del. Ch. Nov. 21, 1988) ("[D]irectors' fiduciary duty runs to the corporation and to the entire body of shareholders generally, as opposed to specific shareholders or shareholder subgroups.") *aff'd*, 575 A.2d 1131 (Del. 1990); *Klaassen v Allegro Dev. Corp.*, 2013 WL 5967028, at *11 (Del. Ch. Nov. 7, 2013) (same). Because Seery did not owe any "duty" to HMIT directly and individually, the Complaint fails to state a claim for breach of fiduciary duty to HMIT.

142. ***Second***, to the extent Seery owed any fiduciary duties to HMIT or the Debtor, he did not breach them by allegedly communicating with Farallon and Stonehill. (*See* Compl. ¶ 64.) As this Court recognized, "claims trading in bankruptcy is [] pretty unregulated—it's just kind of between the claims trader and the transferee." (Morris Dec. Ex. 43 at 53:6–7.) In fact, this Court recognized that "for decades now, since a rule change in the last century, no court approval and order is necessary unless the transferor objects." (Morris Dec. Ex. 6 at 20); *see also* Aaron L. Hammer & Michael A. Brandess, *Claims Trading: The Wild West of Chapter 11s*, 29 Am. Bankr. Inst. J. 61 (July/Aug. 2010) ("In 1991, Fed. R. Bankr. P. 3001(e) was amended to limit the court's oversight on claims trading" such that "only the transferor may object to a transfer.") (quoting Michael H. Whitaker, *Regulating Claims Trading in Chapter 11 Bankruptcies: A Proposal for Mandatory Disclosure*, 3 Cornell J.L. & Pub. Pol'y 303, 320 (1994)). Because none of the

transferors objected to the claims trades at issue, Seery's alleged actions in connection with them cannot constitute a breach of any fiduciary duties.

143. ***Third***, HMIT's "conclusory allegations" and "legal conclusions" are "purely speculative, devoid of factual support," and therefore "stop[] short of the line between possibility and plausibility of entitlement to relief." *Reed v. Linehan (In re Soporex, Inc.)*, 463 B.R. 344, 367, 386 (Bankr. N.D. Tex. 2011) (cleaned up). As to Seery's discussions with Farallon and Stonehill, HMIT asserts that Seery "disclose[d] material non-public information to Stonehill and Farallon," and they "acted on inside information and Seery's secret assurances of great profits." (Compl. ¶¶ 3, 64; *see also id.* ¶¶ 13–14, 40, 47, 50.) HMIT never alleges when any of these purported communications occurred, what material non-public information Seery provided, or what "assurances" he made. The few facts HMIT provides contradict its own allegations. The only purportedly "material non-public information" identified is the Complaint is the MGM E-Mail Dondero sent to Seery containing "information regarding Amazon and Apple's interest in acquiring MGM." (Compl. ¶ 45.) This information was widely reported in the financial press at the time (*see supra* ¶¶ 30–37), so it cannot constitute material non-public information as a matter of law. *See, e.g.*, *SEC v. Cuban*, 2013 WL 791405, at *10–11 (N.D. Tex. Mar. 5, 2013) (holding that information is not "material, nonpublic information" and "'becomes public when disclosed to achieve a broad dissemination to the investing public'") (quoting *SEC v. Mayhew*, 121 F.3d 44, 50 (2d Cir. 1997)). HMIT asserts that Farallon and Stonehill's purchases "made no sense" without access to "material non-public information." (Compl. ¶¶ 3, 50.) But HMIT admits that Farallon and Stonehill purchased Highland claims at discounts of 43% to 65% to their allowed amounts, so they would therefore receive at least an 18% return based on publicly available estimates in Highland's Court-approved Disclosure Statement. (*Id.* ¶¶ 3, 37, 42.)

144. As to Seery's compensation, HMIT asserts that it was "excessive," and speculates that compensation negotiations between Seery and the COB "were not arm's-length." (Compl. ¶¶ 4, 13, 54, 74.) But HMIT does not say one word about the process for negotiating and approving Seery's compensation. Nor does HMIT allege what Seery's compensation actually is, let alone compare it to others' compensation to show that it is "excessive." HMIT's assertion that Seery's compensation package was initially "composed of a flat monthly pay" but now "is also performance based" (*id.* ¶ 4) is wrong and contradicted by Court-approved documents. The structure of Seery's post-effective date compensation, which includes a "Base Salary," "success fee," and "severance," was fully disclosed in the Trust Agreement, which was publicly filed in advance of the Plan confirmation hearing and approved by this Court and the Fifth Circuit as part of the Plan (*see supra* ¶¶ 78–79).

145. Thus, HMIT fails to allege facts that, even if true (and they are not), support a reasonable inference that Mr. Seery breached his fiduciary duty to HMIT or the estate as a result of bad faith, self-interest, or other intentional misconduct rising to the level of a breach of the duty of loyalty. *See Pfeffer v. Redstone*, 965 A.2d 676, 690 (Del. 2009) (dismissing claim for breach of duty of loyalty against a director where "conclusory allegations" failed to give rise to inference that director failed to perform fiduciary duties); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 507 (Del. Ch. 2000) (dismissing claim for breach of fiduciary duty where "[a]though the complaint makes the conclusory allegation that the defendants breached their duty of disclosure in a 'bad faith and knowing manner,' no facts pled in the complaint buttress that accusation.")

B. HMIT's Theories Of Secondary Liability Fail (Counts II and III).

146. HMIT seeks to hold Proposed Defendants secondarily liable for Seery's alleged breach of fiduciaries duties on an aid/abet theory (Compl. ¶¶ 69–74) and conspiracy theory of liability (*id.* ¶¶ 75–81). As a threshold matter, HMIT has not plausibly alleged any primary breach

of fiduciary duties, so it cannot pursue secondary liability for the same alleged wrongdoing. *See English v. Narang*, 2019 WL 1300855, at *14 (Del. Ch. Mar. 20, 2019) ("As a matter of law and logic, there cannot be secondary liability for aiding and abetting an alleged harm in the absence of primary liability.") (cleaned up; collecting cases); *Hill v. Keliher*, 2022 WL 213978, at *10 (Tex. App. Jan. 25, 2022) ("[A] defendant's liability for conspiracy depends on participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable.") (quoting *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996)).[42]

147. Even if HMIT could pursue secondary liability, it has not plausibly alleged any civil conspiracy. Under Texas law, "civil conspiracy is a theory of vicarious liability and not an independent tort." *Agar Corp., Inc. v. Electro Circuits Int'l, LLC*, 580 S.W.3d 136, 142 (Tex. 2019). "[T]he elements of civil conspiracy [are] "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Id.* at 141 (cleaned up).

148. HMIT has not plausibly alleged any "meeting of the minds." HMIT asserts that "Defendants conspired with each other to unlawfully breach fiduciary duties" (Compl. ¶ 76), which is precisely the sort of "legal conclusion" the Supreme Court held is "not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 555 U.S. at 565–66). HMIT repeats four times that Seery provided information to Farallon and Stonehill as a "as a *quid pro quo*" for "additional compensation" (Compl. ¶ 77; *see also id* ¶¶ 4, 47, 74), but never provides

[42] Because HMIT breach of fiduciary duty claim is governed by Delaware law, its aid/abet theory of liability is also governed by Delaware law. *See Xtreme Power Plan Tr. v. Schindler (In re Xtreme Power)*, 563 B.R. 614, 632, 645 (Bankr. W.D. Tex. 2016) (applying Delaware law to claim for aiding and abetting breach of fiduciary duty involving Delaware corporation headquartered in Texas); By contrast, "conspiracy is not an internal affair" or a matter of corporate governance, so it is governed by Texas law under the Plan. *Klinek v. LuxeYard, Inc.*, 596 S.W.3d 437, 450 n.9 (Tex. App. – Houston [14th Dist.] 2020) (applying Delaware law to fiduciary duty claim and Texas law to conspiracy theory); (Plan Art. XII.M).

"nonconclusory factual allegations" in support. *Iqbal*, 556 U.S. at 680 (citing *Twombly*, 550 U.S. at 565–66). HMIT vaguely alleges "upon information and belief" that Seery "did business with Farallon" and "served on [a] creditors committee" with Stonehill. (Compl. ¶ 48.) HMIT also asserts "[u]pon information and belief" that Farallon "conducted no due diligence but relied on Seery's profit guarantees." (*Id.* ¶ 40.) These allegations "upon information belief" are "wholly speculative and conclusory," and therefore do "not satisfy the pleading requirements under Rule 8(a)." *Hargrove v. WMC Mortg. Corp.*, 2008 WL 4056292, at *3 (S.D. Tex. Aug. 29, 2008) (citing *Twombly*, 550 U.S. at 555).

C. HMIT Seeks Remedies That Are Not Available As A Matter Of Law (Counts IV, V, and VI).

149. HMIT seeks a grab bag of unavailable remedies, including (1) equitable disallowance (Compl. ¶¶ 82–87), (2) unjust enrichment (*id.* ¶¶ 88–94), (3) declaratory relief (*id.* ¶¶ 95–99), (4) punitive damages (*id.* ¶¶ 100–01), and (5) equitable tolling (*id.* ¶¶ 103–08), several of which are incorrectly pleaded as causes of action. None of these remedies are available under applicable law.

150. ***First***, Seery does not have any bankruptcy claims that can be subordinated or disallowed. (*Id.* ¶¶ 82–87.) In any event, the Fifth Circuit has expressly rejected equitable disallowance as remedy available under the Bankruptcy Code. *See SED Holdings, LLC v. 3 Star Props., LLC*, 2019 WL 13192236, at *2 (S.D. Tex. Sept. 11, 2019) ("[T]he claim may only be subordinated, but not disallowed.") (citing *Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 699 (5th Cir. 1977)); *see also In re Lightsquared Inc.*, 504 B.R. 321, 339–40 (Bankr. S.D.N.Y. 2013) ("[T]he Bankruptcy Code, pursuant to section 510(c) or otherwise, does not permit equitable disallowance of claims that are otherwise allowable under section 502(b).") (citing *Mobile Steel*, 563 F.2d at 699 n.10).

151. ***Second***, under Texas law, "[u]njust enrichment is not an independent cause of action but rather characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances which give rise to an implied or quasi-contractual obligation to repay." *Taylor v. Trevino*, 569 F. Supp. 3d 414, 435 (N.D. Tex. 2021) (cleaned up); *see also Yowell v. Granite Operating Co.*, 630 S.W.3d 566, 578 (Tex. App. 2021) (same).[43] Thus, "when a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory." *Taylor*, 569 F. Supp. 3d at 435 (quoting *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000)). Here, Seery's compensation is governed by express agreements (*see supra* ¶¶ 78–79), so unjust enrichment is unavailable as a theory of recovery.

152. ***Third***, HMIT brings "claims for declaratory relief, but a request for declaratory relief is not an independent cause of action, [and] in the absence of any underlying viable claims such relief is unavailable." *Green v. Wells Fargo Home Mtg.*, 2016 WL 3746276, at *2 (S.D. Tex. June 7, 2016) (citing *Collins Cnty., Texas v. Homeowners Ass'n for Values Essential to Neighborhoods*, 915 F.2d 167, 170–71 (5th Cir. 1990)).

153. ***Fourth***, HMIT has no basis to seek punitive damages. HMIT abandoned its fraud claim so its sole claim for primary liability is breach of fiduciary duty. As a matter of Delaware law, the "court cannot award punitive damages in [a] fiduciary duty action." *Buchwald v. Renco Grp. (In re Magnesium Corp. of Am.)*, 539 B.R. 31, 52 (S.D.N.Y. 2015) (citing *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1154 (Del. Ch. 2006)), *aff'd* 682 F. App'x 24 (2d Cir. 2017).

[43] Under the Plan, Texas law governs HMIT's "claim" for unjust enrichment because it is not a "corporate governance matter." (Plan Art. XII.M.) It also governs HMIT's "claim" for constructive trust, which "is merely a remedy used to grant relief on the underlying cause of action." *Sherer v. Sherer*, 393 S.W.3d 480, 491 (Tex. App. 2013).

154. ***Finally***, HMIT cannot invoke "the discovery rule," "equitable tolling doctrine," "fraudulent concealment," or "any other applicable tolling doctrine" to toll the statute of limitations (Compl. ¶ 108), because this Court has held that that HMIT "has known about the conduct underlying the desired lawsuit for well over a year, based on activity that has occurred in the bankruptcy court" (Docket No. 3713 at 2–3); *see also* Order at 2–3, *In re Hunter Mt. Inv. Tr.*, No. 23-10376 (5th Cir. Apr. 12, 2023) (declining to disturb this Court's "appropriate" Order, because HMIT "approached the brink of the limitations period before seeking leave to assert its claim").

CONCLUSION

155. For the foregoing reasons, the Highland Parties respectfully request that this Court deny the Motion in its entirety and grant such other relief this Court deems just and proper.[44]

[44] Denial should be ***with prejudice***. HMIT "has known about the conduct underlying the desired lawsuit for well over a year" (Docket No. 3713 at 2–3) and has already filed two proposed Complaints. It should not be permitted to file a third (or more), which "would be futile." *Marucci Sports, L.L.C. v. NCAA*, 751 F.3d 368, 378 (5th Cir. 2014) (affirming denial of leave to amend as futile) (collecting cases).

Dated: May 11, 2023

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Appendix Exhibit 158

SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -

WILLIAM K. HARRINGTON,)
UNITED STATES TRUSTEE, REGION 2,)
Petitioner,)
v.) No. 23-124
PURDUE PHARMA L.P., ET AL.,)
Respondents.)

- - - - - - - - - - - - - - - - - - - -

Pages: 1 through 123

Place: Washington, D.C.

Date: December 4, 2023

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to that, but it's a hearing that didn't even consider the merits of the claim. It specifically said that you get nothing. It doesn't even matter because I think that it's just better enough that you're getting, you know, more for the other claim.

And, as I said before, we don't think that that's the right analysis. If you had joint and several liability for co-tortfeasors, it certainly can't be the analysis when you have claims that don't even overlap as much as those claims do.

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: We have a separate petition in Highland Capital, and the amici briefs argue that or suggest that your argument here about nonconsensual third-party releases affects the question of exculpation clauses for professional services, firms that -- for firms that work on a bankruptcy. Does it?

MR. GANNON: There --

JUSTICE SOTOMAYOR: And how do you get around -- I -- I -- I don't -- I know you're not

Appendix Exhibit 159

IN THE COURT OF CHANCERY
FOR THE STATE OF DELAWARE

HIGHLAND CAPITAL MANAGEMENT, L.P. Plaintiff, -against- SE MULTIFAMILY HOLDINGS LLC and HCRE PARTNERS, LLC (n/k/a NEXPOINT REAL ESTATE PARTNERS, LCC), in its capacity as the Manager of SE MULTIFAMILY HOLDINGS LLC, Defendants.	C.A. No.

VERIFIED COMPLAINT FOR SPECIFIC PERFORMANCE
TO INSPECT AND COPY BOOKS AND RECORDS

Plaintiff Highland Capital Management, L.P. ("Highland"), by and through its undersigned attorneys, for its *Verified Complaint for Specific Performance to Inspect and Copy Books and Records* against defendants SE Multifamily Holdings LLC ("SE Multifamily") and HCRE Partners, LLC (n/k/a NexPoint Real Estate Partners, LLC), in its capacity as the Manager of SE Multifamily ("HCRE" or the "Manager" and with SE Multifamily, the "Defendants"), alleges as follows:

NATURE OF ACTION

1. Highland is a member of SE Multifamily and is forced to bring this action because the Defendants have unjustifiably refused to make available for

inspection and copying SE Multifamily's books and records as is required by SE Multifamily's *First Amended and Restated Limited Liability Company Agreement*, dated March 15, 2019, effective as of August 23, 2018 (a copy of which is attached hereto as **Exhibit 1** and is incorporated herein by reference) (the "Operating Agreement").

2. Highland seeks specific performance of Defendants' obligations under section 8.3 of the Operating Agreement because that is the only way Highland can obtain full, fair, and complete relief.

3. Highland also seeks recovery of its fees and expenses, including counsel fees and expenses, incurred in bringing this action.

THE PARTIES

4. Plaintiff Highland is a Delaware limited partnership. Highland is an investment manager with its principal offices in Dallas, Texas. Highland filed for bankruptcy protection in the United States Bankruptcy Court for the District of Delaware on October 16, 2019 (the "Petition Date"), but the case was transferred to the United States Bankruptcy Court for the Northern District of Texas (the "Bankruptcy Court") in December 2019. Highland's then-management was subsequently replaced by order of the Bankruptcy Court, Highland's plan of reorganization (as amended) was later confirmed, and Highland emerged from bankruptcy as a reorganized entity on August 11, 2021.

5. Defendant SE Multifamily is a Delaware limited liability company with its principal offices in Dallas, Texas. Upon information and belief, SE Multifamily directly or indirectly owns real property in Florida and Texas.

6. Defendant HCRE is a limited liability company formed under the law of the State of Delaware with its principal offices in Dallas, Texas. Upon information and belief, HCRE is the Manager of SE Multifamily.

7. Non-party James Dondero ("Mr. Dondero") is an individual residing in Dallas, Texas. Mr. Dondero is (a) a co-founder of Highland, (b) controlled Highland until January 9, 2020, when he was forced to surrender control to an independent board as part of Highland's bankruptcy, and (c) has controlled (and continues to control) HCRE and SE Multifamily since each of those entities was formed.

JURISDICTION

8. This Court has subject-matter jurisdiction over this action because Highland seeks equitable relief (*i.e.*, specific performance and recovery of fees and expenses incurred in connection with compelling performance) and has no adequate remedy at law; Defendants' breach of their obligations under section 8.3 of the Operating Agreement would continue indefinitely without the equitable remedy of specific performance.

9. This Court has personal jurisdiction over Defendants because they are both Delaware limited liability companies. 6 Del. C. § 18-105.

10. In addition, the parties irrevocably agreed to the exclusive jurisdiction of the courts of the State of Delaware, "expressly submitt[ed] to the personal jurisdiction and the venue of those courts," and "expressly waive[d] any claim of improper venue and any claim that those courts are an inconvenient forum." **Exhibit 1** § 10.6.

FACTUAL ALLEGATIONS

A. Company Background

11. Highland and HCRE are parties to that certain *SE Multifamily Holdings LLC, Limited Liability Company Agreement*, dated as of August 23, 2018 (the "Original Agreement"). Mr. Dondero signed the Original Agreement on behalf of both Highland and HCRE. Highland and HCRE were the only members of SE Multifamily at the time the Original Agreement was executed.

12. SE Multifamily was formed to, among other things, acquire, improve, manage, lease or otherwise deal in real estate-related investment property.

13. On March 15, 2019, Highland, HCRE, and BH Equities LLC ("BH Equities") amended the Original Agreement by entering into the Operating Agreement, effective as of August 23, 2018. The Original Agreement was amended to, among other things, admit BH Equities as a new member of SE Multifamily.

14. Pursuant to the Operating Agreement, (a) Mr. Dondero, in his capacity as an officer of HCRE, was appointed the Manager of SE Multifamily, and (b) the "management, control and direction of [SE Mulitfamily] and its operations, business and affairs [was] vested exclusively in the Manager . . ." *See* **Exhibit 1** §§ 3.1, 3.2.

15. Thus, based on the unambiguous terms of the Operating Agreement, the Manager has exclusive control of SE Multifamily. Upon information and belief, HCRE replaced Mr. Dondero as the Manager of SE Multifamily in 2019 (although Mr. Dondero has continued to control HCRE).

B. <u>Books & Records Request Background</u>

16. Section 8.3 of the Operating Agreement grants to the Members of SE Multifamily—including Highland—a broad, unambiguous, and unconditional right to inspect and copy SE Multifamily's books and records:

> 8.3. <u>Place Kept; Inspection</u>. The books and records of the company shall be maintained at the principal place of business of the Company and ***all such books and records shall be available for inspection and copying at the reasonable request, and at the expense, of any Member*** during the ordinary business hours of the Company.

Exhibit 1 § 8.3 (emphasis added).

17. Since its formation, SE Multifamily has participated in real estate transactions with an aggregate value of hundreds of millions of dollars and currently owns (directly and/or indirectly) substantial real property.

18. Since SE Multifamily was formed, the Manager has made all decisions concerning, among other things, (a) the management of SE Multifamily; (b) the allocation of profits and losses among the Members (as that term is defined in the Operating Agreement); (c) whether, when, and in what amounts to make distributions to the Members; and (d) the preparation of SE Multifamily's federal and state income tax returns (including the Members' Forms K-1).

19. On June 28, 2022, Highland sent a letter to HCRE requesting access to SE Multifamily's books and records (the "Records Request"). **Exhibit 2** at 2.

20. On July 1, 2022, HCRE's counsel informed Highland that the Records Request should be directed to SE Multifamily. Thus, on July 6, 2022, Highland attempted to hand-deliver (as permitted under Section 10.7 of the Operating Agreement) its Records Request to SE Multifamily. SE Multifamily refused delivery asserting that "only Mr. Dondero [was] authorized to accept" the delivery. *See* email communications set forth in **Exhibit 3**.

21. On July 7, 2022, Highland wrote to counsel for HCRE and Mr. Dondero, recounted SE Multifamily's improper refusal to accept delivery of the Records Request, and asked counsel to either acknowledge receipt of its email and propose a date for Highland's inspection of SE Multifamily's books and records, or confirm that none of them were authorized to accept service. *Id.*

22. On July 13, 2022, Mr. Dondero's counsel disclaimed responsibility, vaguely contending "I understand others are addressing this." HCRE's counsel never responded. *Id*. On July 22, Highland's counsel reiterated the Records Request. Again, Highland received no response. *Id*.

23. On October 4, 2022, during a deposition, Mr. Dondero was unable to identify any reason why Highland would not have the right to access and copy SE Multifamily's records.

24. On October 31, 2022, the night before Highland and HCRE were to begin a contested evidentiary hearing in the Bankruptcy Court concerning HCRE's claim that "all or a portion" of Highland's interest in SE Multifamily did not belong to it (the "Trial"), a new law firm emerged as counsel to SE Multifamily who claimed to be "reaching out to find out what exactly you are seeking." **Exhibit 4**.[1]

25. On December 28, 2022, after the Trial and post-trial briefing were completed and in response to SE Multifamily's request for specificity, Highland provided a detailed list of requested information:

> 1. Consolidating financial statements: March 31, 2022, June 30, 2022, September 30, 2022, November 30, 2022 (if November is not yet available, then we request October 31, 2022).

[1] In hindsight, and based on the timing of the communication, SE Multifamily apparently had no intention of providing any information to Highland but "reach[ed] out" to avoid having the issue raised in the Bankruptcy Court during the Trial.

2. Historical distribution amounts to any members of SE Multifamily Holdings LLC listed by date, amount, and LLC unitholder.

3. Closing statement for the purchase of the Florida property in 2021.

4. Current rent roll for Florida property.

5. Monthly property-level reporting from the property manager for all properties that are still owned by SE Multifamily or its subsidiaries, starting with December 31, 2021 until most recent available.

6. For any debt outstanding (whether at the property or SE Multifamily level), list lender name, rate, current amount outstanding, and maturity. If there are other material features to the debt (conversion features, floating rate information, etc.) please note it.

7. For any notes receivable (affiliated or unaffiliated) or other receivables from affiliates at SE Multifamily or its subsidiaries, list borrower/affiliate name, rate (if applicable), current amount outstanding, and maturity. If there are other material features to the receivable (conversion features, floating rate information, etc.) please note it.

8. Copies of all valuations, marketing materials, PPA's, appraisals, or broker opinions of value obtained in 2021 or 2022 for all properties still owned by SE Multifamily or its subsidiaries.

9. Copies of all closing statements for all properties sold 2020-2022.

10. On an on-going basis, provide monthly financial statements for each month end, beginning December 31, 2022, along with property-level reporting from the property manager.

Exhibit 4 (collectively, the "Initial Specified Requests").

26. Over the course of the next six weeks, counsel for Highland and SE Multifamily exchanged a series of communications in which SE Multifamily erected unjustifiable hurdles and advanced new and disingenuous arguments intended to prevent Highland from copying and inspecting SE Multifamily's books and records. *See generally* **Exhibits 4, 5, and 6**.

27. In sum, despite Highland's repeated Records Requests made over an eight-month period, SE Multifamily and its Manager have failed to grant Highland access to SE Multifamily's books and records as unambiguously required under the Operating Agreement. **Exhibit 1** § 8.3.

C. Additional Relevant Facts

28. The Trial conducted before the Bankruptcy Court concerned HCRE's contention that "all or a portion" of Highland's interest in SE Multifamily "may be" HCRE's property. On April 28, 2023, in an exhaustive 39-page decision (the "Decision"), the Bankruptcy Court rejected all of HCRE's contentions and confirmed that—as the parties always intended—Highland owns a 46.06% interest in SE Multifamily. **Exhibit 7**.

29. Finally, with the entry of the Decision, Highland seeks equitable relief here with a sense of urgency because (a) The Dugaboy Investment Trust—one of Mr. Dondero's "family trusts"—has reported to the Bankruptcy Court that the value of Highland's interest in SE Family inexplicably decreased from $20 million

to approximately $12 million within the last year; and (b) under Highland's plan of reorganization, Highland is required to monetize its assets and distribute the proceeds to creditors (after the satisfaction of all other estate obligations). HCRE's unjustifiable interference with Highland's information rights is preventing Highland from completing the Bankruptcy Court-approved plan, which was affirmed by the United States Court of Appeals for the Fifth Circuit.

30. Highland therefore requires copies of SE Multifamily's books and records to determine the value of its interest and whether HCRE has fulfilled its duties as Manager with respect to, among other things, (a) the management of SE Multifamily; (b) the allocation of profits and losses among the Members (as that term is defined in the Operating Agreement); (c) whether, when, and in what amounts and for what reason distributions have been made to the Members; and (d) the preparation of SE Multifamily's federal and state income tax returns (including the Members' Forms K-1).

COUNT I
SPECIFIC PERFORMANCE

31. Highland incorporates by reference all allegations (and the Exhibits upon which they are based) set forth in the preceding paragraphs.

32. Highland is a Member of SE Multifamily.

33. Section 8.3 of the Operating Agreement grants Members a broad and unconditional right to inspect and copy "all" of SE Multifamily's books and records.

34. In contrast to the rights granted under Delaware law (see 6 DEL. C. § 18-305), (a) Members seeking access to SE Multifamily's books and records under section 8.3 are not required to state the purpose of their request or take any other steps to enforce their rights, and (b) the Manager has no right to withhold information on the grounds of "confidentiality" or any other basis.

35. Highland's request to inspect and copy was reasonable because (a) the Initial Specified Requests were tendered in response to SE Multifamily's written inquiry; (b) the Records Request allowed sufficient time for SE Multifamily to produce the requested books and records, and (c) Highland indicated that it was flexible as to the timing and sequence of SE Multifamily's production of the books and records.

36. Defendants have engaged in a continuous pattern of conduct to evade their obligations under section 8.3 and placed unwarranted conditions and restrictions to Highland's Records Requests. *See* Exhibits 3-6.

37. Defendants have not provided any of SE Multifamily's books and records to Highland in response to the Records Requests or the Initial Specific Requests.

38. Highland has no adequate remedy at law because (a) no value can be placed on Highland's contractual right to copy and inspect SE Multifamily's books and records, and (b) Defendants' breach of their obligations under section 8.3 of the Operating Agreement will continue indefinitely in the absence of the equitable remedy of specific performance.

39. Highland therefore requests entry of an order requiring Defendants to permit Highland, its attorneys, and/or agents, to inspect and copy all of SE Multifamily's books and records, including but not limited to those responsive to the Initial Specified Requests.

40. Highland further requests that it be awarded recovery of its full fees, costs, and expenses, including attorneys fees, incurred in bringing this action for address HCRE's unjustifiable failure to comply with its unambiguous contractual obligations.

CONCLUSION

Wherefore, Highland requests that the Court:

A. Schedule a prompt final hearing to resolve the claim asserted herein;

B. Order Defendants to make available for inspection and copying to Highland (a) within fourteen (14) calendar days of the entry of a final order resolving the claim asserted herein, all documents responsive to

the Initial Specified Requests, and (b) any other books and records of SE Multifamily that Highland may reasonably request in the future;

C. Award Highland its fees, costs, and expenses in connection with the prosecution of this action; and

D. Grant Highland such other and further relief as the Court may deem appropriate under the circumstances.

Words: 2,471

Dated: Wilmington, Delaware
May 5, 2023

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Appendix Exhibit 160

File No. 2023-25

IN THE MATTER OF
HIGHLAND CAPITAL MANAGEMENT, L.P.

- and -

IN THE MATTER OF
NEXPOINT HOSPITALITY TRUST

(In connection with a transactional proceeding under Rule 16 and under Subsection 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5)

FACTUM OF THE RESPONDENT

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I. OVERVIEW

1. The core purpose of section 127 of the *Securities Act* is to allow staff of the Commission to seek orders in the public interest. While the Tribunal may consider an application by a private party, the cases have held that such recourse should be treated as exceptional. Section 127 is not to be used by private parties as a means to address private law complaints, or to pursue enforcement with respect to past breaches of securities law.

2. The cases in which the public interest jurisdiction has been exercised typically relate to a transaction or tactic that is of broad interest to market participants or to actions that would bring the integrity of the markets into disrepute, such as unfair tactics in going private transactions or the misuse of shareholder rights plans. This is not such a case.

3. The applicant, Highland Capital Management, holds 7.25% of the outstanding units of the respondent, NexPoint Hospitality Trust, having a value of approximately $536,000. Highland alleges that it requires additional disclosure in order to make a reasonably informed decision as to whether to vote in favour of amendments to conversion rights granted to creditors as part of COVID loan agreements. The amendments will confer a clear and undeniable benefit on the unitholders at no cost. More specifically, the amendments, which were required by the TSXV as a condition of continued listing, will either remove the creditors' conversion rights entirely or will shorten the time period in which the rights can be exercised. The amendments will also reduce the amount convertible. And they will make the rights significantly more expensive for the creditors to exercise, reducing the potential dilution of the REIT's unitholders.

4. The applicant provides no explanation as to how the additional disclosure will help it in deciding whether to vote in favour of these amendments which offer a clear benefit to the REIT

and its unitholders. Instead, the applicant suggests that it requires the disclosure in order to investigate certain inconsistencies in the REIT's historical disclosure, or in the disclosure made by other related parties.

5. Such a backward-looking application, unrelated to NexPoint's future conduct, is at its core enforcement-related and, as such, is not properly brought under s. 127. Indeed, Highland does not even attempt to argue that its allegations engage the public interest or that the issues raised have any implication for the markets more broadly. Nor does Highland allege – nor could it – that the amendments to the loan agreements, which are manifestly to the benefit of the unitholders, are in any way unfair, improper, fraudulent, or otherwise abusive, nor does it allege that any unitholders will suffer prejudice if they are adopted.

6. In short, there is nothing "extraordinary" about Highland's application that justifies invoking the Tribunal's public interest jurisdiction. Its request for standing, and this application, should be dismissed.

7. In any event, Highland has not advanced a *prima facie* case and its complaints are without merit and do not stand up to even the most cursory examination. Some are clearly untenable in the face of the disclosure that is provided by the Management Information Circular, while others do not relate to the amendments that are in fact before the meeting. As for its request to exclude certain unitholders from voting, Highland cannot point to any legal basis for that request, and certainly no legal basis that finds any support in the evidence led.

II. FACTS

Background

8. From the time of its IPO, NexPoint's business comprised a number of hotel properties which catered in large part to business travelers. That business was severely affected by the onset of the pandemic, due to the precipitous (and persistent) decline in business travel.[1]

9. In order to alleviate the financial pressure that it was under, NexPoint received 32 loans in the aggregate amount of US$56,165,000 between June 2021 and September 2022. The loans were all extended by entities controlled or managed by James Dondero, who is NexPoint's largest unitholder, controlling in excess of 70% of the issued units.[2]

10. At the time that the loans were made, NexPoint filed the requisite notices with the TSXV as loan submissions pursuant to TSXV Policy 5.1 – *Loans, Loan Bonuses, Finder's Fees and Commissions*.[3]

11. Although the loans constituted related-party transactions, NexPoint was not required to obtain a formal valuation, as it relied upon the exemption from the Formal Valuation Requirement in s. 5.5(b) of MI 61-101 (which is the "Specified Markets Exemption").[4] And

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[1] NexPoint Audited Financial Statements for the year ended December 31, 2020, p. 8, Exhibit "O" to the Seery Affidavit, Application Record, Tab 2(O), p. 1304.

[2] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 17 and 21, Application Record, Tab 2(A), p. 64 and 68.

[3] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 18, Application Record, Tab 2(A), p. 65.

[4] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 17, Application Record, Tab 2(A), p. 64.

NexPoint was not required to obtain minority approval, as it relied upon the exemption in s. 5.7(1)(a) of MI 61-101 (which applies where the fair market value of the transaction does not exceed 25% of the issuer's market capitalization). NexPoint also had available to it, and relied upon, the "Financial Hardship Exemption", set out in s. 5.7(1)(e) (which applies when the issuer is in serious financial difficulty).[5]

12. At no time prior to the summer of 2023 did the applicant raise any concern with the loans or with the propriety of NexPoint's reliance upon exemptions to the formal evaluation requirement and the minority approval requirement.

13. As will be discussed below, in December 2022, the TSXV advised for the first time that, in its view, the loans ought to have been the subject of filings under TSXV Policy 4.1 (which governs private placements) and not Policy 5.1 (which governs loans). As a result, the TSXV demanded that certain amendments be made to the conversion rights attached to the loans in order to bring the loans into compliance with Policy 4.1.

The Loan Amendments at Issue and the Disclosure Contained in the Management Information Circular

14. The Management Information Circular explains that there are 32 loans in question and that all were made by entities controlled or managed by James Dondero, who beneficially owns or controls more than 70% of the REIT's outstanding units:

[5] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 18, Application Record, Tab 2(A), p. 65.

> The REIT received 32 loans from entities controlled or managed by James Dondero between June 2021 and September 2022 in the aggregate amount of US$56,165,000.[6]

15. The Circular goes on to explain that:

(a) the loans are unsecured;

(b) each loan has a 20-year term;

(c) each loan bears interest, with the applicable interest rate ranging from 2.25% to 7.5% per year, which, in each case, was the market rate as at the date of issuance;

(d) the principal and interest owing under each loan is convertible to Class B Units[7] of the operating partnership of the REIT at the option of the holder of the loan at any time; and

(e) the conversion price is set at the value of the Class B Units at the time of conversion.

16. The Circular states:

> Each of the COVID Loans is unsecured, has a 20-year term and bears interest at interest rates ranging from 2.25% per year to 7.5% per year (which were market interest rates at the time of their issuance). The principal and interest owing under the COVID Loans is convertible into

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[6] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 17, Application Record, Tab 2(A), p. 64.

[7] The Management Information Circular also explains that the Class B Units of the operating partnership do not carry voting rights, but are, in all material respects, economically equivalent to units of the REIT. See Management Information Circular, Exhibit "A" to Seery Affidavit, p. 7, Application Record, Tab 2(A), p. 54.

> Class B Units of the OP, at the option of the holder at any time, based on the value of a Class B Unit at the time of conversion.[8]

17. With respect to the amendments at issue, the Circular explains that the need for them arose because the TSXV advised the REIT in December 2022 (long after notice of the loans had been filed with the exchange) that the loans needed to be treated as "Convertible Securities", governed by TSXV Policy 4.1, rather than as loans, pursuant to TSXV Policy 5.1:

> The COVID Loans were filed with the TSXV at various points during 2021 and 2022, as loan submissions pursuant to TSXV Policy 5.1 – *Loans, Loan Bonuses, Finder's Fees and Commissioner*.
>
> Although the REIT believed that the COVID Loans were properly subject to Policy 5.1 and was not informed of any alternative treatment of the COVID Loans at the time of the filings, in December 2022, the TSXV advised the REIT that the COVID Loans were required to be treated as "Convertible Securities" under TSXV Policy 4.1 – *Private Placements* rather than loans under Policy 5.1[9]

18. Policy 4.1 limits the period within which conversion rights can be exercised to no more than five years from the date of issuance of the convertible security (in this case, the loan):

> The Conversion Period must expire no later than five years from the date of issuance of the Convertible Securities.[10]

19. Policy 4.1 also provides that the conversion price for a convertible security must not be less than the market price as at the "Price Reservation Date":

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[8] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 17, Application Record, Tab 2(A), p. 64.

[9] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 18, Application Record, Tab 2(A), p. 65.

[10] TSXV Policy 4.1, s. 2.3(b).

> The minimum Conversion Price must never be less than the Market Price (as of the Price Reservation Date).[11]

20. Consistent with those provisions, and as disclosed by the Management Information Circular, the TSXV told the REIT that it would require certain amendments to the loans, namely:

(a) that the note holders' conversion rights either be removed or be shortened to five years from the date of each loan's issuance;

(b) that the conversion rights be limited to the principal amount of the loan; and

(c) that the conversion price be fixed at the market price of the REIT's units on the date that the loan was issued.

21. The Circular states:

> . . . [T]he TSXV required the following amendments to the COVID Loans: (i) either the conversion feature be removed or limited to five years from the date of issuance of the COVID Loan; (ii) the conversion feature be limited to the principal amount of the COVID Loan (rather than the principal amount including interest); and (iii) the conversion price be fixed at a price equal to the market price of the REIT's Units on the TSXV at the time of the issuance of the COVID Loan.[12]

22. The Circular goes on to explain that, if the amendments are implemented, only the principal amount of the loans would be convertible into units (rather than both principal and interest) and the note holders' conversion rights would expire between July 1, 2026 and

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[11] TSXV Policy 4.1, s. 2.3(a). The "Price Reservation Date" is, roughly speaking, the date that the issuer makes the requisite filings related to the private placement with the TSXV under Policy 4.1.

[12] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 18-19, Application Record, Tab 2(A), p. 65-66.

September 30, 2027 (depending on the date of issuance of the loan in question). However, the term of the loans themselves would remain 20 years:

> If the Amendments are implemented, only the principal amount of each of the COVID Loans will be convertible into Class B Units for five-year terms ending between July 1, 2026 and September 30, 2027; however, the term of the COVID Loans shall remain as 20 years from their date of issuance.[13]

23. And the Circular explains that the amended conversion rights, if approved, would apply to a total of US$47,665,000 in loans. An additional loan (in the amount of US$8.5 million) would have its conversion right removed altogether:

> For one COVID Loan for an amount of US$8.5 million, the conversion right will be removed altogether. In addition, if the Amendments are implemented, the COVID Loans with conversion rights will be for an aggregate amount of US$47,665,000. . . [14]

24. With respect to the conversion price – i.e., the price which the creditor would pay to convert its debt instrument into Class B units, if the amendments are approved, that price would increase at least six-fold and as much as ten-fold, based on current market prices of the REIT's units. To explain, the loans as they currently stand provide that the conversion price is to be based on the value of a Class B unit at the time of conversion. Based on current market price, the value of a Class B unit is US$0.25. However, if the amendments are approved, the conversion prices will be fixed at prices ranging from US$1.60 to US$2.50:

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[13] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 19, Application Record, Tab 2(A), p. 66.

[14] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 19, Application Record, Tab 2(A) p. 66.

> . . . [T]he conversion price for the principal outstanding will be fixed at prices ranging from US$1.60 to US$2.50 . . .[15]

25. In sum, the amendments restrict rights that had been granted to the REIT's creditors, in that the amendments will either remove the rights entirely, or will shorten the time period within which the rights can be exercised and will reduce the amount convertible to the principal amount of the loans only. Based on the REIT's current unit price, the amendments will also make those rights significantly more expensive for the lenders to exercise and will significantly reduce the potential dilution of REIT unitholders. For the REIT and its unitholders, the amendments confer a clear and undeniable benefit, at no cost. The applicant does not assert otherwise.

26. As further disclosed by the Circular, the TSXV has demanded the amendments in order to satisfy its requirements for continued listing on the exchange. If the amendments are not approved, then the TSXV may halt or suspend trading in the units, and/or delist the REIT:

> If the Amendments are not approved at the Meeting, the REIT will engage with the TSXV to seek alternative solutions to satisfy the TSXV listing requirements; however, there can be no assurance that a satisfactory solution will be found, and if a solution is not found, the TSXV may halt trading in the Units, suspend trading in the Units and/or initiate a delisting review of the REIT's Units as, absent the Amendments, the REIT would not be in compliance with TSXV listing requirements.[16]

27. Not surprisingly, given all of the foregoing, the board of the REIT concluded that the amendments were in the best interests of the REIT:

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[15] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 19, Application Record, Tab 2(A), p. 66.

[16] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 19, Application Record, Tab 2(A), p. 66.

> The Board, having undertaken a thorough review of, and having: (i) considered the terms of the Amendments to the COVID Loans; (ii) considered the need to comply with the requirements of the TSXV in order to maintain a listing for the Units, and (iii) consulted with its legal advisors, concluded that the Amendments are in the best interests of the REIT and agreed to pursue the approval of the Amendments.[17]

28. Consistent with that conclusion, the Circular sets out the board's recommendation that unitholders approve the amendments:

> The Board has unanimously approved the Amendments to the COVID Loans (with James Dondero declaring his interest in the Amendments and abstaining from voting) and recommends that the Unitholders vote **FOR** the Amended COVID Loans Resolution.[18]

29. In addition, the Circular notes that, because the amendments relate to loans with entities controlled by Mr. Dondero, and because Mr. Dondero owns or controls more than 10% of the REIT's units, the amendments constitute a "related party transaction", within the meaning of MI 61-101 and, therefore, require minority approval in order to take effect:

> The Amendments constitute a "related party transaction" within the meaning of MI 61-101, as the Amendments have the effect of amending the terms of the COVID Loans, which are securities of the REIT beneficially owned or over which control is exercised by Mr. Dondero (a "related party" of the REIT because of the fact that Mr. Dondero beneficially owns or controls Units of the REIT that carry more than 10% of the voting rights attached to all of the REIT's issued and outstanding Units).
> . . .

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[17] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 19, Application Record, Tab 2(A), p. 66.

[18] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 20, Application Record, Tab 2(A), p. 67.

> MI 61-101 requires that a related party transaction be subject to "minority approval" . . . of every class of "affected securities" of the issuer. . . [19]

30. Finally, the Circular contains a statement certifying that the facts set out in it are true and complete:

> The foregoing contains no untrue statement of a material fact and does not omit to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made.[20]

31. The applicant alleges that the foregoing disclosure – relating to amendments that are being demanded by the regulator, and that are patently to the benefit of the REIT and its unitholders – is somehow inadequate. However, the applicant does so without any explanation as to how additional information would assist it in deciding how to vote. And tellingly the applicant makes no suggestion – nor could such a suggestion credibly be made – that the amendments pose any risk of prejudice to the unitholders.

III. LAW AND ARGUMENT

The Tribunal's Public Interest Jurisdiction Is Not Engaged

32. Although s. 127 provides the Tribunal with broad jurisdiction to make orders intervening in the capital markets where it is in the public interest to do so, this discretion is not unlimited.[21]

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[19] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 19, Application Record, Tab 2(A), p. 66.

[20] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 40, Application Record, Tab 2(A), p. 87.

[21] *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para. 41.

The Tribunal's public interest jurisdiction must be exercised with caution, having regard to "all of the facts, all of the policy consideration at play, all of the underlying circumstances of the case, and all of the interests affected by the matter and the remedy sought."[22]

33. As this Tribunal has repeatedly affirmed, "The ability of a private party to bring an application under section 127 is intended to be an extraordinary circumstance."[23] Section 127 is not to be used by private parties as a means to address private law complaints, or to pursue enforcement with respect to past breaches of securities law:

> [Section] 127 cannot be used merely to remedy *Securities Act* misconduct alleged to have caused harm or damages to private parties or individuals.[24]

34. Rather, the purpose of such applications must be protective, and to prevent future harm to Ontario's capital markets.[25] As the Commission stated in *MI Developments Inc.*:

> In our view, persons other than Staff are not entitled as of right to bring an application under section 127 where the application is, at its core, for the purpose of imposing sanctions in respect of past breaches of the Act or past conduct alleged to be contrary to the public interest. In our view, those purposes are regulatory in nature and enforcement related and such applications should be able to be brought as of right only by Staff.[26]

35. In order for the Tribunal to make an order under its public interest jurisdiction, it must be

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[22] *Sterling Centrecorp Inc, Re*, 2007 ONSEC 9 at para. 212.

[23] *Catalyst Capital Group Inc.*, 2016 ONSEC 14 at para. 56; *Pearson (Re)*, 2018 ONSEC 53 at para 69.

[24] *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para. 45.

[25] *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para. 42.

[26] *MI Developments Inc.*, 2009 ONSEC 47 at para. 107.

satisfied that the application raises issues relevant not only to the applicant, but also to the public and the efficient functioning of the capital markets.[27]

36. In determining whether the Tribunal's public interest mandate is engaged by an application by a private party, the following factors are relevant: (i) whether the application raises a novel issue; (ii) whether the issues raised could have been addressed in previous applications; (iii) whether the application demonstrates that there is a *prima facie* case; and (iv) whether the timing of the application would interfere unduly with the justified expectations of market participants and affect fairness, efficiency and confidence in the capital markets.[28]

37. Thus, the applicant must establish that there is a threat of abusive future conduct which engages issues of importance to the capital markets. In *Catalyst Capital Group Inc*., the Commission explained:

> The Commission will intervene in situations where [a transaction] is abusive, contravenes Ontario securities law or an animating principle underlying that law, or brings the integrity of the capital markets into disrepute.[29]

38. *In MI Developments Inc. (Re)*., the Tribunal established that a private applicant seeking standing bears the burden of showing a *prima facie* case that the following factors are satisfied:

(a) the application involves or relates to both past and possible future conduct regulated by Ontario securities law;

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[27] *Catalyst Capital Group Inc.*, 2016 ONSEC 14 at para. 56.

[28] *Pearson (Re)*, 2018 ONSEC 53 at para 72.

[29] *Catalyst Capital Group Inc*., 2016 ONSEC 14 at para. 29.

(b) the application is not, at its core, enforcement in nature;

(c) the relief sought is future-looking;

(d) the Commission has the authority to impose an appropriate remedy in the circumstances;

(e) the applicant, as a substantial shareholder of the respondent, is directly affected by the past and future conduct of the respondents; and

(f) it is in the public interest to hear the application.[30]

39. The Commission has repeatedly emphasized that the applicant bears the burden of proof to establish the basis for the exercise of the public interest jurisdiction under section 127. In *Pearson (Re)*, the Commission stated:

> An applicant bears the onus of establishing that it is in the public interest to grant such an extraordinary remedy and must tender "sufficient *prima facie* evidence to satisfy that onus."[31]

40. Where an applicant cannot demonstrate a *prima facie* case, its request for standing will be denied and the application dismissed.[32]

41. The cases in which the Commission has invoked its public interest jurisdiction typically

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[30] *MI Developments Inc.,* 2009 ONSEC 47 at para. 107 and 110; *Pearson (Re)*, 2018 ONSEC 53 at para 70.

[31] *Pearson (Re)*, 2018 ONSEC 53 at para. 71. See also *Catalyst Capital Group Inc*., 2016 ONSEC 14 at para. 30.

[32] *Western Wind Energy Corp. et al.*, 2013 ONSEC 25 at para. 44. And see *Pearson (Re)*, 2018 ONSEC 53 at para. 90; *Catalyst Capital Group Inc*., 2016 ONSEC 14 at para. 64-65.

involve matters of broad interest to market participants or they relate to actions that would bring the integrity of the markets into disrepute. Thus, in *Magna* (a case upon which the applicant places great reliance), the Commission addressed issues relating to the required level of disclosure regarding a major restructuring transaction in respect of which the Board was not making a recommendation, leaving shareholders to their own devices. However, counsel are not aware of any cases (and certainly the applicant cites none) where a mere dispute about the sufficiency of disclosure in an otherwise unremarkable transaction was found to engage s. 127's public interest jurisdiction.

42. None of the factors that are indicative of a matter engaging the public interest is found in Highland's application. Highland's primary allegation is that the REIT's historical disclosure relating to the issuance of the loans has been insufficient. Of course, the desirability of those loans is not the matter to be put before the REIT's unitholders and is not the subject of the disclosure at issue in the within proceeding. Moreover, even if the allegation had any merit – which it does not – such a straight-forward disclosure complaint does not require consideration by the Commission pursuant to s. 127. In any event, any decision from the Commission on this issue would be of limited guidance to the public, as it is well-established that disclosure is "contextual and will vary with the circumstances".[33]

43. The fact that Highland's application does not engage the public interest is further emphasized by the fact that it does not even allege (nor could it) that the transaction at issue in this proceeding – a transaction that on its face is so obviously to the benefit of unitholders – is

[33] *Magna International Inc. et al.*, 2010 ONSEC 14 at para. 128.

unfair, improper, fraudulent, abusive or otherwise contrary to the public interest. There is accordingly no allegation that raises even a *prima facie* case that the Commission would be justified in intervening in the proposed transaction for the protection of the capital markets.

44. Finally, the untimely and disruptive nature of Highland's application should not be ignored. The disclosure complained of by Highland occurred in 2021 and 2022. Thus, the primary basis for this application – an inquiry into the exemptions relied upon for the underlying loans – could have been raised long ago. Yet Highland has provided no explanation as to why it did not raise its complaints at earlier time. Rather, it waited until a scheduled meeting of unitholders was imminent to commence this application, requiring the meeting to be re-scheduled at the last minute. And, as discussed below, the applicant now also takes the position that the meeting cannot proceed on the adjourned date, even if its application is dismissed.

45. The Commission has noted that applications brought by private parties close in time to a definitive event such as a shareholder vote must be closely scrutinized:

> We agree with Staff's submissions that applications for relief under section 127 by private parties brought close in time to a definitive event such as a shareholder vote or Court approval should be closely scrutinized to determine whether there was a reasonable basis for the delay.[34]

46. The same concerns apply in the present circumstances. Highland's unnecessary delay in bringing this application has resulted in significant disruption to the previously scheduled meeting of unitholders, which needed to be rescheduled to accommodate the hearing of this application. This untimeliness should not be excused, particularly since, as described above,

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[34] *Pearson (Re),* 2018 ONSEC 53 at para. 75.

Highland has failed entirely to establish a *prima facie* case of unfair, improper, fraudulent or otherwise abusive practice and has not explained how the orders it seeks would be in the public interest.

47. Furthermore and in any event, as is discussed below, Highland's complaints about the disclosure made in the Management Information Circular are wholly without merit.

There Is No Merit to the Applicant's Complaints – The Applicant Does Not Have a *Prima Facie* Case

48. As discussed above, the disclosure provided in the Management Information Circular clearly explains:

(a) how the amendments came about – i.e., they were demanded by the TSXV;[35]

(b) the substance of the amendments – i.e., they will fix conversion prices at prices significantly higher than the REIT's current market price (thereby reducing the potential dilution of the REIT's unitholders), will restrict the term of (and, in one instance, eliminate) the lenders' conversion rights, and will restrict the amount convertible to the principal amount of the loan only;[36] and

[35] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 18, Application Record, Tab 2(A), p. 65.

[36] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 18-19, Application Record, Tab 2(A), p. 65-66.

(c) the consequences if the amendments are not approved – i.e., the REIT will not be in compliance with the TSXV listing requirements, which could lead the TSXV to halt or suspend trading and/or initiate a delisting review.[37]

49. Notwithstanding the fact that the amendments are, on their face, clearly beneficial to unitholders and notwithstanding the fact that the rejection of the amendments would be detrimental to the interests of all unitholders, the applicant advances a myriad of arguments as to why it says that further information is required. None of those arguments stands up to scrutiny.

50. Moreover, many of the applicant's arguments seem to be directed at concerns that it appears to have with NexPoint's past disclosure (or with the disclosure of other entities controlled by James Dondero), all of which suggests that the within proceeding is simply the latest chapter in a long-running and multi-faceted dispute between the applicant and Mr. Dondero – the type of private dispute that does not engage s. 127's public interest jurisdiction.

(i) The Management Information Circular Clearly States that the Trustees Believe the Amendments to Be Fair and Desirable and in the Best Interests of the REIT

51. The applicant argues at length that the disclosure in the Management Information Circular is inadequate because it does not state whether the trustees believe that the amendments to the notes are fair. For example, the applicant's factum states:

> The trustees have not disclosed their views on the fairness of the amendments to the notes.[38]

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[37] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 19, Application Record, Tab 2(A), p. 66.

[38] Applicant's factum at para. 50.

52. Similarly:

> The trustees have also failed to disclose or explain their reasonable beliefs as to the desirability or fairness of the specific amendments to the notes. . .[39]

53. And:

> . . . [T]he Information Circular is silent on whether the amendments are fair to the unitholders.[40]

54. And:

> . . . [W]hile the Information Circular discloses that one Convertible Note in the amount of $8.5 million will have its conversion term removed completely, it does not disclose whether this is fair or desirable.[41]

55. The applicant's argument is difficult to credit.

56. As discussed above, the amendments were required by the TSXV as a condition of continued listing. Moreover, the amendments are all manifestly to the benefit of the REIT and its unitholders, as they restrict or eliminate conversion rights granted to the REIT's creditors, and make the exercise of those rights more expensive for the creditors, thereby reducing the extent of any possible dilution of existing unitholders. In those circumstances, it is difficult to imagine any trustee making a good faith determination that the amendments were anything other than fair and desirable. And that is precisely the determination made by the board, as set out in the Management Information Circular, which clearly states that the board "concluded that the

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[39] Applicant's factum at para. 60.

[40] Applicant's factum at para. 61.

[41] Applicant's factum at para. 62.

Amendments are in the best interests of the REIT".[42] The concept of "fairness" can have no other meaning in this context.

(ii) The Management Information Circular Clearly Discloses the Factors on which the Trustees Based Their Decision

57. The applicant's next complaint is similarly spurious. The applicant argues that "the trustees have failed to disclose in reasonable detail the material factors on which their beliefs regarding the amendments are based and the background of their deliberations".[43]

58. The trustee's conclusion that the amendments are in the best interests of the REIT flows obviously from the description of the amendments themselves: a removal or restriction of the lenders' conversion rights; and an increase in the conversion price, resulting in a decrease of any possible dilution of existing unitholders. And the amendments were demanded by the TSXV as a condition for continued listing. No reasonable unitholder should require any further explanation as to why the trustees concluded that the amendments were in the best interests of the REIT and its unitholders.

(iii) The Applicant's Purported Concerns Regarding a Potential Breach of Duty of Loyalty or Duty of Care Are Speculative and Are Not Properly the Subject of a Section 127 Public Interest Hearing

59. Other arguments advanced by the applicant have a slightly different focus and are objectionable for different reasons.

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[42] Management Information Circular, Exhibit "A" to Seery Affidavit, p. 19, Application Record, Tab 2(A), p. 66.

[43] Applicant's factum at para. 63.

60. These arguments seem to suggest – without any foundation – that the trustees of the REIT failed to fulfill their fiduciary duty or duty of care owed to the REIT and its unitholders, by failing to secure the best possible amendment terms with the REIT's lenders. For example, the applicant's factum states:

> While the factors listed in NHT's Information Circular may speak to the desirability of amending the Convertible Notes to meet the TSXV's policies, they fail to disclose why the specific amendments subject to minority approval, as opposed to other potential amendments, are the most desirable or fair for NHT and its unitholders. [emphasis added][44]

61. Similarly:

> [I]f the amendment of the $56 million in Convertible Notes is beneficial to NHT, the unitholders should understand why NHT has not sought to amend all the Convertible Notes.[45]

62. This complaint does not go to whether the unitholders have enough information to decide whether to approve the amendments in question. Rather, it goes to whether the REIT's officers or trustees should have negotiated harder in order to secure terms that were even more favourable to the REIT or should have negotiated similarly beneficial amendments to other agreements, which amendments were not demanded by the TSXV.

63. The applicant has led no evidence, nor has it suggested any reason to believe, that there was any possibility of the REIT extracting terms from its creditors that were any more favourable than those which have been put before the unitholders. On the contrary, commercial common sense tells us that the only terms which could be obtained from the REIT's lenders are

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[44] Applicant's factum at para. 66.

[45] Applicant's factum at para. 76.

those which the TSXV has demanded as a condition of continued listing.

64. Moreover, even if there were evidence that the trustees carried out the negotiations in a manner which breached their duty of loyalty or duty of care, that question would not be germane to the within application. The complaint that the trustees could perhaps have done better raises no issue that is germane to a s. 127 proceeding; if it had any merit, it would be a matter for another forum.

65. Similar issues arise in connection with the applicant's argument that it needs disclosure as to why NexPoint initially believed that the loans were governed by TSXV's policy regarding loans, as opposed to the policy regarding convertible securities. The applicant's factum states:

> The Information Circular is silent on why the trustees and their advisors believed that the Convertible Notes . . . were not initially filed as "Convertible Securities" under the TSXV's Private Placement policy but rather under the TSXV's Loans, Loan Bonuses, Finder's Fees and Commissions policy.
> . . .
> NHT has not disclosed how it made the mischaracterization that caused the Convertible Notes to avoid TSXV scrutiny when they were filed.[46]

66. However, the details as to how/why NexPoint believed that the loans were governed by Policy 5.1 – how "the problem came to be", in the applicant's phrasing,[47] has no bearing on whether the amendments, which the TSXV has now required, and which are manifestly to the benefit of the REIT and its unitholders, should be approved at the upcoming meeting. The question posed has no relevance for unitholders regarding the amendments and certainly does not

[46] Applicant's factum at para. 71 and 74.

[47] Applicant's factum at para. 74.

engage the public interest.

(iv) The Applicant's Purported Concerns with Past Disclosure Are Not Properly the Subject of a Section 127 Application

67. The applicant also makes allegations regarding the REIT's historical disclosure.

68. For example, the applicant suggests that there was some impropriety in the REIT's historical disclosure which stated that the loans, when originally issued, were exempt from the requirement to obtain minority approval, by virtue of section 5.7(1)(a) of MI 61-101, which applies where the fair market value of the transaction is less than 25% of the issuer's market capitalization. The applicant calls into question whether that particular exemption was actually available to the REIT, with the unspoken implication being that the REIT may have acted contrary to securities law in failing to obtain minority approval at the time the loans were issued. However, the applicant does so not by referencing the market capitalization at the relevant time (i.e., the time of issuance), but the current market capitalization. The applicant's factum states:

> Considering that the current value of the Convertible Notes far exceeds NHT's market capitalization, unitholders should have the opportunity to satisfy themselves that the notes were truly exempt from minority unitholder approval when they were entered into.[48]

69. Regardless, such a historically-oriented verification exercise – designed to determine whether or not a past transaction should have been subject to minority approval – is outside of the proper scope of a section 127 application brought by a private party. The applicant's frank admission that it is trying to detect what it perceives as past misconduct provides a strong

[48] Applicant's factum at para. 79.

indication that its goal in bringing the within proceeding is not forward-looking and preventive, but rather is backward-looking and punitive.

70. The applicant also takes issue with past public disclosure made by NexPoint regarding the conversion rights attached to the loans. Specifically, financial statements from 2021 and 2022 stated that the loans were convertible at the option of the REIT,[49] while financial statements from 2023 stated that the loans were convertible at the election of the noteholder. The Q1 2023 financial statements describe the conversion rights as follows:

> The Company's notes due to affiliates are, subject to TSXV approval, convertible at any time at the election of the holders into Class B Units. [emphasis added][50]

71. In a purported effort to investigate these past inconsistencies, the applicant seeks disclosure of copies of the actual loan agreements. Its factum states:

> NHT should be required to disclose copies of the actual executed agreements for the notes, including any past amendments or assignments. This is the only way unitholders can view and assess the specific terms of each note for themselves and clarify the inconsistencies in past disclosure.[51]

72. However, there is no question (and the applicant does not seem to raise any) that the conversion right is that of the holder. It is this right which has activated the TSXV's requirement for the amendment. The reason as to why a past disclosure said otherwise is not properly the

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[49] Affidavit of James Seery, para. 16**,** Application Record, Tab 2, p. 23.

[50] NexPoint Interim Financial Statements for the three months ended March 31, 2023, Exhibit "W" to the Affidavit of James Seery, p. 24, Application Record, Tab 2(W), p. 1595.

[51] See in this regard, Applicant's factum at para. 55.

subject-matter of a s. 127 application. Nor does the applicant explain why it did not raise its concern months ago, when the REIT's Q1 2023 financial statements, which clearly stated that the loans were convertible at the election of the creditors, were issued.

73. Even in cases where the standing threshold can be satisfied, there rests on the applicant the obligation to prove its allegations on the balance of probabilities. The Tribunal will not move to a full hearing on the merits on the basis of speculative assertions.[52]

74. Lastly, it is not any disclosure failure which must be proven, but rather the non-disclosure of a material fact.[53] None of the complaints raised by the applicant rise to that level.

(v) The Applicant's Purported Concerns with Public Disclosure Made by Third Parties Are Not Properly the Subject of the Within Application

75. Seeking to stretch section 127's jurisdiction even further, the applicant is also attempting to use the within proceeding to investigate what it believes to be misstatements contained in the disclosure of a third party, an entity named Highland Opportunities and Income Fund, which is one of the holders of the loans in question. More specifically, the applicant takes issue with past public disclosure of Highland Opportunities and Income Fund filed with the U.S. Securities and Exchange Commission, which disclosure stated that the loan in question was secured (and not, as is set out in all of NexPoint's disclosure, unsecured).[54] In a purported attempt to investigate this past statement, which was made not by the REIT, but by its contracting counterparty, and which

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[52] *Re Global Partners Capital*, 2010 ONSEC 17 at para. 27; *Pearson (Re)*, 2018 ONSEC 53 at para. 83.

[53] *Sterling Centrecorp Inc. (Re)*, 2007 ONSEC 9 at para. 211.

[54] Applicant's factum at p. 29.

was made pursuant to a foreign securities regulation regime, the applicant seeks production of copies of the various loan agreements.[55]

76. Again, the applicant's focus is misdirected. It is not proper to use the within application, brought against NexPoint, to pursue suspected misstatements made by a third party in a foreign jurisdiction.

(vi) There Is No Basis to the Applicant's Request to Exclude Liberty CLO Holdco or Highland Dallas Foundation from Voting

77. In addition to its request for additional disclosure, the applicant also seeks to exclude two unitholders from voting. The applicant does so without having served notice of the within application on those unitholders. And it does so without engaging with the applicable legal test for excluding unitholders from the vote which is set down by MI 61-101. Indeed, the applicant does not even identify the particular provision of MI 61-101 which it alleges is applicable. Instead, the applicant contents itself with vague assertions that the two unitholders are "interested" and that they are "connected to" James Dondero.[56]

78. The governing provision of MI 61-101 is s. 8.1(2), which provides that, in determining minority approval, certain classes of security holders must be excluded:

> In determining minority approval for a . . . related party transaction, an issuer shall exclude the votes attached to affected securities that, to the knowledge of the issuer or any interested party or their respective directors or senior officers, after reasonable inquiry, are beneficially owned or over which control or direction is exercised by
>
> (a) the issuer,

[55] Applicant's factum at para. 55.

[56] See in this regard Applicant's factum at para. 83 and 85.

> (b) an interested party,
>
> (c) a related party of an interested party . . . or
>
> (d) a joint actor with a person referred to in paragraph (b) or (c) in respect of the transaction.[57]

79. While the applicant does not specify to which of these categories it alleges the two entities belong, it obviously is not relying upon category (a) (since neither of the two entities is "the issuer"), and it presumably is not relying upon category (b) (since neither of the two entities is alleged to be a party to the loan transaction, or to be entitled to receive any collateral benefit or payment of any kind from the transaction – as is required to fall within the definition of "interested party").[58]

80. With respect to category (c) – i.e., a "related party of an interested party", again the applicant does not provide any assistance as to whether it is alleging that these two unitholders are "related parties" to either Mr. Dondero or to the counterparties to the loans. Regardless, the applicant has not led any evidence to support any such allegation. It has not led any evidence, or made any suggestion that, the unitholders are "a control person" of the counterparties to the loan (as would satisfy paragraph (a) of the definition of "related party", which refers to a "control person of the entity").[59]

81. Nor has it led any evidence that the control person of the counterparties (i.e., Mr. Dondero) is a control person of the two unitholders (as would satisfy paragraph (b) of the

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[57] Multilateral Instrument 61-101, s. 8.1(2).

[58] For the definition of "interested party", see MI 61-101, s. 1.1.

[59] For the definition of "related party", see MI 61-101, s. 1.1.

definition of "related party"). In that regard, the applicable definition of "control person" is found in s. 1(1) of the *Securities Act* and states as follows:

> "control person" means,
>
> (a) a person or company who holds a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and, if a person or company holds more than 20 per cent of the voting rights attached to all outstanding voting securities of an issuer, the person or company is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer, or
>
> (b) each person or company in a combination of persons or companies, acting in concert by virtue of an agreement, arrangement, commitment or understanding, which holds in total a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and, if a combination of persons or companies holds more than 20 per cent of the voting rights attached to all outstanding voting securities of an issuer, the combination of persons or companies is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer.[60]

82. There is no evidence that Mr. Dondero is a "control person" of either of the two entities. Indeed, with respect to the Highland Dallas Foundation, there cannot possibly be a "control person" of that entity, since it does not appear to be an "issuer", as it does not appear to have any outstanding securities.[61]

83. Nor can there be any suggestion that either of the two unitholders fall within any of the other parts of the definition of "related party", such as would make either of them a "related

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[60] *Securities Act*, R.S.O. 1990, c. S.5, s. 1(1).

[61] With respect to the fact that Highland Dallas does not appear to have any outstanding securities, due to the fact that it is a non-profit corporation, see Exhibit "NN" to Seery Affidavit, Application Record, Tab 2(N), p. 1699-1701.

party" of Mr. Dondero or any of the lenders.

84. That leaves the possibility that the applicant is alleging that the two unitholders are "joint actors" with Mr. Dondero or the lenders. If so, the applicant has failed to lead any evidence of such a relationship.

85. "Joint actors" is defined in MI 61-101 to mean "acting jointly or in concert", as determined in accordance with s. 1.9 of MI 62-104. As set out in s. 1.9(1) and as explained by the Commission in *Sterling Centrecorp Inc. (Re)*, whether two parties are "joint actors" is a question of fact (and neither of the situations whereby persons are presumed to be acting jointly or in concert has any application here).[62]

86. Thus, in *Sterling Centrecorp Inc. (Re)*, the Commission found that a shareholder may be acting jointly and in concert with insiders to a particular transaction, if that shareholder played an integral role in planning, promoting or structuring the transaction in question:

> A determination of a joint actor relationship can be made if the facts establish that the parties in question played an integral role in planning, promoting and structuring the transaction to ensure its success beyond their customary role.[63]

87. Of course, there is no suggestion that either of the two unitholders played any role whatsoever with respect to the planning, promoting, or structuring of the loans in question. Rather, the applicant merely alleges that Mr. Mark Patrick, who is the "general manager" of a company related to Liberty CLO Holdco, used to be employed by a company controlled by Mr.

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[62] *Sterling Centrecorp Inc. (Re)*, 2007 ONSEC 9 at para. 79.

[63] *Sterling Centrecorp Inc. (Re)*, 2007 ONSEC 9 at para. 102.

Dondero.[64] However, as the Commission explained in *Sterling Centrecorp Inc. (Re)*, the mere fact that parties have personal or business relationships is not sufficient to make them joint actors:

> The mere fact that parties had personal or business relationships in the past does not render them joint actors within the meaning of Rule 61-501.[65]

88. And, with respect to Highland Dallas Foundation, the applicant relies upon the fact that Mr. Dondero is one of three directors of that entity and that the Foundation used to share (but no longer shares) an address with the REIT[66] – facts that are entirely irrelevant to whether the Foundation was acting jointly and in concert with Mr. Dondero or the lenders in respect of these loan transactions.

89. Finally, the filings and decisions from the U.S. bankruptcy court upon which the applicant relies are of no assistance. One of the decisions upon which Highland relies does not even reflect the outcome of an adjudication on the merits, but was merely a summary of allegations made by one of the parties.[67] The other decisions do not deal with either of Liberty CLO Holdco or Dallas Mountain Trust and they certainly do not purport to make any broad findings about who controls those two entities (or indeed to make any findings about those two

---

[64] See, e.g., Exhibit "I" to the Seery Affidavit, p. 3, Application Record, Tab 2(I), p. 814; and for the corporate relationship between the corporate entity controlled by Mr. Patrick and Liberty CLO Holdco, see Exhibit "MM" to the Seery Affidavit, Application Record, Tab 2(MM), p. 1660.

[65] *Sterling Centrecorp Inc. (Re)*, 2007 ONSEC 9 at para. 183.

[66] See Applicant's factum at para. 85.

[67] Seery Affidavit, para. 11b, and Exhibit "K", Application Record, Tab 2(K), p. 20 and p. 983.

entities at all).[68] What Highland's extensive reliance upon these Texas decisions best demonstrates is that Highland and Mr. Dondero have a litigation history which engages other agendas.

90. In sum, there is simply no evidentiary basis – certainly no "clear and cogent evidence"[69] – in support of the applicant's assertion that Liberty CLO Holdco or the Highland Dallas Foundation are "interested parties" within the meaning of MI 61-101 and thereby excluded from voting.

There Is No Basis for the Cease Trade Order Sought by the Applicant

91. In addition to seeking additional disclosure and an order excluding two unitholders from voting (discussed above), the applicant also seeks an order prohibiting the REIT from "trading its securities" or the Class B units of the operating partnership "with any entities controlled or managed by James Dondero" until such time as the REIT makes the additional disclosure sought by the applicant.[70]

92. The applicant says that the purpose of this order is, in part, "to prevent NHT from entering into further convertible notes with Dondero-affiliated parties".[71] And it explains that, without such an order, the REIT will be able "to continue entering into convertible notes without

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[68] Seery Affidavit, Exhibits "I" and "L", Application Record, Tabs 2(I) and 2(L) p. 832 and p. 1039-1040.

[69] *Sterling Centrecorp Inc. (Re)*, 2007 ONSEC 9 at para. 116.

[70] Application of Highland Capital Management, L.P., para. A3, Application Record, Tab 1, p. 1.

[71] Applicant's factum at para. 88.

proper oversight".[72]

93. First, there is no evidence whatsoever – nor does the applicant even suggest – that the REIT has any intention of entering into any such additional loans. Second, cease trading the units will do nothing to prevent the issuance of such new notes, even if such a course of action were being contemplated.

94. In the circumstances, the only conceivable reason for the applicant to seek the cease-trade order is to clothe the within application in the guise of a forward-looking, public interest proceeding. However, the claim for forward-looking relief is a contrivance and cannot conceal that the proceeding is, at its core, enforcement-related.

If No Further Disclosure Is Ordered, There Is No Basis for a Further Postponement of the Meeting

95. Finally, the applicant makes a most puzzling request. It asks that the meeting, now scheduled with its concurrence for October 26, be further adjourned, even if its application is dismissed.

96. The meeting was adjourned to a fixed date to accommodate an orderly hearing of this matter. In turn, the schedule for delivery of materials was set to allow the matter to be dealt with before the adjourned date. And, as required by the applicable regulatory requirements, the REIT established a proxy deadline of two days prior to the meeting.

97. The applicant now says that that unitholders should not be required to submit proxies for

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[72] Applicant's factum at para. 89.

how they will vote if the application is dismissed. The applicant cites no precedent or authority – and counsel is not aware of any – for the startling proposition that a meeting adjourned to accommodate the Tribunal's process must not proceed, even if the application is dismissed.

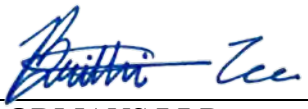
98. It is submitted that the applicant's request should be rejected.

IV. ORDER REQUESTED

99. The Respondent respectfully requests that this Tribunal dismiss this proceeding, with costs.

October 17, 2023

ALL OF WHICH IS RESPECTFULLY SUBMITTED



GOODMANS LLP

Alan Mark

Julie Rosenthal

Brittni Tee

Lawyers for the Respondent

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Catalyst Capital Group Inc.*, 2016 ONSEC 14
2. *Committee for Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37
3. *Re Global Partners Capital*, 2010 ONSEC 17
4. *Magna International Inc. et al.*, 2010 ONSEC 14
5. *MI Developments Inc.,* 2009 ONSEC 47
6. *Pearson (Re)*, 2018 ONSEC 53
7. *Sterling Centrecorp Inc, Re*, 2007 ONSEC 9
8. *Western Wind Energy Corp. et al.*, 2013 ONSEC 25

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & OTHER PROVISIONS

***Securities Act*, R.S.O. 1990, c. S.5, s. 1(1).**

Purposes of Act

1.1 The purposes of this Act are,

(a) to provide protection to investors from unfair, improper or fraudulent practices;

(b) to foster fair, efficient and competitive capital markets and confidence in capital markets;

(b.1) to foster capital formation; and

(c) to contribute to the stability of the financial system and the reduction of systemic risk. 1994, c. 33, s. 2; 2017, c. 34, Sched. 37, s. 2; 2021, c. 8, Sched. 9, s. 40 (7).

TSXV Policy 4.1 – Private Placements

2.3 Conversion Terms

(a) The minimum Conversion Price must never be less than the Market Price (as of the Price Reservation Date). Furthermore, if the Convertible Security has a term of greater than one year, the minimum allowable Conversion Price after the first year must be the greater of the Market Price and $0.10. For greater certainty, if, for example, the applicable Market Price on issuance of the Convertible Security is $0.07, the minimum allowable Conversion Price will be $0.07 in the first year of the term of the Convertible Security and $0.10 thereafter.

(b) The Conversion Period must expire no later than five years from the date of issuance of the Convertible Securities.

Multilateral Instrument 61-101

Definitions

1.1 In this Instrument

[…]

"interested party" means

(a) for a take-over bid including an insider bid, the offeror or a joint actor with the offeror,

(b) for an issuer bid

(i) the issuer, and

(ii) any control person of the issuer, or any person that would reasonably be expected to be a control person of the issuer upon successful completion of the issuer bid,

(c) for a business combination, a related party of the issuer at the time the transaction is agreed to, if the related party

(i) would, as a consequence of the transaction, directly or indirectly acquire the issuer or the business of the issuer, or combine with the issuer, through an amalgamation, arrangement or otherwise, whether alone or with joint actors,

(ii) is a party to any connected transaction to the business combination, or

(iii) is entitled to receive, directly or indirectly, as a consequence of the transaction

(A) consideration per affected security that is not identical in amount and form to the entitlement of the general body of holders in Canada of securities of the same class,

(B) a collateral benefit, or

(C) consideration for securities of a class of equity securities of the issuer if the issuer has more than one outstanding class of equity securities, unless that consideration is not greater than the entitlement of the general body of holders in Canada of every other class of equity securities of the issuer in relation to the voting and financial participating interests in the issuer represented by the respective securities, and

(d) for a related party transaction, a related party of the issuer at the time the transaction is agreed to, if the related party

(i) is a party to the transaction, unless it is a party only in its capacity as a holder of affected securities and is treated identically to the general body of holders in Canada of securities of the same class on a per security basis, or

(ii) is entitled to receive, directly or indirectly, as a consequence of the transaction

(A) a collateral benefit, or

(B) a payment or distribution made to one or more holders of a class of equity securities of the issuer if the issuer has more than one outstanding class of equity securities, unless the amount of that payment or distribution is not greater than the entitlement of the general body of holders in Canada of every other class of equity securities of the issuer in relation to the voting and financial participating interests in the issuer represented by the respective securities;

[…]

"related party" of an entity means a person, other than a person that is solely a bona fide lender, that, at the relevant time and after reasonable inquiry, is known by the entity or a director or senior officer of the entity to be

(a) a control person of the entity,

(b) a person of which a person referred to in paragraph (a) is a control person,

(c) a person of which the entity is a control person,

(d) a person that has

(i) beneficial ownership of, or control or direction over, directly or indirectly, or

(ii) a combination of beneficial ownership of, and control or direction over, directly or indirectly, securities of the entity carrying more than 10% of the voting rights attached to all the entity's outstanding voting securities,

(e) a director or senior officer of

(i) the entity, or

(ii) a person described in any other paragraph of this definition,

(f) a person that manages or directs, to any substantial degree, the affairs or operations of the entity under an agreement, arrangement or understanding between the person and the entity, including the general partner of an entity that is a limited partnership, but excluding a person acting under bankruptcy or insolvency law,

(g) a person of which persons described in any paragraph of this definition beneficially own, in the aggregate, more than 50 per cent of the securities of any outstanding class of equity securities, or

(h) an affiliated entity of any person described in any other paragraph of this definition;

[…]

General

8.1 (1) If minority approval is required for a business combination or related party transaction, it shall be obtained from the holders of every class of affected securities of the issuer, in each case voting separately as a class.

(2) In determining minority approval for a business combination or related party transaction, an issuer shall exclude the votes attached to affected securities that, to the knowledge of the issuer or any interested party or their respective directors or senior officers, after reasonable inquiry, are beneficially owned or over which control or direction is exercised by

(a) the issuer,

(b) an interested party,

(c) a related party of an interested party, unless the related party meets that description solely in its capacity as a director or senior officer of one or more persons that are neither interested parties nor issuer insiders of the issuer, or

(d) a joint actor with a person referred to in paragraph (b) or (c) in respect of the transaction

IN THE MATTER OF NEXPOINT HOSPITALITY TRUST File No. 2023-25

ONTARIO SECURITIES COMMISSION
CAPITAL MARKETS TRIBUNAL

FACTUM OF THE RESPONDENT

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1385-1302-3240

Appendix Exhibit 161

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OUR FILE NO. 436724-000001

January 31, 2023
VIA E-MAIL

John A. Morris
jmorris@pszjlaw.com
PACHULSKI STANG ZIEHL & JONES LLP
780 Third Avenue, 34th Floor
New York, NY 10017-2024

Re: SE Multifamily REIT Holdings LLC | Books and Records Request

Dear John:

We write in response to the request by Highland Capital Management, L.P. ("Highland") to review and copy the books and records of SE Multifamily REIT Holdings LLC ("SE Multifamily").

We note that Highland's written request does not state the purpose of Highland's demand, as required under Delaware law. *See* 6 Del. Code § 18-305(e). Further, we have not received the required power of attorney or other writing authorizing your office to act on behalf of Highland, as a member of SE Multifamily, for the purpose of this demand. *Id.*

Upon receipt of a written statement of purpose and accompanying written authorization, SE Multifamily is prepared to produce non-confidential records which are maintained in the usual course of the company's business pursuant to the First Amended and Restated Limited Liability Company Agreement. These records include the company's last twelve-month financials, historical distribution amounts, the closing statement for the purchase of the Florida property in 2021, the current rent roll for the Florida property, information regarding outstanding debt, and quarterly financial statements. SE Multifamily can produce these documents on a rolling basis beginning next week.

Please let me know if you would like to discuss any of the above.

Best regards,

DLA Piper LLP (US)

Amy L. Ruhland
Partner

AR: