Case No. 24-10267

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.;

Appellants,

v.

Highland Capital Management, L.P.,

Appellee.

APPELLANTS' RECORD EXCERPTS

Appeal from the United States District Court for the Northern District of Texas, the Honorable Karen Gren Scholer

Davor Rukavina, Esq.
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ATTORNEYS FOR NEXPOINT ADVISORS, L.P. AND HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.

1934054240619000000000003

TABLE OF CONTENTS

RESPECTFULLY SUBMITTED this 18th day of June, 2024.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Davor Rukavina

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 18th day of June, 2024, a true and a correct copy of the foregoing document was served on the counsel of record listed below via electronic service.

- Mr. Zachery Z. Annable: zannable@haywardfirm.com
- Mr. Gregory Vincent Demo: gdemo@pszjlaw.com, lcanty@pszjlaw.com
- Ms. Melissa Sue Hayward: mhayward@haywardfirm.com
- Mr. John A. Morris: jmorris@pszjlaw.com, lcanty@pszjlaw.com
- Mr. Jeffrey N. Pomerantz: jpomerantz@pszjlaw.com
- Mr. Davor Rukavina: drukavina@munsch.com
- Mr. Julian Preston Vasek: jvasek@munsch.com, hvalentine@munsch.com, courtmail@munsch.com
- Ms. Hayley R. Winograd: hwinograd@pszjlaw.com, lcanty@pszjlaw.com

By: /s/ Davor Rukavina
Davor Rukavina, Esq.

Tab 1

APPEAL,BKAPP,CLOSED,HORAN

U.S. District Court
Northern District of Texas (Dallas)
CIVIL DOCKET FOR CASE #: 3:22-cv-02170-S

NexPoint Advisors LP et al v. Highland Capital Management LP
Assigned to: Judge Karen Gren Scholer
Case in other court: USCA5, 24-10267
Cause: 28:0158 Notice of Appeal re Bankruptcy Matter (BA

Date Filed: 09/30/2022
Date Terminated: 02/28/2024
Jury Demand: None
Nature of Suit: 422 Bankruptcy: Appeal 28 USC 158
Jurisdiction: Federal Question

Debtor

Highland Capital Management LP

Appellant

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V.

Appellee

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Bankruptcy Judge

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PRO SE

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Notice Only

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PRO SE

Date Filed	#	Docket Text

09/30/2022	1 (p.9)	Pursuant to Fed. R. Bankr. P. 8003(d), the bankruptcy clerk has transmitted the notice of appeal filed in bankruptcy case number 21-03010 and the notice of appeal has now been docketed in the district court in case 3:22-cv-2170. (The filing fee has been paid in the Bankruptcy Court.) Pursuant to Fed. R. Bankr. P. 8009, before the record on appeal can be assembled and filed in the district court, designations of items to be included in the record on appeal and statements of issues must be filed in the bankruptcy case. If a sealed document is designated, the designating party must file a motion in the district court case for the document to be accepted under seal. See also District Court Local Bankruptcy Rule 8012.1. Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms and Instructions found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (Attachments: # 1 (p.9) Notice of appeal and supporting documents) (Whitaker - TXNB, Sheniqua) (Entered: 09/30/2022)
09/30/2022		New Case Notes: A filing fee has been paid. (ndt) (Entered: 09/30/2022)
11/22/2022	2 (p.39)	Notice Transmitting COMPLETE BK Record on Appeal re 1 (p.9) Notice Transmitting BK Appeal or Withdrawal of Reference,,,,,, (Attachments: # 1 (p.9) Mini Record Vol. 1, # 2 (p.39) Appellant Record Vol. 2, # 3 (p.3010) Appellant Record Vol. 3, # 4 Appellant Record Vol. 4, # 5 (p.3014) Appellant Record Vol. 5, # 6 (p.3256) Appellant Record Vol. 6, # 7 (p.4201) Appellant Record Vol. 7, # 8 Appellant Record Vol. 8, # 9 (p.4207) Appellant Record Vol. 9, # 10 (p.4211) Appellant Record Vol. 10, # 11 (p.4275) Appellant Record Vol. 11, # 12 (p.4279) Appellant Record Vol. 12, # 13 Appellant Record Vol. 13, # 14 (p.4282) Appellant Record Vol. 14, # 15 (p.4293) Appellant Record Vol. 15) (Blanco - TXNB, Juan) (Entered: 11/22/2022)
12/12/2022	3 (p.3010)	Unopposed MOTION for Extension of Time to File Appellants' Brief filed by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP (Attachments: # 1 (p.9) Proposed Order) (Vasek, Julian) (Entered: 12/12/2022)
12/13/2022	4	ELECTRONIC ORDER: **IT IS ORDERED** that 3 (p.3010) Appellants NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P.'s Unopposed Motion to Extend Brief Deadline, to and including **January 12, 2023**, is **GRANTED**. (Ordered by Judge Karen Gren Scholer on 12/13/2022) (chmb) (Entered: 12/13/2022)
01/05/2023	5 (p.3014)	STIPULATION *Notice of Stipulated Supplemental Record on Appeal* by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP. (Attachments: # 1 (p.9) April 12 Transcript, # 2 (p.39) April 13 Transcript) (Vasek, Julian) (Entered: 01/05/2023)
01/12/2023	6 (p.3256)	Appellant's BRIEF by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP. (Attachments: # 1 (p.9) Appendix) (Vasek, Julian) (Entered: 01/12/2023)
01/20/2023	7 (p.4201)	MOTION for Extension of Time to File Response/Reply to 6 (p.3256) Appellant's Brief filed by Highland Capital Management LP (Attachments: # 1 (p.9) Proposed Order) (Annable, Zachery) (Entered: 01/20/2023)
01/23/2023	8	ELECTRONIC ORDER: **IT IS ORDERED** that 7 (p.4201) Highland Capital Management, L.P.'s Unopposed Motion for Extension of Time to File Response Brief, to and including **March 15, 2023**, is **GRANTED**. (Ordered by Judge Karen

		Gren Scholer on 1/23/2023) (chmb) (Entered: 01/23/2023)
01/25/2023	9 (p.4207)	CERTIFICATE OF SERVICE by Highland Capital Management LP re 7 (p.4201) MOTION for Extension of Time to File Response/Reply to 6 (p.3256) Appellant's Brief (Annable, Zachery) (Entered: 01/25/2023)
03/15/2023	10 (p.4211)	Appellee's BRIEF by Highland Capital Management LP. (Annable, Zachery) (Entered: 03/15/2023)
03/16/2023	11 (p.4275)	CERTIFICATE OF SERVICE by Highland Capital Management LP re 10 (p.4211) Appellee's Brief (Annable, Zachery) (Entered: 03/16/2023)
03/29/2023	12 (p.4279)	MOTION for Extension of Time to File Response/Reply to 10 (p.4211) Appellee's Brief filed by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP (Attachments: # 1 (p.9) Proposed Order)Attorney Thomas D Berghman added to party Highland Capital Management Fund Advisors LP(pty:a), Attorney Thomas D Berghman added to party NexPoint Advisors LP(pty:a) (Berghman, Thomas) (Entered: 03/29/2023)
04/03/2023	13	ELECTRONIC ORDER: **IT IS ORDERED** that the 12 (p.4279) Unopposed Motion to Extend Reply Brief Deadline, to and including **April 3, 2023**, is **GRANTED**. (Ordered by Judge Karen Gren Scholer on 4/3/2023) (chmb) (Entered: 04/03/2023)
04/03/2023	14 (p.4282)	Appellant's REPLY BRIEF by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP. (Rukavina, Davor) (Entered: 04/03/2023)
04/20/2023	15 (p.4293)	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Gregory V. Demo with Pachulski Stang Ziehl & Jones LLP (Filing fee $100; Receipt number ATXNDC-13682709) filed by Highland Capital Management LP (Attachments: # 1 (p.9) Certificate of Good Standing, # 2 (p.39) Proposed Order) (Hayward, Melissa) (Entered: 04/20/2023)
04/20/2023	16 (p.4301)	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Hayley R. Winograd with Pachulski Stang Ziehl & Jones LLP (Filing fee $100; Receipt number ATXNDC-13682878) filed by Highland Capital Management LP (Attachments: # 1 (p.9) Certificate of Good Standing, # 2 (p.39) Proposed Order) (Hayward, Melissa) (Entered: 04/20/2023)
04/20/2023	17 (p.4307)	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney John A. Morris with Pachulski Stang Ziehl & Jones LLP (Filing fee $100; Receipt number ATXNDC-13682885) filed by Highland Capital Management LP (Attachments: # 1 (p.9) Certificate of Good Standing, # 2 (p.39) Proposed Order) (Hayward, Melissa) (Entered: 04/20/2023)
04/20/2023	18	ELECTRONIC ORDER granting 15 (p.4293) Application for Admission Pro Hac Vice of Gregory V. Demo. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Karen Gren Scholer on 4/20/2023) (chmb) (Entered: 04/20/2023)
04/20/2023	19	ELECTRONIC ORDER granting 16 (p.4301) Application for Admission Pro Hac Vice of Hayley R. Winograd. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Karen Gren Scholer on 4/20/2023) (chmb) (Entered: 04/20/2023)

04/20/2023	20	ELECTRONIC ORDER granting 17 (p.4307) Application for Admission Pro Hac Vice of John A. Morris. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Karen Gren Scholer on 4/20/2023) (chmb) (Entered: 04/20/2023)
04/24/2023	21 (p.4315)	Application for Admission Pro Hac Vice with Certificate of Good Standing for Attorney Jeffrey N. Pomerantz with Pachulski Stang Ziehl & Jones LLP (Filing fee $100; Receipt number ATXNDC-13689417) filed by Highland Capital Management LP (Attachments: # 1 (p.9) Proposed Order) (Annable, Zachery) (Entered: 04/24/2023)
04/25/2023	22	ELECTRONIC ORDER granting 21 (p.4315) Application for Admission Pro Hac Vice of Jeffrey N. Pomerantz. Important Reminder: Unless excused for cause, an attorney who is not an ECF user must register within 14 days of the date the attorney appears in a case pursuant to LR 5.1(f) and LCrR 49.2(g). (Ordered by Judge Karen Gren Scholer on 4/25/2023) (chmb) (Entered: 04/25/2023)
08/07/2023	23	ELECTRONIC ORDER: The Court sets this case for an **in-person** status conference on **August 14, 2023**, at **9:30 a.m.** (Ordered by Judge Karen Gren Scholer on 8/7/2023) (chmb) (Entered: 08/07/2023)
08/14/2023	24	ELECTRONIC Minute Entry for proceedings held before Judge Karen Gren Scholer: Status Conference held on 8/14/2023. Attorney Appearances: Plaintiff - Davor Rukavina, Amy Ruhland; Defense - John Morris, Zachery Annable. (Court Reporter: Tutti Bui) (No exhibits) Time in Court - 1:16. (tub) (Entered: 08/14/2023)
08/14/2023	25	ELECTRONIC ORDER: The Court **GRANTS** the request for oral argument contained within 6 (p.3256) Brief of Appellants NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P. Accordingly, this case is set for oral argument on **November 14, 2023**, at **1:00 PM**. (Ordered by Judge Karen Gren Scholer on 8/14/2023) (chmb) (Entered: 08/14/2023)
08/15/2023	26 (p.4324)	ORDER: The Court has been advised that mediation has been ordered in the bankruptcy case underlying this appeal. See Bankruptcy Case No. 19-34054-SGJll, Order Granting in Part and Denying in Part Motion to Stay and to Compel Mediation [ECF No. 3897]. Accordingly, the above-styled appeal is ABATED and ADMINISTRATIVELY CLOSED until at least 11/05/2023, without prejudice to it being reopened thereafter upon a motion by any party or to enter a judgment. (Ordered by Judge Karen Gren Scholer on 8/15/2023) (twd) (Entered: 08/15/2023)
09/26/2023	27 (p.4370)	Notice of Filing of Official Electronic Transcript of Status Conference Proceedings held on 8/14/2023 before Judge Karen Gren Scholer. Court Reporter/Transcriber Thu "Tutti" Bui, Telephone number (214) 753-2354. Parties are notified of their duty to review the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office. If the transcript contains personal identifiers that must be redacted under MO 61, Fed.R.Civ.P. 5.2 or Fed.R.Crim.P. 49.1, or if the transcript contains the name of a minor child victim or a minor child witness that must be redacted under 18 U.S.C. § 3509, file a Redaction Request - Transcript within 21 days. If no action is taken, the entire transcript will be made available through PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed. (46 pages) Redaction Request due 10/17/2023. Redacted Transcript Deadline set for 10/27/2023. Release of Transcript Restriction set for 12/26/2023. (tub) (Entered: 09/26/2023)

10/22/2023	28	ELECTRONIC ORDER: Based on the Court's 26 (p.4324) Order abating and administratively closing the appeal, the 25 oral argument set on November 14, 2023, is hereby **CANCELLED**. (Ordered by Judge Karen Gren Scholer on 10/22/2023) (chmb) (Entered: 10/22/2023)
11/10/2023	29 (p.4325)	Agreed MOTION to Reopen Case *and Set Oral Argument* filed by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP (Attachments: # 1 (p.9) Proposed Order) (Vasek, Julian) (Entered: 11/10/2023)
11/14/2023	30 (p.4329)	ORDER granting 29 (p.4325) Motion to Reopen and Set Oral Argument. Oral Argument set for 1/30/2024 01:00 PM before Judge Karen Gren Scholer. (Ordered by Judge Karen Gren Scholer on 11/14/2023) (axm) (Entered: 11/14/2023)
01/30/2024	31	ELECTRONIC Minute Entry for proceedings held before Judge Karen Gren Scholer: Motion Hearing held on 1/30/2024 re 29 (p.4325) Motion to Reopen Case filed by NexPoint Advisors LP, Highland Capital Management Fund Advisors LP. re: 29 (p.4325) Agreed MOTION to Reopen Case *and Set Oral Argument* Attorney Appearances: Plaintiff - Davor Rukavina, Julian Vasek, Thomas Berghman; Defense - John Morris, Zachery Annable. (Court Reporter: Tutti Bui) (No exhibits) Time in Court - 2:26. (tub) (Entered: 01/30/2024)
02/06/2024	32 (p.4417)	Notice of Filing of Official Electronic Transcript of Motion Hearing Proceedings held on 01/30/2024 before Judge Karen Gren Scholer. Court Reporter/Transcriber Thu "Tutti" Bui, Telephone number (214) 753-2354. Parties are notified of their duty to review the transcript. A copy may be purchased from the court reporter or viewed at the clerk's office. If the transcript contains personal identifiers that must be redacted under MO 61, Fed.R.Civ.P. 5.2 or Fed.R.Crim.P. 49.1, or if the transcript contains the name of a minor child victim or a minor child witness that must be redacted under 18 U.S.C. § 3509, file a Redaction Request - Transcript within 21 days. If no action is taken, the entire transcript will be made available through PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed. (96 pages) Redaction Request due 2/27/2024. Redacted Transcript Deadline set for 3/8/2024. Release of Transcript Restriction set for 5/6/2024. (tub) (Entered: 02/06/2024)
02/13/2024	33 (p.4330)	Unopposed MOTION to Amend/Correct */ Supplement the Record on Appeal* filed by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP (Attachments: # 1 (p.9) Exhibit EE, # 2 (p.39) Proposed Order) (Vasek, Julian) (Entered: 02/13/2024)
02/15/2024	34	ELECTRONIC ORDER: **IT IS ORDERED** that 33 (p.4330) Appellants' Unopposed Motion to Supplement the Record on Appeal is **GRANTED**. Advisors' Exhibit EE is hereby included in the electronic record on appeal. *See* ECF No. 33-1. (Ordered by Judge Karen Gren Scholer on 2/15/2024) (chmb) (Entered: 02/15/2024)
02/28/2024	35 (p.4340)	Memorandum Opinion and Order: The Judgment of the Bankruptcy Court is AFFIRMED. (Ordered by Judge Karen Gren Scholer on 2/28/2024) (ykp) (Entered: 02/28/2024)
03/27/2024	36 (p.4358)	NOTICE OF APPEAL as to 35 (p.4340) Memorandum Opinion and Order to the Fifth Circuit by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP. Filing fee $605, receipt number ATXNDC-14493870. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic copy of any exhibit you offered during

		a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Vasek, Julian) (Entered: 03/27/2024)
04/04/2024	37 (p.4361)	Transcript Order Form: transcript requested by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP for Oral Argument held 1/30/2024 (Court Reporter: Thu Bui.) Payment method: Private funds - Requester has obtained the estimate from the reporter and has paid or will pay the cost as directed. Reminder: If the transcript is ordered for an appeal, Appellant must also file a copy of the order form with the appeals court. (Vasek, Julian) (Main Document 37 replaced on 4/4/2024 to flatten pdf) (axm). (Entered: 04/04/2024)
04/07/2024		USCA Case Number 24-10267 in USCA5 for 36 (p.4358) Notice of Appeal filed by NexPoint Advisors LP, Highland Capital Management Fund Advisors LP. (axm) (Entered: 04/07/2024)
04/09/2024	38 (p.4363)	NOTICE of *Statement of the Issues on Appeal* re: 36 (p.4358) Notice of Appeal,,,, filed by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP (Vasek, Julian) (Entered: 04/09/2024)
04/09/2024	39 (p.4366)	DESIGNATION of Record on Appeal by Highland Capital Management Fund Advisors LP, NexPoint Advisors LP re 36 (p.4358) Notice of Appeal,,,, (Vasek, Julian) (Entered: 04/09/2024)

Tab 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	
	§	
Highland Capital Management, L.P.,	§	Bankr. Case No. 19-34054-sgj-11
	§	
Debtor.	§	
	§	
Highland Capital Management Fund Advisors, L.P., now known as NexPoint Asset Management, L.P., and NexPoint Advisors, L.P.,	§	
	§	
Appellants,	§	Civil Act. No. 3:22-cv-02170-S
	§	
v.	§	
	§	
Highland Capital Management, L.P.,	§	
	§	
Appellee.	§	

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NexPoint Advisors, L.P. and Highland Capital Management Fund Advisors, L.P. (now known as NexPoint Asset Management, L.P.), as movants in the Bankruptcy Court and appellants in the District Court (the "Appellants"), hereby appeal to the United States Court of Appeals for the Fifth Circuit from the *Memorandum Opinion and Order* of the United States District Court for the Northern District of Texas, entered in this case on February 28, 2024 at Dkt. No. 35 (the "Judgment"), which affirmed the decision of the Bankruptcy Court from which the Appellants originally appealed.

The parties to the Judgment appealed from and the names and addresses of their respective attorneys are as follows:

NexPoint Advisors, L.P., and Highland Capital Management Fund Advisors, L.P.	Davor Rukavina Julian P. Vasek MUNSCH HARDT KOPF & HARR P.C. 500 N. Akard St., Ste. 4000 Dallas, TX 75201
Highland Capital Management, L.P.	John A. Morris Gregory V. Demo Jeffrey N. Pomerantz Hayley R. Winograd PACHULSKI STANG SIEHL & JONES, LLP 780 Third Avenue, 34th Floor New York, NY 10017 Zachery Z. Annable Melissa S. Hayward HAYWARD PLLC 10501 N Central Expressway, Suite 106 Dallas, TX 75231

RESPECTFULLY SUBMITTED this 27th day of March, 2024.

MUNSCH HARDT KOPF & HARR P.C.

/s/ *Davor Rukavina*

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COUNSEL FOR THE APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that, on March 27, 2024, I caused true and correct copies of this document to be served on the following recipients via the Court's CM/ECF system:

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/s/ *Davor Rukavina*
Davor Rukavina, Esq.

Tab 3

The following constitutes the ruling of the court and has the force and effect therein described.

Signed August 30, 2022

United States Bankruptcy Judge

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF A JUDGMENT: (A) GRANTING BREACH OF CONTRACT CLAIMS ASSERTED BY THE REORGANIZED DEBTOR; AND (B) DENYING DEFENDANTS' REQUESTS FOR ALLOWANCE OF ADMINISTRATIVE EXPENSE CLAIMS

I. INTRODUCTION

The above-referenced adversary proceeding ("Adversary Proceeding") is related to the Chapter 11 bankruptcy case of Highland Capital Management, L.P. (the "Debtor" or "Highland"), which was filed on October 16, 2019 (the "Petition Date"). Highland is now a Reorganized Debtor (sometimes referred to as such, herein). It obtained confirmation of a plan on February 22, 2021. The plan went effective on August 11, 2021. On direct appeal to the Fifth Circuit, Highland's confirmation order was affirmed in substantial part, on August 19, 2022.

A few days before confirmation of its plan, Highland filed the complaint ("the Complaint") initiating this Adversary Proceeding.[1] The defendants in the Adversary Proceeding are two very significant ***non-debtor entities*** within the massive Highland complex of companies: one known as Highland Capital Management Fund Advisors, L.P. ("HCMFA") and the other known as NexPoint Advisors, L.P. ("NexPoint" or sometimes "NPA"). These two companies are sometimes collectively referred to as the "Advisors" or "Defendants." It is undisputed that, at all relevant times, the Advisors have been controlled by James Dondero ("Mr. Dondero"), the co-founder and former CEO of the Debtor.[2] Early during the Highland bankruptcy case (on January 9, 2020), Mr. Dondero's tenure as CEO of Highland was terminated, and three new independent directors (the "Independent Board") were appointed to manage the affairs of the Debtor, pursuant to a settlement

[1] Plaintiff Highland Capital Management, L.P.'s Verified Original Complaint for Damages and for Declaratory and Injunctive Relief, filed February 17, 2021, DE # 1 in the AP. Note: all references herein to "DE # ___" shall refer to the docket entry number at which a pleading appears in the docket maintained in the Highland main bankruptcy case. All references to "DE # ___ in the AP" refer to the docket entry number at which a pleading appears in the docket maintained in this Adversary Proceeding.

[2] Joint Pretrial Order, DE # 92 in the AP at p. 9, ¶ 35. *See also* Tr. Transcript 4/13/22, Part 2 of 2 [DE # 116], at 14:19-20.

between the Debtor and Official Committee of Unsecured Creditors ("UCC"), approved by the bankruptcy court.[3]

The Adversary Proceeding involves Highland's breach of contract allegations against the two Advisors arising under four different agreements: (a) two Shared Services Agreements (one between Highland and each of the two Advisors); and (b) two Payroll Reimbursement Agreements (again, one between Highland and each of the two Advisors).[4] As later further explained, the Advisors are "registered investment advisors" who manage approximately $11 billion of assets for numerous clients, including retail investors (the retail investor funds constitute about $3 billion of the $11 billion of assets under management).[5] Pursuant to the two Shared Services Agreements, Highland provided the "back-office" and "middle-office" services (i.e., accounting, legal, regulatory compliance, human resources, information technology, etc.) that enabled the Advisors to operate as a business. And pursuant to the two Payroll Reimbursement Agreements, Highland provided "front-office" advisory services (i.e., investment advisory personnel) that enabled the Advisors to provide investment services to the funds under their management. To be clear, Highland maintained a full staff of actual employees and essentially contracted out to the Advisors

[3] The settlement between the Debtor and UCC is sometimes referred to by the parties as the "corporate governance settlement," and it was entered into to avert the likely appointment of a Chapter 11 trustee.

[4] The Debtor originally asserted three claims in the Complaint: Count One, seeking declaratory relief, as to the parties' respective rights and obligations under the two Shared Services Agreements; Count Two for Breach of Contract under the two Shared Services Agreements; and Count Three, seeking injunctive relief requiring the Advisors to cooperate in an orderly transition of services away from the Debtor, under the Shared Services Agreement. DE # 1 in the AP. On February 24, 2021, following an evidentiary hearing, the bankruptcy court entered an order resolving the claims for declaratory and injunctive relief (Counts One and Three) of Highland's Complaint. Subsequently, on August 4, 2021, the parties entered into a stipulation that the claims for declaratory and injunctive relief were finally resolved by the prior order. DE # 36 in the AP. Thus, the only claims remaining from Highland's Complaint to be considered are those for breaches of contract (Count Two). Notably, the parties' Joint Pretrial Order expanded Highland's Count Two to include breaches of the Payroll Reimbursement Agreements and not simply breaches of the Shared Services Agreements. DE # 92 in the AP, ¶¶ 15, 69, 71, 73, 74, 75, 76, 78, 79, 80, 81 & 85.

[5] Tr. Transcript 4/13/22, Part 2 of 2 [DE # 116], at 106:13-16.

for the necessary services, so that the Advisors could manage funds for their clients. The Advisors themselves had relatively few employees.

The Shared Services Agreements, later more fully defined, will sometimes collectively be referred to herein as the "SSAs," and the Payroll Reimbursement Agreements, also more fully defined herein, will sometimes be referred to as the "PRAs." The cash flow streams from the SSAs and PRAs were a significant source of revenue and liquidity for Highland. And, of course, the Advisors, themselves, earned significant fees from the contracts that they had with their clients to manage the $11 billion of assets (the Advisors' revenue numbers are not in evidence).

Highland asserts that breaches of contract occurred due to the Advisors' failure—late during Highland's bankruptcy case, when things had become very contentious between Highland and Mr. Dondero—to pay amounts due and owing under the four agreements (specifically, after Highland had given notice on November 30, 2020, of Highland's intent to terminate the SSAs, in 60 days, in connection with its chapter 11 plan).[6] Highland asserts that the Advisors thereafter failed to pay some $2,747,000 due and owing under the four agreements, in late 2020 and early 2021.

Meanwhile, shortly before the filing of the Adversary Proceeding, on January 24, 2021, the Advisors filed their *Application for Allowance of Administrative Claim* in the underlying bankruptcy case.[7] On May 5, 2021, Highland filed its *Objection to Application for Administrative Claim of Highland Capital Management Fund Advisors, L.P. and NexPoint Advisors, L.P.*[8] Contrary to Highland's position that the Advisors owe Highland money for unpaid services that

[6] Highland planned to reduce its workforce in February 2021, in connection with confirmation of its plan, and anticipated it would have insufficient personnel to perform under the agreements thereafter.
[7] DE # 1826.
[8] DE # 2274.

Highland provided, the Application asserted ***claims back against Highland*** for: (1) alleged post-petition overpayments by the Advisors to Highland under the PRAs, throughout the bankruptcy case (under a theory that the fees payable to Highland under the PRAs were tied to the headcount of employees providing services, and Highland allegedly improperly charged the Advisors the same fixed, monthly amount under the PRAs, over time, as employee headcount at Highland dwindled); (2) alleged post-petition breaches of the SSAs by Highland, for allegedly failing to provide certain legal and compliance services contemplated under the SSAs—causing the Advisors to have to hire their own employees to provide such services; and (3) alleged post-petition overpayments by the Advisors to Highland under the SSAs for the services that Highland allegedly failed to provide. The Advisors have asserted up to $14 million in administrative expense claims against Highland.

On August 6, 2021, the parties stipulated that the contested matter created by the Advisors' Application for Allowance of Administrative Claim (and Highland's objection thereto) should be consolidated with the Debtor's breach of contract claims within this Adversary Proceeding.[9] All consolidated, competing claims of the parties were tried before the bankruptcy court on April 12 and April 13, 2022, with closing arguments heard on April 27, 2022 (the "Trial"). The court heard from six witnesses and admitted nearly 200 exhibits.

For the reasons set forth below, the bankruptcy court has determined that the Advisors have failed to meet their burden of proving: (i) that they made any "overpayments" under the PRAs; (ii) that Highland breached the SSAs; or (iii) that the Advisors "overpaid" under the SSAs. The court also has determined that, even if the Advisors had met their burden of proving that they "overpaid"

[9] Stipulation (A) Amending Scheduling Order and (B) Consolidating and Resolving Certain Matters, DE # 36 in the AP.

under the PRAs, the Advisors claims were waived. The Advisors' claims for "overpayments" under the SSAs were likewise waived. No administrative expense claims will be allowed.

The bankruptcy court has further determined that Highland has met its burden of proving its breach of contract claims against the Advisors for failure to pay certain amounts due under both the SSAs and PRAs in late 2020 and early 2021.

Accordingly, the bankruptcy court ***denies*** the request for allowed administrative expense claims by the Advisors. Further, the bankruptcy court ***grants*** the relief requested by Highland under its claims for breach of contract in this Adversary Proceeding. Highland is entitled to the damages set forth at the end of this document.

Set forth below are the court's Findings of Fact and Conclusions of Law, pursuant to Fed. R. Bankr. Proc. 7052. Any Finding of Fact that should be more appropriately characterized as a Conclusion of Law should be deemed as such, and *vice versa*.

II. FINDINGS OF FACT

The Defendant/Advisor known as HCMFA was formed on or around February 2, 2009, and was previously known as Pyxis Capital, L.P. ("Pyxis").[10] The Defendant/Advisor known as NexPoint was formed on or around March 20, 2012. It is undisputed that, at all relevant times, both Defendants (i.e., the Advisors) were controlled by Mr. Dondero.[11]

The Advisors are registered investment advisors under the Investment Advisers Act of 1940. They serve as the investment managers for, among other things, certain retail funds (the

[10] Joint Pretrial Order, DE # 96 in the AP at p. 10. *See also* Tr. Transcript 4/13/22, Part 2 of 2 [DE # 116], at 14:19-20.
[11] *Id.* at p. 9.

"Retail Funds") that are regulated pursuant to the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940.

The Advisors provide investment advisory services to their clients pursuant to written investment advisory agreements (the "Investment Advisory Agreements"). These Investment Advisory Agreements are: (a) the principal source of the Advisors' revenue, and (b) are the reason for the Advisors' existence.

An individual named David Klos ("Mr. Klos") served as Highland's Controller and Chief Accounting Officer during the times relevant in this Adversary Proceeding (including overseeing the SSAs and PRAs between Highland and the Advisors) and reported directly to an individual named Frank Waterhouse ("Mr. Waterhouse"), who served as both: (a) Highland's Chief Financial Officer ("CFO"), while simultaneously serving as (b) the Treasurer for each of the Advisors. Both Mr. Klos and Mr. Waterhouse testified at Trial and seemed to be the witnesses who were most involved with the Agreements at the time of their execution, implementation, and during performance thereof.

Mr. Klos now works as CFO of the Reorganized Debtor. Mr. Waterhouse no longer has any employment position with the Reorganized Debtor, but he still serves as an officer and/or employee of both of the Advisors and of Skyview—the latter of which is an entity that many former Highland employees transitioned to around the time that the Highland plan was confirmed, and they were terminated from Highland (Skyview now provides middle- and back-office services to the Advisors).[12] The court found Mr. Klos to be a credible and knowledgeable witness. The court found Mr. Waterhouse's testimony to have been only moderately helpful. Mr. Waterhouse

[12] *See* Tr. Transcript 4/13/22, Part 2 of 2 [DE # 116], at 55:3-21.

testified either "Not that I recall," "I don't recall," "Not that I'm aware of," or "I don't remember," more than 75 times, during two hours and 26 minutes of testimony regarding the SSAs and PRAs.[13]

A. The SSAs

i. *The HCMFA SSA*.

On February 9, 2012, Highland and HCMFA (then operating as Pyxis) entered into a *Shared Services Agreement*, effective as of December 15, 2011 ("Original HCMFA SSA").[14] On September 12, 2012, the parties entered into an *Amended and Restated Shared Services Agreement*, effective as of December 15, 2011.[15] Subsequently, the parties entered the *Second Amended and Restated Shared Services Agreement*, effective as of February 8, 2013—which is the SSA that was in place between Highland and HCMFA during the bankruptcy case and is at issue in this litigation (the "HCMFA SSA").[16]

To understand the impetus for the HCMFA SSA (and, for that matter, all of the agreements at issue in this Adversary Proceeding) one must fully appreciate that the Defendants/Advisors had relatively few employees of their own during the times relevant in this Adversary Proceeding. Rather, the Defendants/Advisors essentially contracted for services and/or personnel employed by the mothership, Highland. Pursuant to the HCMFA SSA, HCMFA agreed to pay Highland for costs relating to certain shared services requested by HCFMA and provided by Highland, including, in pertinent part: (i) finance and accounting, (ii) human resources, (iii) marketing, (iv) legal, (v) corporate, (vi) information technology, and (vii) operations.[17] According to all

[13] With all due respect, the court realizes that most witnesses do not have perfect memories and occasionally testify "I don't recall" or "I don't know" during testimony. Indeed, during this Trial, other witnesses sometimes testified as such. But Mr. Waterhouse's lack of answers to important questions was somewhat troubling to the court.
[14] Pl. Ex. 54.
[15] Pl. Ex. 55.
[16] Pl. Ex. 2.
[17] *See id.* at Article II, Section 2.01.

witnesses, these services are commonly referred to in the industry as "middle- or back-office" services, in contrast to "front-office" services that would be investment advisory services.

Pursuant to the HCMFA SSA, HCMFA was required to pay Highland its allocable share of the "Actual Cost" of "Shared Services" and "Shared Assets" based on an "Allocation Percentage," as those terms are defined in the HCFMA SSA.[18] To determine the amounts owed, (a) Highland was to prepare Quarterly Reports setting forth the cost allocations and detailing amounts paid during the applicable quarter; (b) the parties were to agree on the allocations set forth in the Quarterly Reports and prepare invoices; and (c) the invoiced amounts were to be paid within 10 days.[19] In contrast to the other SSA with Nexpoint (described below) and the PRAs (also described below), the HCMFA SSA is stipulated to have been a ***variable fee arrangement*** between the parties.

ii. The NexPoint SSA.

On June 5, 2013, Highland and NexPoint entered into their original *Shared Services Agreement*, effective as of January 1, 2013 (the "Original NexPoint SSA").[20] The Original NexPoint SSA was modelled after the HCMFA SSA and included a formula for determining NexPoint's share of allocable cost of "Shared Services" and "Shared Assets," which did not rely on an actual analysis of cost, but rather a percentage of managed fund assets.[21] This contract covered the same "middle- or back-office" services provided under the HCMFA SSA.

Subsequently, Highland and NexPoint amended the Original NexPoint SSA. The parties entered into the *Amended and Restated Shared Services Agreement*, effective as of January 1, 2018—which is the SSA that was in place between Highland and NexPoint during the bankruptcy

[18] *See id.* at Section 4.01.
[19] *See id.* at Sections 5.01, 5.02, & 5.03.
[20] Pl. Ex. 29.
[21] *See id.* at Sections 4.01, 5.01, 5.02, & 5.03.

case and is at issue in this litigation (the "NexPoint SSA").[22] The notable changes made to the NexPoint SSA included that: (a) the "asset based" formula (which was calculated using the asset values of a fund advised by NexPoint) for determining the value of Highland's services was replaced with a monthly, "flat fee" arrangement; and (b) Highland was provided with exculpation and indemnification rights. The monthly flat fee charged by Highland to NexPoint in the amended NexPoint SSA was $168,000.[23]

NexPoint agreed to pay Highland the flat monthly fee of $168,000, due before the first business day each month, in exchange for the shared services provided by Highland.[24] Additionally, under Section 6.03 of the NexPoint SSA, Highland is entitled to recover its costs and expenses, including attorney's fees, incurred in connection with the defense or settlement of indemnifiable claims.[25]

The NexPoint SSA was signed by Mr. Waterhouse on behalf of ***both*** Highland (in his capacity as Treasurer of Strand Advisors, Inc., the general partner of Highland) and NexPoint (in his capacity as Treasurer of NexPoint Advisors GP, LLC, the general partner of NexPoint).

On November 30, 2020, Highland—with confirmation of its plan pending, which contemplated a separation of Highland from Dondero-controlled entities—exercised its right to terminate both the HCMFA SSA and NexPoint SSA, by providing a written termination notice to the Advisors, indicating Highland's intent to terminate them, effective January 31, 2021 (the "Termination Date"). However, on January 29, 2021, Highland agreed to extend the Termination Date by two weeks (to February 14, 2021), due to ongoing negotiations for an orderly transition of services, provided the Advisors paid for the services in advance. Highland has credibly

[22] Pl. Ex. 3.
[23] *Id.* at Article III, Section 3.01.
[24] *See id.*.
[25] *See id.* at Section 6.03.

represented that it believed termination without a service provider in place to fill Highland's role would have had dire consequences to the Retail Funds and their investors. The parties later agreed to extend the Termination Date one final time in February 2021, to extend the deadline through the end of February 2021.

The Advisors do not contend that Highland failed to perform under the SSAs, other than, perhaps, providing certain legal and compliance services to the Advisors a handful of times, at a point in time during the bankruptcy case when the Debtor believed it would be a conflict of interest to do so (as the Debtor and Advisors were becoming adverse). Further, it is agreed that the NexPoint SSA contemplated a fixed fee arrangement of $168,000 per month. To reiterate, the HCMFA SSA was ***not*** a fixed fee arrangement, but the amounts invoiced under the HCMFA SSA generally ranged between $300,000 to $310,000 each month.

B. <u>The PRAs</u>

In addition to the two SSAs, Highland and each of the Advisors/Defendants were parties to two "Payroll Reimbursement Agreements" (the "PRAs" and together with the SSAs, the "Agreements"). The PRAs—in contrast to the SSAs that were designed to compensate Highland for the Defendants' usage of "middle- and back-office" services—were designed to compensate Highland for the Defendants usage of ***"front-office"*** services.

There is a confusing history leading up to execution of the PRAs. Notably, prior to the year 2018, Highland had provided "front-office" services to the Advisors ***for free***. Also notably, in early 2018, the parties embarked on documenting a new arrangement whereby Highland would henceforth be compensated for "front-office" services through the mechanism of "sub-advisory agreements" with the Advisors (which would be typical in the industry generally, as a way to

compensate a party for "front-office" services). But the parties ended up using the PRAs instead, as set forth below.

i. Events Leading up to the PRAs.

As noted above, prior to the year 2018, Highland had provided "front-office" services to the Advisors for free, for six years.[26] But at the end of 2017, Highland was operating at a loss and those losses were expected to increase in 2018.[27] According to the credible testimony of Mr. Klos at Trial, Mr. Dondero came up with a number of $6 million that the Defendant NexPoint should be paying Highland, every year in the aggregate, to compensate for the mounting operating losses at Highland—which also had the added benefit of reducing NexPoint's taxable income that it was generating, that happened to be flowing up to Mr. Dondero.[28]

So, on or about January 11, 2018, Highland and NexPoint entered into that certain *Sub-Advisory Agreement*, effective as of January 1, 2018 (the "Initial Sub-Advisory Agreement"). Notably, a typical sub-advisory agreement might provide for compensation for front-office services in a myriad of ways, including possibly: based on actual costs; flat fees; or percentage of assets under management ("AUM"), using basis points computed on assets managed.[29] Pursuant to the Initial Sub-Advisory Agreement, Highland would be providing certain "front-office" services to NexPoint to enable it to fulfill its obligations to its Clients under its Investment Management Agreements.[30] In exchange, NexPoint agreed to pay a flat monthly fee of $252,000, while each of the parties agreed to bear their own expenses.[31] As with the NexPoint SSA, Mr. Waterhouse signed the Sub-Advisory Agreement on behalf of ***both*** Highland and NexPoint. The

[26] Tr. Transcript 4/12/22, Part 1 of 2, [DE # 110] at 69:13-71:19.
[27] Pl. Ex. 86 at p. 2. *See* Tr. Transcript 4/12/22, Part 1 of 2 [DE # 110], at 65:13-22.
[28] Tr. Transcript 4/12/22, Part 1 of 2, [DE # 110] at 66:6-71:19.
[29] Tr. Transcript 4/13/22, Part 1 of 2, [DE # 114] at 37-47.
[30] Joint Pretrial Order, DE # 96 in the AP at p. 11.
[31] NexPoint Sub-Advisory Agreement, Pl. Ex. 5, §2(a)-(b).

payment of $252,000 times 12 equaled $3,024,000; meanwhile NexPoint would be paying Highland $168,000 per month under the fixed fee NexPoint SSA, and $168,000 times 12 equaled $2,016,000. Thus, by the court's calculations, this would mean that NexPoint would be paying Highland not quite $6 million per month for "back-", "middle-", and "front-office" services. However, the court understands that a subsidiary of NexPoint, called NREA, would be paying an additional $80,000 per month flat amount for "back- and middle-office" shared services, which would total $248,000 per month for shared services being paid from NexPoint (inclusive of its subsidiary) to Highland.[32] $248,000 times 12 equals $2,976,000 and, when added to the $3,024,000 being paid for "front-office" sub-advisory services, this totaled exactly $6 million.

Each year, Mr. Waterhouse and Mr. Klos prepared a written analysis of Highland's past and projected financial performance (each, an "Annual Review") that they presented to Mr. Dondero and Mark Okada (the latter of whom was Highland's other co-founder).[33] The 2017/2018 Annual Review included statements and information that: (i) Highland was projected to incur operating losses of $12 million in 2018;[34] (ii) the agreements of NexPoint to pay $6 million in fees to Highland was to "remain unchanged;"[35] (iii) the aggregate of $6 million to be paid by NexPoint to Highland was projected to be unchanged in 2018, 2019, and 2020;[36] and (iv) changes through new hires, internal transfers, terminations, and compensation and benefits paid had been made across the Highland platform.[37]

But, a hugely significant event occurred that affected Highland's cash flow right after the 2017/2018 Annual Review was presented. On January 30, 2018, a former Highland employee

[32] Pl. Ex. 146. *See also* Tr. Transcript 4/12/22, Part 2 of 2 [DE # 113], at 70:6-17.
[33] *See, e.g.,* Pl. Ex. 86 (2017/2018 Annual Review), Pl. Ex. 142 (2018/2019 Annual Review), & Pl. Ex. 143 (2019/2020 Annual Review).
[34] Pl. Ex. 86 at p. 2.
[35] *Id.* at p. 36.
[36] *Id.* at p. 46.
[37] *Id.* at pp. 29-33, 48.

named Joshua Terry commenced an involuntary bankruptcy case against Acis Capital Management, L.P. ("Acis") in this bankruptcy court (Mr. Terry had obtained a large arbitration award and judgment against Acis and was being frustrated in his efforts to collect upon it). At that time, Acis was an affiliate of Highland that managed certain collateralized loan obligations ("CLOs"). To perform its duties, Acis had earlier entered into its own sub-advisory and shared services agreements with Highland (the "Acis Agreements"). The Acis Agreements were a vital source of Highland's revenue. Highland was projected to receive almost $10 million in revenue in 2018 alone from the Acis Agreements—Highland's second-highest source of revenue representing nearly 12% of its total projected operating income.[38]

So, on March 7, 2018, just weeks after the 2017/2018 Annual Review was presented—and in an attempt to make up for anticipated lost revenue from Acis—Highland decided to create a Sub-Advisory Agreement ***also for HCMFA***, initially for a flat monthly fee of $450,000, retroactive to January 1, 2018. Recall that, heretofore, Highland had been providing front-office services to HCMFA for free. A week later, a draft Sub-Advisory Agreement modeled on the NexPoint Initial Sub-Advisory Agreement was prepared for HCMFA.[39]

Notably: (a) the 2017/2018 Annual Review presented to Mr. Dondero and Mr. Okada just six weeks earlier ***did not contemplate that HCMFA would be party to a Sub-Advisory Agreement or otherwise would be compensating Highland for investment advisory services Highland was providing***, and (b) both the title and terms of the draft HCMFA Sub-Advisory Agreement corroborated Highland's contention that the parties intended to create a "fee for service" advisory relationship.

[38] Pl. Ex. 86 at p. 35 ("Highland 2.0 CLOs" refers to the CLOs managed by Acis).
[39] *See* Pl. Ex. 87 (e-mails between March 7 and March 15, 2018).

But, alas, the Initial Sub-Advisory Agreements for both HCMFA and NexPoint were not to be, because Highland learned: (a) from its outside counsel that (i) the Advisors' Retail Board[40] needed to approve the Sub-Advisory Agreements during an ***in-person*** meeting, and that (ii) the two Sub-Advisory Agreements ***could not be made retroactive to January 1, 2018***, and (b) that the next in-person meeting of the Retail Board would not be until ***June 2018***.[41] This was a problem because Highland needed cash-flow immediately and could not wait until June 2018.

Based on this legal advice, the parties concluded that they could not utilize the contemplated Sub-Advisory Agreement structure because: (a) Highland would not be able to earn any revenue for sub-advisory services until June, the earliest date the Retail Board could approve of the Sub-Advisory Agreements during an in-person meeting, and (b) it could not be retroactive to January 1, 2018, meaning that Highland would be unable to receive six months' of needed revenue. So, another method was needed to overcome these obstacles—and the Payroll Reimbursement Agreements were born.[42]

ii. *The Use of PRAs instead of Sub-Advisory Agreements to Compensate Highland for "Front-Office" Advisory Services*.

So, the next month, Highland prepared a draft PRA that did not need the Advisors' Retail Board's approval and could be made retroactive to the beginning of the year.

While the Initial Sub-Advisory Agreements had clearly contemplated that a flat fee for front-office services would be paid to Highland, Mr. Klos expressed concerns, after reviewing the draft PRAs, about language therein—and an Exhibit A chart attached thereto, listing out 25 "Dual

[40] The "Retail Board" is essentially an independent board of trustees or board of directors for retail funds managed by the Advisors. Tr. Transcript 4/13/22, Part 1 of 2 [DE # 114], at 4:22-24.
[41] *See* Pl. Ex. 87 (March 15, 2018 e-mails from Lauren Thedford ("Ms. Thedford"), an attorney employed by Highland but who also served as an officer of the Advisors).
[42] No one ever explained at Trial the exact reasons that a document entitled "Sub-Advisory Agreement" would require in-person Retail Board approval and could not be retroactive in effect. But no one seemed to dispute this fact.

Employees" who would be working both for Highland and the Advisors, and suggesting the percentage of time they might be working for the Advisors—that payments to Highland would be based on "actual costs" ***associated with specific employees.*** Mr. Klos was worried about the cumbersomeness of the PRAs and wrote to Highland inhouse attorney Lauren Thedford ("Ms. Thedford"), who also served as an officer of the Advisors, that:

> Does it have to be framed as reimbursement of actual costs? ***We'd much rather it be characterized as just an agreed upon amount between the two entities***. It's not a small task and involves subjective assumptions to allocate individual employees, so as it's written, ***it would be creating a ton of work that isn't creating any value to the overall complex***.[43]

In response, Ms. Thedford stated that she was "open" to changing the "definition of Actual Costs" but observed that there "needs to be some method of determining the amounts" and that it was "important" to treat the agreement as one for "reimbursement." In response, Mr. Klos stated:

> Could we say that Actual Cost is being determined ***at the outset of the agreement, have a schedule as of Jan. 1, 2018 and say that Actual Cost shall be as set out in that schedule and shall be paid in monthly installments for the term of the agreement . . . that way the exercise is only performed once***.
>
> Beyond that year, termination provision kicks-in, so if there's a belief that Actual Costs have changed materially, either party could terminate and/or renegotiate for an amended agreement.[44]

At Trial, Mr. Klos credibly testified that the Exhibit A list of employees attached to the PRAs, and the allocation made for employees created in connection with the PRAs, were created to be the same monthly fees previously contemplated under the Initial Sub-Advisory Agreement.[45] Further, Mr. Klos testified that the estimates, despite being made in good faith, were based on his own subjective assessments and were only created as a proxy for the flat monthly fees previously envisioned by Mr. Dondero, to get Highland needed cash flow.[46]

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[43] Pl. Ex. 129 (emphasis added).
[44] *Id.* (Klos e-mail to Thedford sent on April 17, 2018, at 10:56 a.m.) (emphasis added).
[45] Tr. Transcript 4/12/22, Part 1 of 2, at 104:9-24.
[46] Tr. Transcript 4/12/22, Part 1 of 2, at 104:19-106:16.

On or around May 1, 2018, Highland and NexPoint entered into that certain Payroll Reimbursement Agreement (the "NexPoint PRA").[47] The NexPoint PRA replaced the NexPoint Initial Sub-Advisory Agreement that had been effective as of January 1, 2018.[48] Then, on or around May 1, 2018, Highland and HCMFA entered into that certain Payroll Reimbursement Agreement, also effective as of January 1, 2018 (the "HCMFA PRA").[49]

Except for the (a) names of the parties, (b) the amount of monthly payments thereunder, and (c) the list of "Dual Employees" and their respective allocations set forth in Exhibit A to each of the PRAs, the NexPoint PRA and HCMFA PRA were identical.

So, to be clear, whereas the SSAs were to provide compensation for "middle-" and "back-office" services provided by Highland to each of the Advisors, the PRAs were, generally, structured for the Advisors to pay Highland amounts in recognition of the "front-office" services provided by the Dual Employees to the Advisors (which "Dual Employees" were technically employed by Highland).

To be further clear, both the NexPoint PRA and HCMFA PRA stated that the Advisors were required to pay Highland the "Actual Cost" to Highland for the Dual Employees pursuant to Section 2.01.[50] However, "Actual Cost" was defined in each of the PRAs as:

> with respect to any period hereunder, the actual costs and expenses caused by, incurred, or otherwise arising from or relating to each Dual Employee, in each case during such period. ***Absent any changes to employee reimbursement, as set forth in Section 2.02, such costs and expenses are equal to [$252,000 for NexPoint and $416,000 for HCMFA] per month***.[51]

[47] Pl. Ex. 6 (NexPoint PRA)
[48] Joint Pretrial Order, DE # 96 in the AP at p. 11.
[49] *Id.*
[50] Pl. Ex. 6 §§ 2.01, 3.01; Pl. Ex. 8 §§ 2.01, 3.01.
[51] Pl. Ex. 6 at Article I (fixing the costs and expenses at $252,000 per month for NexPoint) (emphasis added); Pl. Ex. 8 at Article I (fixing the costs and expenses at $416,000 per month for HCMFA) (emphasis added).

Significantly, pursuant to Section 2.02, the parties could agree to modify the Actual Cost if they believed a change to employee reimbursement was appropriate, and each party was required to negotiate any change in good faith.[52] The Advisors contend that Section 2.02, in conjunction with Section 4.02, imposed an affirmative obligation on Highland to update the Exhibit A list of Dual Employees and unilaterally adjust the monthly payments, but no such obligation exists under the clear language of the PRAs.[53]

The undisputed evidence establishes that: (a) neither Mr. Klos nor anyone else ever updated the Exhibit A list of Dual Employees attached to the PRAs; (b) neither Mr. Klos nor anyone else was ever instructed to update Exhibit A attached to the PRAs; (c) at all relevant times, the Advisors and Highland had access to the same information concerning the amounts paid under the PRAs, the amounts projected to be paid under the PRAs, the termination of Dual Employees, the compensation of Dual Employees, and the investment advisory services provided by Highland to each of the Advisors; and (d) as discussed below, the parties knew of and relied on Section 2.02 in December 2018 to amend the PRAs while Mr. Dondero was still fully in control of the entire Highland complex. The undisputed evidence was also that four out of the twenty-five Dual Employees listed on the Exhibit A's attached to the PRAs were no longer employed as of the May 1, 2018 date on which the PRAs were executed (although they had been employed as of the January 1, 2018 effective date of the PRAs).

Without considering any extrinsic evidence, the court finds the clear and unambiguous language of the definition of "Actual Cost" in the PRAs indicates that these were intended to be

[52] Pl. Ex. 6 § 2.02; Pl. Ex. 8 § 2.02 ("During the Term, the Parties may agree to modify the terms and conditions of [NexPoint's/HCMFA's] reimbursement in order to reflect new procedures or processes, including modifying the Allocation Percentage (defined below) applicable to such Dual Employee to reflect the then current fair market value of such Dual Employee's employment. The Parties will negotiate in good faith the terms of such modification.").
[53] Pl. Ex. 6 § 4.02 ("Should either Party determine that a change to employee reimbursement is appropriate, as set forth in Section 2.02, the Party requesting the modification shall notify the other Party on or before the last business day of the calendar month"); Pl. Ex. 8 § 4.02 (same).

fixed amount contracts, ***simply plugging in a set monthly amount for front-office services that—absent agreed modifications—were never required to be adjusted based on particular employees' daily activities or their comings-and-goings, despite the use of the words "Actual Cost."*** Further, the clear and unambiguous language of Sections 2.02 and 4.02 of the PRAs contemplated possible agreed modifications and required "the Party requesting modification [to] notify the other Party" before the end of the month to change the employee reimbursement amount and the parties had to agree on any change to in amount.[54] The requirement that such notification and agreement be made shows the monthly payment was intended to be fixed and provided no mandatory obligation to update it, based on the Dual Employees' allocation of time or employment at any time. The court finds these provisions, taken together, leave no ambiguity or lack of clarity that the terms of the PRAs generally intended to set a fixed monthly amount for front-office services, for ease of implementation. The parties could always terminate with or without cause,[55] or seek to modify the PRAs if the plugged-in amount seemed unreasonable over time.[56]

C. The Amendments to the PRAs

On December 14, 2018, (a) Highland and NexPoint entered into that certain *Amendment Number One to Payroll Reimbursement Agreement* (the "NexPoint PRA Amendment"), pursuant to which NexPoint paid an extra $1,300,000 to Highland, and (b) Highland and HCMFA entered into that certain *Amendment Number One to Payroll Reimbursement Agreement* (the "HCMFA PRA Amendment" and together with the NexPoint PRA Amendment, the "PRA Amendments"), pursuant to which HCMFA paid an extra $1,200,000 to Highland.[57]

[54] *See id.*
[55] Pl. Exs. 6 § 5.02; Pl. Ex. 8 § 5.02.
[56] Pl. Ex. 6 § 2.02; Pl. Ex. 8 § 2.02.
[57] Pl. Ex. 7 (NexPoint PRA Amendment); Pl. Ex. 9 (HCMFA PRA Amendment).

These PRA Amendments are short, sparsely worded documents. They simply indicate that the Advisors are agreeing to pay the additional amounts to Highland "representing an estimate of additional Actual Costs owed under the [PRAs] for additional resources used."[58] At Trial, Mr. Klos credibly testified that neither he, nor anyone else to his knowledge, ever performed an analysis of Highland's actual costs under the PRAs to determine the extra amounts that ended up being paid to Highland under the PRA Amendments, and the PRA Amendments were only made because Highland was losing money rapidly and the Advisors had taxable income.[59] Additionally, by December 1, 2018 (before the PRA Amendments were executed), the Advisors had knowledge that ***nine of the twenty-five Dual Employees listed in Exhibit A to the original PRAs were no longer employed by Highland***.[60] Yet, the Advisors made ***additional lump sum payments*** exceeding the fixed monthly amounts set forth in the PRAs. The Advisors claim it was their standard practice to perform annual "true-ups" of the various contracts in the Highland complex and that these the PRA Amendments were a "true-up," which should be used to find that the PRAs did not contemplate flat amounts for services. But this would mean that the Advisors paid Highland $2.5 million on a PRA "true-up," when they knew that over one-third of the Dual Employees under the PRAs were terminated during the relevant time period. Further, neither the Advisors nor any individual ever requested Exhibit A to the PRAs to be amended at any time prepetition. As of the Highland bankruptcy Petition Date (October 16, 2019), fourteen of the twenty-five Dual Employees were no longer employed at Highland. Mr. Dondero controlled both Highland and the Advisors at this time. To be clear, the Advisors had never taken the position that there were "overpayments" under the PRAs as of the Petition Date or sought modification of the PRAs. Mr.

[58] *Id.*
[59] Tr. Transcript 4/12/22, Part 1 of 2, at 113:4-21.
[60] Pl. Ex. 14 (responses to Interrogatories 3 and 4).

Waterhouse, who signed the PRA Amendments on behalf of both Highland and the Advisors, testified that he had no recollection of how the amounts set forth in the PRA Amendments were determined or whether it was actually a "true-up."

The court finds that nothing in the record suggests that the Advisors were doing a "true-up" when implementing the PRA Amendments. Nor do the additional amounts that were paid by the Advisors to Highland under the PRA Amendments suggest that the previously fixed monthly amount set forth in the PRAs was intended to be a variable amount. The court finds that the PRA Amendments were simply made with the purpose of funneling in more money to Highland to help with its liquidity crisis—with the added benefit of reducing the Advisors' taxable income.

D. Extrinsic Evidence: Post-Petition Communications and Continued Payments under the PRAs and SSAs

The court will now roll forward and consider the extrinsic evidence from the postpetition time period that might shed light on the disputes in this Adversary Proceeding. Both Highland and the Advisors have taken the position that the Agreements are ***unambiguous***—although they each have different interpretations as to what the Agreements mean. While the court is hard-pressed to find any ambiguity in the ***content*** of the Agreements,[61] the court will analyze the extrinsic evidence presented, since the parties have submitted it, and want the court to consider it if ambiguity is deemed to exist as to the Agreements.

In January 2020 (early during the Highland bankruptcy case), in response to inquiries from the Advisors' Retail Board, Ms. Thedford sought information concerning expense reimbursements and allocations under the PRAs. Mr. Klos thereafter informed Ms. Thedford that such information "doesn't exist in terms of current percentages." Ms. Thedford then asked whether such information

[61] The court does think the ***title*** of the PRAs—Payroll Reimbursement Agreement—is rather ambiguous, given the content of the document. Also, the Exhibit A list of employees further injects some ambiguity, given the overall content of the Payroll Reimbursement Agreements.

was contained in Exhibit A to the PRAs. In response, Mr. Klos reminded Ms. Thedford that the allocations in Exhibit A were:

> ***a point in time estimate as of 2018. Half the people are gone now and if you were to reallocate them now, all the percentages would be different***. On top of that, we don't have anything comprehensive that is comparable for back office people so the only thing we can really provide is a stale percentage on a small subset of the overall population.
>
> Would be much more logical to do the yes/no and then as ***a blanket statement say that HCMFA/NPA pay $x/$y annually to HCMLP for these employees' services***.[62]

Ms. Thedford responded by simply writing "Got it, thanks."[63]

Also, in January 2020 (again, early in the Highland bankruptcy case and the month Mr. Dondero ceded control of Highland to the Independent Board under a stipulated corporate governance order), Mr. Waterhouse, the Treasurer of each of the Advisors, requested information from Mr. Klos concerning the "monthly amount for each agreement."[64] Mr. Klos responded to Mr. Waterhouse confirming the fixed amounts under the Agreements:

> Monthly amounts below
>
> HCMFA
> $416k ***flat*** for investment support
> $290k-300k for shared services
>
> NPA
> $252k ***flat*** for investment support
> $248k ***flat*** for shared services ($168k from NPA directly; $80k from NREA, but assume you're looking for a consolidated number)[65]

There is no credible evidence that Mr. Waterhouse ever raised any concerns about the fixed monthly amounts being charged and, in fact, he continued approving payments for these exact

[62] Pl. Ex. 151 (emphasis added).
[63] *Id.*
[64] Pl. Ex. 146.
[65] *Id.* (emphasis added).

amounts. Payments did not stop until December 2020, when Mr. Dondero, wearing his Advisors' hat, directed Mr. Waterhouse to stop paying the amounts due under the Agreements. Then the Advisors filed their Application for Administration Expense Claim the very next month.[66] While there was some testimony suggesting that concerns had been raised in early January 2020 regarding possible overpayments under the PRAs to an individual named Fred Caruso (a financial advisor for the Debtor at the firm DSI),[67] the court did not have compelling evidence of this—Fred Caruso did not testify, and Frank Waterhouse had a generally poor memory for the details about this.

The court finds that these continued communications to officers of the Advisors confirming the amounts being paid under the Agreements, and the continued payments by the Advisors, after obtaining this information, is further evidence of the intent of the parties to structure the Agreements as fixed amount contracts.

E. Extrinsic Evidence: Highland Performed under the Agreements Postpetition

Significantly, there was extensive evidence at Trial that Highland performed at all times under the Agreements, and the Advisors made contemporaneous and repeated representations to their Retail Board that Highland was providing all services required under the Agreements.

All parties agreed that, as required by the Investment Company Act, the Retail Board for the Advisors conducts an annual review whereby it determines whether to extend its own Investment Advisory Agreements with the Advisors. This is referred to as a "15(c) review" process. A witness Ethan Powell, a member of the Retail Board, credibly testified about all this.[68]

[66] Pl. Exh. 11.
[67] Tr. Transcript 4/13/22, Part 2 of 2 [DE #], at 144.
[68] Tr. Transcript 4/13/22, Part 1 of 2 [DE # 114], at 4-34.

As part of this "15(c) review" process, and at other times during Highland's bankruptcy case, the Advisors provided the Retail Board with information concerning the status of the shared services relationship, Highland's provision of services thereunder, and contingency planning in case the Advisors' shared services relationship with Highland was terminated.

The Advisors provided this information to the Retail Board either in writing or orally during meetings of the Retail Board (the "Retail Board Meetings"). Minutes from the Retail Board Meetings were created in the ordinary course (the "Retail Board Minutes"). Ethan Powell testified that the Retail Board Minutes were adopted only after, among other things, the Advisors had an opportunity to review and edit their content to assure their accuracy.[69]

The Retail Board Minutes recite, among other things, that one or more of the Advisors' officers (i.e., Mr. Waterhouse, Mr. Norris, Ms. Thedford, or Mr. Post) or their attorneys (i.e., Dennis C. Sauter, the Advisors' in-house counsel, or K&L Gates, their outside counsel) were present and participated in every applicable Retail Board Meeting.[70]

Mr. Powell further testified that the Retail Board: (a) assumed that the Advisors made the statements and representations reflected in the Retail Board Minutes on an informed basis after conducting due diligence, and (b) the Retail Board relied on the statements and representations made by or on behalf of the Advisors in the Retail Board Meetings.[71]

It is important to note that, in January 2020, Mr. Dondero had avoided the likely appointment of a Chapter 11 trustee in the Highland bankruptcy case, by ceding control of Highland to the three new Independent Board members. With Mr. Dondero's loss of control of Highland, the Retail Board naturally sought information about whether this change would impact

[69] *Id.*, at 9:15-10:24.
[70] *See generally* Pl. Exs. 57-73.
[71] *See* Tr. Transcript 4/13/22, Part 1 of 2 [DE # 114], at 11:22-12:6, 13:1-13.

Highland's staffing. Thus, the Retail Board Minutes from the Retail Board Meeting, held on January 22, 2020, included the following entries:

> Ms. Thedford noted that ***the Meeting Materials included a headcount report that lists each employee associated with HCMLP and the Advisers and identifies whether the employee is dually employed by both HCMLP and an Adviser*** or pursuant to a separate arrangement, such as Mr. Norris' employment with the Funds' distributor, NexPoint Securities, Inc. . . .
>
> Mr. Norris discussed the shared services arrangements that each Adviser is a party to with HCMLP pursuant to which the Adviser may utilize employees from HCMLP for the provision of various services such as human resources, accounting, valuation, information technology services, compliance and legal. Mr. Norris noted, however, that many of these "third party" services are readily available on the open market.[72]

In response to the Retail Board's request, the Advisors included in the "Meeting Materials" a list of every person employed in the Highland complex, including (a) name, (b) title, (c) department, (d) employing entity (e.g., Highland, HCMFA, NexPoint), (e) whether the person was a Dual Employee, (f) office location, and (g) whether the person was an "investment professional" or was providing "back office" services."[73]

In mid-June 2020, Jason Post ("Mr. Post"), the Advisors' Chief Compliance Officer, assured the Retail Board that the Advisors were "monitor[ing]" the "level and quality" of Highland's shared services and that he was unaware of any disruptions:

> Mr. Post described the team members providing compliance and legal support services to the Funds and the Advisers. . . . Mr. Post stated he believed the Compliance department was adequately staffed.
>
> Mr. Post also discussed the quality and continuity of services provided to the Funds by HCMLP pursuant to shared services agreements with the Advisers in the context of the HCMLP bankruptcy. A discussion ensued during which Mr. Post responded to questions from the Board. ***He noted the regular updates provided to the Board and also discussed how the level and quality of services are being monitored and***

[72] Pl. Ex. 57 at pp. 2-3.
[73] Pl. Ex. 75.

> ***confirmed that he is not aware of any disruptions in the service levels provided to the Funds***.[74]

In August 2020, Dustin Norris ("Mr. Norris"), an Executive Vice President of each of the Advisors, represented to the Retail Board that "there had been no issues or disruptions in services as a result of the HCMLP bankruptcy matter," although James P. Seery, Jr. ("Mr. Seery"), Highland's new CEO (and a member of the court-appointed Independent Board), advised the Retail Board that certain conflicts might arise, given the differing investment strategies being adopted by Highland, on the one hand, and the Advisors, on the other:

> Mr. Norris next provided an overview of the 15(c) review materials and process and discussed the expected timeline with respect to Board consideration of approval of the renewals. ***He noted that there had been no issues or disruptions in services as a result of the HCMLP bankruptcy matter***.
>
> Mr. Seery then pointed out to the Board a potential conflict of interest that had arisen with respect to an investment held by both HCMLP-advised funds and certain of the Funds. Mr. Seery explained that the HCMLP-advised funds were likely to seek to sell their interests in the investment. This divergence of investment objectives of HCMLP and the Funds, and the overlapping portfolio and administrative personnel of HCMLP and HCMFA and the NexPoint Advisors working on the matter, created a potential conflict between the two groups.[75]

In advance of a Retail Board Meeting to be held in September 2020, the Advisors sent a memorandum to the Retail Board in which they stated, among other things, that the "Advisors and HCMLP believe the current shared services being provided are generally consistent with the level of service that historically been received," and further addressed potential conflict issues.[76]

During the two-day Retail Board meeting held on September 17-18, 2020, the Retail Board was advised that Highland continued to perform all of the shared services and was provided with additional information concerning potential conflicts:

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[74] Pl. Ex. 58 at p. 20 (emphasis added).
[75] Pl. Ex. 59 at pp. 6, 11.
[76] Pl. Ex. 18 at ACL 080581 (response to question 3).

> Mr. Surgent joined the Meeting. During the discussion, he responded to the 15(c) follow-up questions submitted by the Board relating to HCMLP matters. ***He provided the Board with a status update on the HCMLP bankruptcy and discussed the impact of the HCMLP bankruptcy on the shared services arrangements with the Funds, noting he does not expect that the level and quality of services would change in the immediate term***. Regarding the bankruptcy, Mr. Surgent reiterated Mr. Seery's stated goal to achieve a consensual, omnibus resolution by the end of the year. To the extent this was not achievable, Mr. Surgent noted that an alternative plan had been filed by HCMLP. . . . ***He indicated that at this time it was business as usual with respect to the services provided to the Funds*** and that the Board would be notified immediately of any developments.[77]

On October 9, 2020, Mr. Norris sent an e-mail to the Retail Board and other officers and agents of the Advisors (including outside counsel) to provide an interim update in which he advised the Retail Board that NexPoint was working on contingency plans to "ensure that there is no disruption in services":

> We are working on full responses to your with [sic] 15(c) follow-up questions attached, however we want to keep you updated as it pertains to the continued developments with shared services and your first question on the attached. As it stands today, NexPoint's senior management's plan as a backup/contingency plan is to extend employment offers to the vast majority of HCMLP's employees by 12/31/2020. ***This will help ensure that there is no disruption in services to the Funds. Once we have further details of this we will advise. In the interim the plan is to continue with existing shared services***.[78]

A few days later, on October 13, 2020, Mr. Norris informed the Retail Board during a regularly scheduled meeting that, with respect to shared services, "all operations continued in the normal course there [sic] had been no material impact on the day-to-day operations of the Funds" and that contingency plans were "in place to continue to provide the same level and quality of services to the Funds":

> Mr. Ellington then explained three various potential scenarios contemplated during the ongoing negotiations, including a full or partial buyout of certain creditor claims by Mr. Dondero or no agreement, which could potentially lead to liquidation of HCMLP and termination of all HCMLP employees. . . .

[77] Pl. Ex. 60 at pp 12-13 (emphasis added).
[78] Pl. Ex. 81 (emphasis added).

> Mr. Sauter also discussed the status of the shared services agreements. In response to another question, ***Mr. Norris discussed the morale employees [sic] and noted that all operations continued in the normal course there [sic] had been no material impact on the day-to-day operations of the Funds***. He indicated that there would not likely be any material developments with respect to the status of HCMLP until the end of the year at the earliest. The Board requested that the Advisers continue working toward developing definitive plan to ***ensure that the resources, both of personnel and equipment, are in place to continue to provide the same level and quality of services to the Funds*** and to continue to report back to the Board on the status.[79]

On October 23, 2020, the Retail Board asked whether there were "any material outstanding amounts currently payable or due in the future (e.g., notes) to HLCMLP [sic] by HCMFA or NexPoint Advisors or any other affiliate that provide services to the Funds."[80] As to that question, the Advisors informed the Retail Board that "***[a]ll amounts owed by each of NexPoint and HCMFA pursuant to the shared services arrangement with HCMLP have been paid as of the date of this letter***."[81]

On October 28, 2020, the Retail Board was again told that: (i) Highland was expected to continue to provide shared services without interruption, (ii) the parties continued to work on a "seamless transition," (iii) according to Mr. [Brian] Collins [HR manager], there had been no "significant departures" of employees, and that (iv) the "quality and level" of services had not been negatively impacted by Highland's bankruptcy:

> Mr. Ellington provided an update on the HCMLP bankruptcy, focusing on the contingency plan for fund service providers if HCMLP is unable to perform its current functions. . . . He also noted that based upon on-going discussions with HCMLP, as well as in view of these alternative contingency plans, ***the Advisers do not expect any interruption to the services to the Funds that are currently being provided by HCMLP pursuant to the Shared Services Agreement***.
>
> Mr. Collins noted that, although employees of HCMLP were not yet able to be released subject to confirmation of the plan of bankruptcy, ***he was confident in the firm's ability to retain talent throughout this process based on discussions with***

[79] Pl. Ex. 61 at pp. 2-3.
[80] Pl. Ex. 22 at 2.
[81] *Id.*

> ***the employees. He noted that every employee team leader had been spoken to and also noted that there have been no significant departures to date****. . . .*
>
> ***The Advisers represented that the quality and level of services provided to the Funds by the Advisers and pursuant to the shared services arrangements had not been negatively impacted to date and that adequate plans were in place prevent any diminution of services as a result of any potential issues relating to the HCMLP bankruptcy that might arise****. . . .*
>
> ***The Board noted that the level and quality of services to the Funds by the Advisers and its affiliates had not been materially impacted by the HCMLP bankruptcy and took into account the Advisers' representations that the level and quality of the services provided by the Advisers and their affiliates, as well as of those services currently being provided by HCMLP pursuant to the Shared Services Agreement, would continue to be provided to the Funds at the same or higher level and quality****.*[82]

A week later, Mr. Norris again reassured the Retail Board that Highland continued to provide shared services on an uninterrupted basis and that no issues of "conflict" arose:

> ***Mr. Norris then noted that there has not been any disruption to the services provided to the Funds by HCMLP pursuant to the Shared Services Agreement and that he expects that such services will continue to be provided in normal course****.* In addition, Mr. Norris noted that there have been no issues with an HCMLP employee being conflicted out since the last update.[83]

By December 1, 2020: (a) Highland had sent the Termination Notices, indicating its intent to termination the Agreements; and (b) the Advisors had allegedly discovered the "overpayments under the Agreements."[84] Yet, the Advisors continued to reassure the Retail Board that everything was proceeding normally and that the parties were working to achieve an orderly, seamless transition.

Indeed, on December 1, 2020, Mr. Post confirmed that Highland sent the Termination Notices and informed the Retail Board, among other things, that:

> On November 30, 2020, HCMLP provided notice of termination of the Shared Services Agreement to HCMFA/NPA, effective January 31, 2021. However, based

[82] Pl. Ex. 62 at pp. 2-3, 7.
[83] Pl. Ex. 63 at p. 3.
[84] Pl. Ex. 13 ¶16.

> upon on-going discussions with HCMLP, ***HCMFA/NPA expects to be able to continue to receive these services through a transfer of personnel, equipment and facilities from HCMLP*** either to HCMFA/NPA or to a third-party service provider.[85]

On December 7, 2020, the Advisors provided written responses posed by Blank Rome, outside counsel to the Retail Board. In response to a question about who "is responsible for putting together the plan to continue to provide/transition shared services for the retail complex," the Advisors stated:

> The senior management team of the Advisors is responsible for the transition of services, and this group is made up of Jim Dondero, D.C. Sauter, Jason Post, and Dustin Norris. ***This group is working with HCMLP management to ensure an orderly transition***.[86]

The Retail Board also asked for a "matrix of current services provided and services that will be transferred." In response, the Advisors stated:

> Please see Appendix A below, which includes the list of services provided under the shared services agreement with HCMLP. These services fall into two broader categories: 1) Employees performing services and 2) Systems, infrastructure, software and supplies/equipment. As we understand it, the bankruptcy plan of reorganization approved by the bankruptcy court (the "Approved Plan") anticipates the termination of all HCMLP employees by 1/31/21. ***The Advisors anticipate extending employment offers to the vast majority of HCMLP's employees such that the employees would be rehired immediately upon termination of their employment with HCMLP. This will cover all of the services under category 1 above***.[87]

During a Retail Board meeting held on December 10-11, 2020: (a) Mr. Norris reviewed the "current services provided under the shared services agreement with HCMLP and discussed the current plans for ensuring the continuation of those services after a plan of reorganization is

[85] Pl. Ex. 16. (December 1, 2020 email from Mr. Post) (emphasis added).
[86] Pl. Ex. 10 at 1 (emphasis added).
[87] *Id.* at 2 (emphasis added).

approved"; and (b) Mr. Sauter "noted that there has been no material attrition to date with respect to employees":

> Mr. Norris provided responses to the Board's follow up questions that had been submitted on their behalf prior to the Meeting. Among these items, ***Mr. Norris reviewed a matrix of current services provided under the shared services agreement with HCMLP and discussed the current plans for ensuring the continuation of those services after a plan of reorganization is approved***. Mr. Norris noted that these shared services fell into two broader categories: (1) employees performing services and (2) systems, infrastructure, software and supplies/equipment. With respect to the first category, Mr. Norris discussed plans by the Advisers to extend employment offers to the vast majority of HCMLP's employees such that the employees would be rehired immediately upon termination of their employment with HCMLP. In the alternative, these employees could join a newly formed entity (New Co) and continue to provide services to the Funds through NewCo. ***With respect to the second category, Mr. Sauter noted that the Advisers and HCMLP were in agreement that these would be assigned with a payment from the Advisers*** and that there were working groups set up that were pursuing an orderly transition of all of these items, which included orderly assignment and assumption of the relevant agreements needed to continue with all current services. ***He noted that there has been no material attrition to date with respect to employees***. . . . Mr. Norris also discussed the Advisers' proposed alternative plan and confirmed that ***regardless of whether the Advisers and HCMLP came to an agreement on shared services, such services would be continued to be provided to the Funds without interruption***.[88]

By January 2021, Highland had become embroiled in litigation with Mr. Dondero and had obtained temporary injunctive relief against him. However, the Advisors assured the Retail Board that this had no impact on the Advisors' ability to obtain access to information and resources concerning the Retail Funds:

> Mr. Norris confirmed that ***the Advisers did not feel limited by the temporary restraining orders relating to the HCMLP bankruptcy with respect to access to Fund information***. Mr. Norris then updated the board on a number of employee moves from HCMLP to NexPoint. In response to a question, Messrs. Post and Norris confirmed that there was sufficient legal and compliance coverage for the Funds.
>
> Mr. Norris then provided an update on the negotiations with HCMLP on the transition of shared services. He noted that both sides had agreed in principle on

[88] Pl. Ex. 64 at pp. 7-8.

> the transition of services and cost sharing but that it was not yet memorialized in a contract and a number of details still needed to be resolved. ***He confirmed that the Advisers continued to receive full access to information and resources with respect to the Funds***.[89]

On January 29, 2021, Jackie Graham, NREA's[90] Director of Investor Relations and Capital Markets, sent an e-mail to Mr. Dondero, Mr. Sauter, and others in advance of a Board call in which she attached an outline of certain issues concerning shared services provided by Highland and stated, among other things, that:

> Because the [relevant Funds] are externally managed by external advisors (NexPoint Real Estate Advisors, L.P. and its affiliates (the "Advisors")), the [relevant Funds] rely on the Advisors to provide certain services to them. ***The Advisors utilize Highland Capital Management, L.P. ("HCM") to provide a certain subset of these services under a shared services agreement between HCM and the Advisors***. . . .
>
> Employees of the Advisors are working with HCM to provide a transition of shared services from HCM to the Advisors or third party providers. . . . Specifically, the Advisors and affiliate advisors would pay a one-time fee of $400,000 and ongoing monthly costs of $270,000. Additionally, ***HCM may require the Advisors and affiliate advisors to pay previously unpaid fees allegedly owed to HCM totaling $5.5m***. . . .
>
> Winston is reviewing potential legal remedies ***in the event HCM breaches the shared services*** by denying us access to our data held by HCM or otherwise attempts to cause harm to our shareholders . . .[91]

Eventually, a transition of shared services from Highland to a Newco entity known as Skyview was effectuated (Skyview being owned and operated by individuals previously employed by Highland). As the transition of the shared services from Highland to Skyview was nearing completion, the Advisors continued to reassure the Retail Board that all was well. On February 26, 2021, Mr. Norris provided an update on the transition:

> Mr. Norris provided an update on the shared services arrangements and employee transitions. ***He indicated that there would be no impact as a result of certain***

[89] Pl. Ex. 66 at pp. 2-3.
[90] "NREA" stands for NexPoint Real Estate Advisors, L.P., a subsidiary of NexPoint.
[91] Pl. Ex. 84 at FUNDS 0000043-44 (emphasis added).

> ***employees not transitioning to the Advisers*** and discussed the team in place and their qualifications. He noted that the current shared services arrangements with HCMLP would cease at the end of February and that the Advisers wish to move forward with new Shared Services Agreements between each Adviser and NewCo. He then stated that these Agreements were in the process of being drafted and finalized and will be reviewed with the Board at its next meeting. ***He indicated that there had been no major issues in connection with the transition and that the personnel from the Advisers had met with HCMLP with respect to data files and are comfortable that HCMLP will be providing the necessary information***. In response to a question from the Board, he indicated that there was not an immediate need for such data and confirmed that the Advisers had the data and information files they needed with respect to Fund operations and services.[92]

Based on all the information and representations made by the Advisors, the NexPoint Diversified Real Estate Trust (one of the Advisors' Clients) filed its annual report with the SEC in early ***2022*** (about a year after Highland commenced this Adversary Proceeding and the Advisors filed their administrative expense claims) in which it disclosed, among other things, the following:

> The Fund has retained NexPoint Advisors, L.P. (the "Investment Adviser") to manage the assets of the Fund pursuant to an investment advisory agreement between the Investment Adviser and the Fund (the "Agreement"). . . . ***The Board of Trustees noted that the level and quality of services to the Fund by the Investment Adviser and its affiliates had not been materially impacted by the HCMLP bankruptcy*** and took into account the Investment Adviser's representations that the level and quality of the services provided by the Investment Adviser and their affiliates, as well as of those services provided by Skyview to the Investment Adviser under the Skyview Services Agreement, would continue to be provided to the Fund at the same or higher level and quality.[93]

Pursuant to the evidence set forth above, the court finds that the Advisors made ***numerous representations*** to the Retail Board, before and after the Advisors allegedly became aware of the "overpayments" and ceased making payments to Highland under the Agreements, indicating that Highland had sufficiently performed all services provided under the Agreements. The court notes that, many times, the communications between the Advisors and the Retail Board (or the Retail

[92] Pl. Ex. 73 at pp. 9-10 (emphasis added).
[93] Pl. Ex. 77 at 41, 43

Board Minutes) refer to no interruption in "shared services." The court interprets this to generically mean shared services under both the SSAs and PRAs. This is strong evidence that Highland, indeed, performed all services contemplated under the Agreements.

F. Extrinsic Evidence that the Advisors had Knowledge of Employees Hired and Terminated by Highland, Both Pre- and Post-Petition

In addition to the evidence detailed above, there is still more credible evidence that the Advisors had knowledge of when employees of Highland, including the Dual Employees, were hired and terminated by Highland. Among other things:

- In their written responses to interrogatories, the Advisors admitted that they had contemporaneous knowledge of the termination of every Dual Employee;[94]
- Every month from at least October 2017 through January 2021, Highland's Human Resources department (under the direction of a Mr. Brian Collins) prepared a "Monthly Headcount Report" (the "Monthly Headcount Reports") listing every employee in the Highland complex and highlighting new hires and terminations and distributed such reports to numerous people, including the Advisors' officers (i.e., Mr. Waterhouse, Ms. Thedford, and Mr. Norris);[95]
- Mr. Dondero was provided with extensive information concerning hires, terminations, and employee compensation and benefits during the Annual Reviews;[96]
- In early 2020, the Advisors provided detailed information to the Retail Board concerning all of Highland's employees;[97]

Yet, despite having knowledge of Highland terminating certain employees, both when it was controlled by the Independent Board and when it was controlled by Mr. Dondero, the Advisors continued to approve and make payments in the same monthly amounts under the Agreements.

[94] Pl. Ex. 14 at pp 12-13 (responses to Interrogatories 3 and 4).
[95] Pl. Exs. 88-127.
[96] Pl. Ex. 86 at pp. 29-33; Pl. Ex. 142 at pp. 6-10.
[97] Pl. Ex. 57; Pl. Ex. 75.

As earlier noted, as of May 1, 2018, when the Advisors entered the PRAs, four of the twenty-five Dual Employees on Exhibit A had already been terminated, and Mr. Waterhouse had every reason to know that cost allocations for terminated employees were being used when he signed the Agreements.[98]

As also earlier noted, as of December 14, 2018, when the PRA Amendments paying Highland $2.5 million of extra compensation were entered, nine of the twenty-five Dual Employees on Exhibit A had already been terminated. Finally, as of the Petition Date, fourteen of the twenty-five Dual Employees on Exhibit A had already been terminated.

Still, no change in the monthly payments (only the unexplained ***increase*** in payment made by the Advisors under the PRA Amendments that had no analysis done in connection with it) were ever made or requested by the Advisors under the PRAs.

The court finds the Advisors had knowledge of the termination of Dual Employees under Exhibit A of the PRAs. Further, the court finds the Advisors continued making the same monthly payments under the PRAs, despite knowledge of the terminations, for 35 months.

G. The Advisors Knowingly and Intentionally Made All Payments under the Agreements until November 30, 2020

The evidence is undisputed that, from January 1, 2018 through November 30, 2020, the Advisors made all of the same monthly payments under the Agreements in exchange for the back-office, middle-office, and front-office services provided to them by Highland. Each of the payments that the Advisors made under the Agreements between January and November 2020 (when the new Independent Board controlled Highland) were exactly the same (or, in the case of the HCMFA SSA, utilized the exact same methodology) as the payments that the Advisors made

[98] Tr. Transcript 4/12/22, Part 2 of 2 [DE # 113], at 111:22-112:5.

under the Agreements between January 1, 2018 and December 31, 2019 (when Mr. Dondero still controlled Highland).

It cannot be legitimately disputed that the Advisors had knowledge of the payments made under the Agreements. The evidence shows: (1) the Agreements were signed by Mr. Waterhouse, the Treasurer of the Advisors and the CFO of Highland;[99] (2) Highland sought and obtained permission from Mr. Waterhouse before making payments under the Agreements as the officer of the Advisors;[100] (3) Mr. Waterhouse testified that he, in his role as the Treasurer of the Advisors, was responsible for ensuring the Advisors paid the proper amounts under the Agreements;[101] and (4) the Advisors represented to the Retail Board that "[a]ll amounts owed by each of NPA and HCMFA pursuant to the shared services arrangement have been paid."[102]

The Advisors made an argument in their trial brief that Highland was simply paying itself without any involvement from any Advisor employee or officer. This statement is disingenuous, given Mr. Waterhouse's testimony that he was the officer in charge of making sure the proper amounts were transferred under the Agreements and his regular approval of payments.

The court finds, when considering the collective of this evidence, that the Advisors had knowledge of and authorized the payments by the Advisors to Highland under the Agreements.

H. The Advisors' Stoppage of Payments under the Agreements Late in the Bankruptcy Case

As stated above, from the January 1, 2018 until November 30, 2020, the Advisors paid Highland the same fixed monthly amounts due and owing under the Agreements, without change or objection.[103]

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[99] There is one exception. The NexPoint SSA, executed in 2013, was signed by James DOndero and by an individual named Brian Mitts. Pl. Exh. 2.
[100] *See, e.g.*, Pl. Exs. 147, 152.
[101] Tr. Transcript 4/12/22, Part 2 of 2 [DE # 113], at 69:19-25.
[102] Pl. Ex. 22 at ACL 080593 (response to Question 2).
[103] And, notably, without any request for a modification or "true-up" post-petition.

By the end of November 2020: (i) the Independent Board had demanded Mr. Dondero's resignation (from his post-petition role as a portfolio manager for Highland); (ii) Mr. Dondero had begun interfering with Highland's business and engaging in conduct that ultimately led to the imposition of injunctive relief; and (iii) Highland had delivered the termination notices for the SSAs.[104]

It was around this time when Mr. Dondero instructed Mr. Waterhouse to stop making any payments to Highland on account of the Agreements. As a result, the Advisors failed to make payments under the Agreements for the months of December 2020 and January 2021 (and, in the case of the HCMFA SSA, also the month of November 2020). The court finds, and there is no dispute by the Advisors, that the Advisors intentionally did not make these payments to Highland under the Agreements.

I. The Advisors' Lack of an Attempt to Modify the PRAs

As earlier noted, the Advisors claim that, in late 2019 or early 2020, after Highland had filed bankruptcy, Mr. Waterhouse raised the existence of overpayments with Fred Caruso ("Mr. Caruso"), an employee of Development Specialists, Inc. ("DSI"), before the new Independent Board of Highland was even appointed. Another employee of DSI, Brad Sharp, serve as the Chief Restructuring Officer in the bankruptcy, at that time (again, before the Independent Board was appointed). However, despite what was alleged in the Advisors' pleadings, Mr. Waterhouse testified that he does not remember ever asking Mr. Caruso to amend the amounts under the PRAs, only that he made him aware that there might be overpayments.[105] The Advisors and Mr.

[104] The termination notices did not mention the PRAs. Mr. Seery credibly testified that he does not know why the PRAs were not mentioned in the termination notices, but that they were rejected as part of the confirmed plan. Tr. Transcript 4/13/22, Part 1 of 2 [DE #114], at 62:1-63:21.
[105] Tr. Transcript 4/12/22, Part 2 of 2, at 109:18-110:4.

Waterhouse claim that Mr. Caruso told Mr. Waterhouse that the PRAs could not be amended because of the automatic stay in place from the bankruptcy. There is no documentation of this discussion or any subsequent documentation of what Mr. Caruso or Mr. Waterhouse discussed—only the testimony of Mr. Waterhouse where he couldn't remember specifics. Mr. Caruso did not testify at Trial.

There is no evidence that Mr. Waterhouse might have followed up with Mr. Caruso. Mr. Waterhouse never told anyone else affiliated with the Advisors that he had learned of potential overpayments, other than Scott Ellington ("Mr. Ellington") and Isaac Leventon ("Mr. Leventon") with Highland's legal department, and this included not telling Mr. Dondero.[106] Mr. Waterhouse never made Highland's new Independent Board aware of the alleged potential overpayments, despite many interactions with the Independent Board.[107] And notably absent from his testimony, was any claim that he made a formal request for modifications to the PRAs as the Advisors' Treasurer, despite having knowledge of the alleged overpayments since at least late 2019, and likely since the PRAs were signed.

Viewing the evidence in the light most favorable to the Advisors, they only raised the issue of potential overpayments to Highland in late 2019, through Mr. Caruso, Mr. Ellington, and Mr. Leventon. The Advisors never subsequently followed up with Mr. Caruso or informed Highland's new Independent Board of the alleged overpayments after the Independent Board was put in place shortly after the alleged conversations with Mr. Caruso. Further, and most importantly, the court finds that the Advisors, based on the testimony of Mr. Waterhouse, never made a request to modify

[106] Tr. Transcript 4/12/22, Part 2 of 2, at 111:18-112:8.
[107] Tr. Transcript 4/12/22, Part 2 of 2, at 114:15-25.

the payments under the PRAs during the relevant period before payments were withheld in November 2020.

III. CONCLUSIONS OF LAW

A. Jurisdiction and Venue

Bankruptcy subject matter jurisdiction exists in this Adversary Proceeding, pursuant to 28 U.S.C. § 1334(b), and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (C), and (O). The court has Constitutional authority to enter a final judgment in this Adversary Proceeding. While Defendants, in their Original Answer, initially contested that core matters were involved and they did not consent to bankruptcy court adjudication,[108] the parties later stipulated to final adjudication of these matters in the bankruptcy court.[109] Venue is proper in this judicial district pursuant to 28 U.S.C. § 1409.

B. Choice of Law

The four relevant documents in the Adversary Proceeding are the HCMFA SSA, NexPoint SSA, HCMFA PRA, and NexPoint PRA. All four of these contracts contain choice of law provisions that the Agreements "will be governed and construed in accordance with the laws of the State of Texas."[110] Accordingly, Texas law applies to the claims at issue.

C. The Advisors' Claims for Overpayment under the PRAs

The Advisors seek an administrative expense claim for alleged overpayments they made under the PRAs from the Petition Date until November 30, 2020 (the date the Advisors ceased making any payments under the PRAs).

[108] DE # 33 in AP, ¶ 10.
[109] DE # 37 in AP, ¶ 2.
[110] Pl. Ex. 2 § 9.05; Pl. Ex. 3 § 8.04; Pl. Ex. 6 § 6.05; Pl. Ex. 8 § 6.05.

As set forth in the Joint Pretrial Order filed in this Adversary Proceeding, the Advisors contend that each of the Advisors were required to reimburse Highland for its actual costs of the Dual Employees listed on the Exhibit A's to the PRAs, but that as of the Petition Date, many of the Dual Employees (fourteen out of twenty-five) were no longer employed at Highland. Therefore, the Advisors argue, during this period, they were essentially paying Highland for Dual Employees who were no longer employed by Highland and that such payments constituted overpayments under the PRAs. The Advisors maintain that their monthly payments under the PRAs resulted in overpayments by the Advisors to Highland totaling $7,649,942, broken down as $4,928,103 in post-petition overpayments by HCMFA and $2,721,839 in post-petition overpayments by NexPoint. The Advisors' overpayment claim is premised on the contention that the Advisors were only required to pay for "actual costs and expenses" relating to each particular Dual Employee.

Alternatively, the Advisors argue that if their interpretation of the PRAs is incorrect—such that the PRAs contemplated fixed monthly payments and Section 2.02 of the PRAs would have required a modification of the PRAs in order to reduce the required monthly payment to conform to a smaller number of Dual Employees—then the court should find that the Advisors did, indeed, seek to modify the fixed monthly amounts under Section 2.02, but that Highland failed to negotiate the same in good faith as required by such section.

In response, Highland argues that the PRAs clearly and unambiguously require that the Advisors pay a flat monthly amount for investment advisory services rendered, regardless of which employees actually performed those services, unless the parties agreed otherwise in writing pursuant to Section 2.02. Highland also argues that parole evidence and the parties' uninterrupted course of dealing proves that the parties intended for the Advisors to pay a fixed monthly amount

for investment advisory services, unless modified pursuant to Section 2.02. Highland further argues that the Advisors never sought modification and that their claims have been (a) waived and (b) are barred by the voluntary payment rule.

i. The PRAs are Unambiguous as a Matter of Law

Under Texas law, a party claiming breach of contract has the burden to prove the following elements: "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff as a result of the defendant's breach." *Williams v. Wells Fargo Bank, N.A.*, 884 F.3d 239, 244 (5th Cir. 2018) (internal citations omitted). The court's primary role in interpreting a contract is "to determine the parties' intent as reflected in the [contract's] terms." *Chrysler Ins. Co. v. Greenspoint Dodge of Houston Inc.*, 297 S.W.3d 248, 252 (Tex. 2009). "Contract language that can be given a certain or definite meaning is not ambiguous and is construed as a matter of law." *Id.* "If the contract is capable of being given a definite legal meaning, parole evidence is generally not admissible to create an ambiguity." *Kendziorski v. Saunders*, 191 S.W.3d 395, 405 (Tex. App. – Austin 2006). "Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered into." *BCC Merchant Solutions, Inc. v. Jet Pay, LLC*, 129 F.Supp.3d 440, 466 (N.D.Tex. 2015) (internal quotations omitted); *see also Watkins v. Petro-Search, Inc.*, 689 F.2d 537, 538 (5th Cir. 1982) ("[W]hen a question relating to the construction of a contract or its ambiguity is presented, the court is to take the wording of the contract in the light of the surrounding circumstances, in order to ascertain the meaning that would be attached to the wording by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration").

A contract is unambiguous and will be enforced as written where it is "susceptible to only one reasonable construction." *BCC Merchant*, 129 F.Supp.3d at 477. "[A] cardinal rule of contract interpretation under Texas law is that the entire writing must be examined" and "no single provision taken alone [may] be given controlling effect." *Id.* (citing Texas law) (internal quotations omitted). "Where the language is clear and definite, the contract is not ambiguous, and a court must apply the plain language as a matter of law." *Main Street Bank v. Unisen*, No. H-06-3776, 2008 WL 11483415, at *4 (S.D.Tex. Feb. 15. 2008).

Thus, the court begins its analysis by looking at the plain language of the PRAs. In both of the PRAs, Section 2.01 mandated that the Advisors were required to pay Highland the "Actual Cost" of the services provided by the Dual Employees.[111] However, despite the use of the words "Actual Cost," and an Exhibit A attachment purporting to list out the Dual Employees, the PRAs defined that term "Actual Cost" under Article I as a specific dollar amount. The PRAs defined "Actual Cost" as equal to $252,000 per month for NexPoint and $416,000 per month for HCMFA.[112] There was no requirement of periodic reevaluation of the Actual Cost; no automatic adjustments to the Actual Cost amounts, for such things as employee comings-and-goings or employee changes in job duties; and no mention of a "true-up" annually or at any other time. The PRAs simply plugged in a decisive monthly amount.

Section 4.02 of the PRAs required any party seeking modifications to amounts paid under the definition of "Actual Cost" to make a request on the other party "on or before the last business day of the calendar month." Further, Section 2.02 permitted the parties to "agree to modify the terms and conditions" of the amounts paid and the parties were required to negotiate any

[111] Pl. Ex. 6 § 2.01; Pl. Ex. 8 § 2.01.
[112] Pl. Ex. 6 Article I; Pl. Ex. 8 Article I.

modification requested in good faith. Finally, Section 6.02 required that any amendment to the PRAs to be in writing by all parties.

These are the PRA provisions that are germane to the disputes in this Adversary Proceeding. When reading these provisions within the entirety of the PRAs, the court concludes that the PRAs are unambiguous as a matter of law. Section 2.01 and an accompanying Article I definition of "Actual Cost" set forth a flat monthly amount; the parties agreed that this flat monthly amount would be deemed to be the "Actual Cost" of the front-office services that Highland was providing to the Advisors, through the Highland employees. The accompanying Sections 2.02, 4.02, and 6.02 allowed for a modification of these amounts, but only if a party notified the other party on or before the last business day of a calendar month that it requested such a modification. If the parties agreed to a modification, there had to be a written agreement memorializing the amendment.

The Advisors seem to argue that Sections 2.02 and 4.02 imposed an affirmative obligation on Highland to update the list of Dual Employees and their respective Allocation Percentages, or to unilaterally adjust the "Actual Costs." The literal wording of these provisions does not support such an obligation. Under the Advisors' interpretation of the PRA, Highland would have been obligated to invoke Section 4.02 (which is itself dependent on Section 2.02) on the Advisors' behalf and to adjust the Advisors' monthly payments as Dual Employees were terminated, or as changes were made in their compensation or Allocation Percentages. But again, that is simply not what the PRAs provide. The PRAs use the words the "Parties may agree to modify the terms" when assigning the obligation under Section 2.02, which the preamble defines as both Highland and the Advisors. Further, Section 4.02 requires "the Party requesting modification" to notify "the other Party." Notably, Section 4.02 does not put this obligation solely on Highland as it uses

"Party" to refer to either party to the contract, whereas it uses "HCMLP" specifically when assigning obligations to Highland elsewhere in the PRAs. The court concludes that the unambiguous language put no unilateral obligation on Highland to amend the PRAs to reflect changes in Dual Employees, but rather on both the parties to negotiate such amendments.

ii. Even if the PRAs Were Ambiguous, Extrinsic Evidence Supports a Fixed Payment Interpretation

As stated above, the court concludes that the PRAs are not ambiguous, and that the only reasonable interpretation of the PRAs is they contemplate a fixed monthly payment. In fact, the only aspects of the PRAs that give the court any pause regarding ambiguity are as follow: (a) the title of the PRAs (i.e., Payroll ***Reimbursement*** Agreement—suggesting an intention to reimburse payroll costs); and (b) the fact that there was a list of employees attached as Exhibit A. Why use the term "reimbursement" or attach a list of employees if these words/concepts were not really dispositive of anything? If these two aspects of the PRAs make them ambiguous, then the court is required to consider the wording of the contract ***in the light of the surrounding circumstances***, in order to ascertain the meaning the agreements, as might be given by a reasonably intelligent person acquainted with all operative usages, and knowing all of the circumstances prior to and contemporaneous with the making of the agreements. *See Watkins v. Petro-Search,* 689 F.2d at 538.

The Findings of Fact set out a plethora of evidence that established that the parties always contemplated fixed amounts being used to pay Highland for providing front-office services to the Advisors. This evidence included, among other things: (1) Mr. Klos credibly testifying that the PRAs, and Exhibit A's, were created to reflect payments, in conjunction with the other Agreements, that equaled the annual amounts that Mr. Dondero wanted transferred to Highland

after the 2017/2018 Annual Review ***to deal with Highland's cash liquidity problems*** (recall that prior to 2018, Highland provided sub-advisory services to the Advisors for free and Highland was facing an imminent loss of its Acis sub-advisory fees); (2) Mr. Waterhouse testifying that he was aware that four of the Dual Employees had been terminated at the signing of the PRAs, yet did not seek to update the Dual Employee allocations on the Exhibit A's at any point to reflect this; (3) employees and officers of the Advisors received Monthly Headcount Reports from Highland, detailing the hiring and termination of employees, including the Dual Employees during the relevant period; (3) the Exhibit A's were never updated, even though Dual Employees were terminated over time, and no one was ever asked to update them; (4) Mr. Waterhouse, as the Advisors' Treasurer, had knowledge of Dual Employees being terminated or otherwise leaving Highland, and continued to approve payments under the PRAs on 35 separate occasions; (5) Mr. Klos communicated with Mr. Waterhouse in January 2020, during which Mr. Klos confirmed to Mr. Waterhouse that the Agreements were "flat" amount payments and the same amounts had been paid since the PRAs were signed; and (6) no request for an amendment to the PRAs was made through November 2020 (except for the 2018 PRA Amendments—pursuant to which $2.5 million extra was paid to Highland on account of the PRAs, even though five more employees on the Exhibit A lists had left Highland since execution of the PRAs).

In summary, this extrinsic evidence further supports a conclusion that the PRAs were fixed rate contracts, if the PRAs should be determined to be ambiguous. This extrinsic evidence reveals that the Advisors were aware Dual Employees were being terminated, made no request for an amendment to the PRAs, and continued to make payments under the PRAs until Mr. Waterhouse, under the direction of Mr. Dondero, stopped making payments in November 2020.

Given that the court has concluded that the PRAs were fixed rate arrangements, the Advisors have failed to meet their burden of proving overpayments under the PRAs.

iii. Highland Did Not Fail to Negotiate in Good Faith

The court noted above that Section 2.02 of the PRAs included language that required the parties to negotiate in good faith when a party notifies the other party that it is requesting a modification, pursuant to Section 4.02, before the last business day of the calendar month. The Advisors allege that Highland never negotiated in good faith when the Advisors supposedly made Highland aware (through Highland's consultant, Mr. Fred Caruso) that overpayments under the PRAs may have been made, and Mr. Caruso told the Advisors that an amendment could violate the automatic stay in bankruptcy.

The court has already found and concluded that: (a) the PRAs unambiguously created a fixed amount contract; (b) Highland was under no duty to unilaterally modify the PRAs if it knew that Dual Employees were terminated; and (c) the Advisors failed to provide sufficient evidence that they made a formal request of Highland to modify the fixed monthly amount, pursuant to the terms of the PRAs.[113] Thus, the Advisors never triggered Highland's obligation under Section 2.02. Specifically, without a formal notification/request of the type set forth in Section 4.02 of the PRAs, Highland's obligation to negotiate in good faith could not exist. Discussing potential overpayments with a third-party consultant (Mr. Caruso)—assuming such overpayments could even be possible—is not enough. Additionally, if the automatic stay was a valid concern of the Advisors (potentially impairing their ability to exercise contractual rights under the PRA), there were options available to them, including filing a motion for relief from stay to exercise

[113] The Advisors, in their pleadings, claimed Mr. Waterhouse made such a request in late 2019 in his conversations with Mr. Caruso. However, Mr. Waterhouse testified that they talked about overpayments possibly being made, but that he never recalled requesting amendment of the PRAs.

termination rights (termination was permissible under the PRAs, with or without cause, on 60-day notice)[114] or filing a motion to compel rejection of the PRAs pursuant to Bankruptcy Code section 365.

As such, the court concludes that Highland did not fail to negotiate in good faith under Section 2.02.

iv. Highland's Waiver Defense to Overpayments under the PRAs

Alternatively, if the PRAs should be construed to have contemplated variable amounts—that should have changed automatically as Dual Employees departed, as opposed to fixed rate amounts—Highland argues that the preset monthly amounts listed in the PRAs were controlling until the Advisors made a request under Section 2.02 to change those monthly amounts, and that the Advisors ***waived*** any right to overpayments by not making such a request or objecting to payments under the PRAs for all the many months during which Dual Employees were being terminated.

"Under Texas case law, waiver is the intentional relinquishment of a known right or the intentional conduct inconsistent with claiming that right." *Sedona Contracting, Inc. v. Ford, Powell & Carson, Inc.*, 995 S.W.2d 192, 195 (Tex. App. 1999). The elements of waiver include: (1) an existing right, benefit, or advantage held by a party; (2) the party's actual or constructive knowledge of its existence; and (3) the party's actual intent to relinquish the right or intentional conduct inconsistent with the right (which can be inferred from the conduct). *See id.*; *see also Ulico Cas. Co. v. Allied Pilots Ass'n,* 262 S.W.3d 773, 778 (Tex. 2008); *Tenneco Inc. v. Enter. Products Co.*, 925 S.W.2d 640, 643 (Tex. 1996) ("The affirmative defense of waiver can be

[114] Pl. Ex. 6 § 5.02; Pl. Ex. 8 § 5.02.

asserted against a party who intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right.").

Waiver "results as a legal consequence from some act or conduct of the party against whom it operates" and is "essentially unilateral in character," meaning "no act of the party in whose favor it is made is necessary to complete it." *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 485 (Tex. 2017) (quotation marks omitted). "Silence or inaction, for so long a period as to show an intention to yield the known right, is also enough to prove waiver." *Tenneco*, 925 S.W.2d at 643.

While waiver is ordinarily a question of fact, when the surrounding facts and circumstances are undisputed, the question becomes one of law. *Motor Vehicle Bd. of Tex. Dep't of Transp. v. El Paso Indep. Auto. Dealers Ass'n, Inc.,* 1 S.W.3d 108, 111 (Tex. 1999); *Tenneco*, 925 S.W.2d at 643.

The first element is met here. Pursuant to Sections 2.02 and 4.02 of the PRAs, the Advisors had the right to seek a change to the fixed monthly rate if they believed a change was appropriate.

There is no dispute over the second element. The PRAs were signed by Mr. Waterhouse as an officer of both Highland and the Advisors. Further, the Advisors have never disputed having knowledge of Sections 2.02 and 4.02 under the PRAs during the relevant period.

The third and final element is the most pertinent under the analysis for waiver—the question being whether the actions or inactions of the Advisors were sufficient to show an intention to relinquish their right to modify the PRAs. Relevant here: (a) the Advisors (through their officers Mr. Waterhouse, Mr. Norris, and Ms. Thedford) were kept up to date from before the PRAs were signed until after November 30, 2020, by Monthly Headcount Reports created by Highland and distributed to these officers; (b) the Advisors signed the PRAs on May 1, 2018, at which time, the Advisors knew four of the twenty-five Dual Employees under the attached Exhibit A's had been

terminated; (c) the Advisors entered into the PRA Amendments in December 2018, when they had knowledge that nine of the twenty-five Dual Employees had been terminated—instead of attempting to amend under Sections 2.02 and 4.02, to reduce the monthly payments, to reflect the reduced number of Dual Employees, the Advisors paid Highland an additional sum of $2.5 million and never requested an amendment thereafter; and (d) on the Petition Date in October 2019, the Advisors were aware that fourteen of the twenty-five Dual Employees had been terminated; yet, from the Petition Date to November 30, 2020, the Advisors never made a request to modify the PRAs under Sections 2.02 and 4.02 and continued to pay the fixed amounts, despite knowledge that over half the Dual Employees had been terminated.

In summary, the Advisors did not exercise their alleged right to correct the monthly flat amount, to account for alleged overpayments, for almost three years (from the time the contract was signed until November 30, 2020). Mr. Waterhouse authorized payments under the PRAs for almost three years—i.e., thirty-five times.

The court notes again that Mr. Waterhouse, when asked directly, did not recall ever requesting that the PRAs be amended in his conversations with Mr. Caruso and also failed to ever make a request to amend to Highland's new Independent Board. The Advisors do not claim to have made a request for amendment to the PRAs, despite claiming that Highland failed to negotiate in good faith when Mr. Caruso allegedly suggested the automatic stay might prevent amendments to the PRAs.

The waiver here cannot be remedied by the general non-waiver provisions in the PRAs.[115] A nonwaiver provision in a contract that purports to absolutely bar waiver in the most general of terms might be wholly ineffective and itself can be waived. *Shields Ltd. P'ship v. Bradberry*, 526

[115] See Section 6.02 of Pl. Exh. 6 and Pl. Exh. 8.

S.W.3d 471, 484 (Tex. 2017) (while contrarily noting that ***specific*** non-waiver provisions noting specific actions or inaction that will not result in waiver are wholly enforceable). Nothing in the general non-waiver provisions in the PRAs provided any specificity as to the above actions or nonactions of the Advisors regarding amendment to the PRAs that would prevent waiver.

The Advisors never exercised their rights under Sections 2.02 and 4.02 of the PRAs and, indeed, acted counter to those rights by continuing to make payments without requesting amendment to the fixed monthly amounts from the time that the PRAs were signed until November 30, 2020, while simultaneously having knowledge that many of the Dual Employees were gone. Accordingly, the court concludes that Highland has met its burden of proof that the Advisors waived any amounts of alleged overpayments that might have been properly remedied by amendment of the monthly rates under Sections 2.02 and 4.02.

v. Highland's Defense to Overpayments under the Voluntary Payment Rule

Highland also raised the voluntary payment rule as a defense to the Advisors claims of overpayments. Under the voluntary payment rule, "money voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, duress, or compulsion, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability." *Miga v. Jensen*, 299 S.W.3d 98, 103 (Tex. 2009). "The rule is a defense to claims asserting unjust enrichment; that is, when a plaintiff sues for restitution claiming a payment constitutes unjust enrichment, a defendant may respond with the voluntary-payment rule as a defense." *XTO Energy Inc. v. Goodwin*, 584 S.W.3d 481, 497 (Tex. App. 2017). Highland contends that the Advisors overpayment claims under the PRAs are essentially ones for unjust enrichment and, thus, the voluntary payment rule is a proper defense to such claims.

In response, the Advisors contend that the voluntary payment rule cannot be asserted in regard to a breach of contract claim, which is what the Advisors contend they are claiming (i.e., not unjust enrichment). Texas case law cited by the Advisors states, "although the voluntary-payment rule may have been widely used by parties and some Texas courts at one time, its scope has diminished as the rule's equitable policy concerns have been addressed through statutory or other legal remedies." *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 771 (Tex. 2005). "Like other equitable claims and defenses, an adequate legal remedy may render equitable claims of unjust enrichment and equitable defenses of voluntary-payment unavailable." *Id.* at 770. While not completely abrogated, the rule today has only "limited application in Texas jurisprudence." *Id.* at 771.

The court need not decide the scope and applicability of the voluntary payment rule to the disputes under the PRAs at this time. The court has already found and concluded that the PRAs are unambiguous and created a fixed amount payment arrangement. The court has also found and concluded that, even if the PRAs were ambiguous, the extrinsic evidence supports the interpretation that the PRAs created a fixed amount payment arrangement. Further, the court has found and concluded that, even if the PRAs were not intended to be fixed amount payment arrangements, the Advisors waived their right to modify by continuing to make payments with knowledge of terminated Dual Employees for three years.

D. The Advisors' Claims under the SSAs

i. The Advisors' Claim for Breach of Contract under the SSAs

Turning to the SSAs—which were less of a focus at Trial than the PRAs—the Advisors claim that Highland breached the SSAs by failing to perform certain services owing to the Advisors, including legal and compliance services, thereunder. The Advisors contend that on or

around July 2020, Highland instructed its employees to cease providing certain services to the Advisors which Highland believed were adverse to the interests of Highland. The Advisors maintain that this forced the Advisors to retain two new employees to "cover" for such lost services, resulting in $425,000 in damages. The Advisors also contend that they were forced to pay Highland $1 million for legal services that Highland was no longer providing, resulting in $1.3 million in payments post-petition for services that Highland failed to provide. The Advisors seek damages for overpayments and breaches of the SSAs totaling $1,725,000.

As stated above, the elements of breach of contract under Texas law are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff as a result of the defendant's breach. *Williams*, 884 F.3d at 244.

Highland argues that the Advisors have not met their burden of proving the elements of breach or damages. Highland argues that the evidence, to the contrary, shows that Highland continued to perform under the SSAs—not the least of which was the evidence of the Advisors' continuous representations to the Retail Board that the quality of services under the agreements with Highland had not deteriorated.

As discussed extensively in the court's Findings of Fact above, the Advisors made numerous repeated representations to the Retail Board that performance under the SSAs continued as normal following July 2020—despite the Advisors now alleging that legal and compliance services were withheld.

To recap, in August 2020, the Advisors represented to the Retail Board that "there had been no issues or disruptions in services as a result of the HCMLP bankruptcy matter" and that the Advisors believed "the current shared services being provided are generally consistent with the

level of services that historically have been received."[116] In September and October 2020, the Advisors continued their representations that shared services continued to be properly provided. During a two-day meeting of the Retail Board, on September 16-17, 2020, the Advisors told the Retail Board that they do "not expect that the level and quality of services would change in the immediate term, and Mr. Norris stated he was "comfortable with the level and quality of services being provided and has not seen any issue with the conflicts process."[117] On October 9, 2020, the Advisors told the Retail Board there were "contingency plans" being formulated but "[i]n the interim the plan is to continue with the existing services."[118] On October 13, 2020, Mr. Norris represented to the Retail Board that "all operations continued in the normal course [sic] there had been no material impact on the day-to-day operations of the Funds".[119] On October 28, 2020, the Advisors continued to reassure the Retail Board by saying Highland and the Advisors were working on a "seamless transition" and the "quality and level" of services had not been negatively impacted by Highland's bankruptcy.[120] A week after that, the Retail Board was told there "has not been any disruption to the services provided to the Funds by HCMLP pursuant to the Shared Services Agreement".[121] The Advisors continued to communicate with the Retail Board in December 2020 and January 2021 but never made any representation Highland had provided any less quality or level of services than it had previously under the SSAs.

Based on their own representations to the Retail Board, the court finds and concludes that the Advisors have failed to meet their burden for proving the element of breach by Highland for a lack of services provided under the SSAs.

[116] Pl. Ex. 59; Pl. Ex. 18.
[117] Pl. Ex. 60.
[118] Pl. Ex. 81.
[119] Pl. Ex. 61.
[120] Pl. Ex. 62.
[121] Pl. Ex. 63.

Further, based on those same representations and no other evidence showing otherwise, the Advisors did not meet their burden of showing damages as a result of the alleged breaches. The Advisors failed to show that the "loss" from employing two new employees to provide certain legal services were caused by Highland's failure to perform under the SSAs.

ii. The Advisors' Claim for Overpayment under the SSAs

Finally, the Advisors also have brought a claim for overpayments under the SSAs, asserting that they overpaid Highland by $1 million for legal services that Highland stopped providing. This claim, like the Advisors' breach of contract claim, relies on the court concluding that the Advisors have satisfied their burden of showing Highland did not perform under the SSAs. Relying on the analysis above, the court concludes that the Advisors have not satisfied their burden of showing Highland failed to provide any services contracted for under the SSAs and, thus, cannot succeed on their claim for overpayment.

iii. Highland's Waiver Defense to the Advisors' Claims under the SSAs

If the court were to find that Highland had breached the SSAs, Highland alternatively pleaded the defense of waiver, similar as it did with regard to the Advisors' claims under the PRAs.

The elements of waiver, again, include: (1) an existing right, benefit, or advantage held by a party; (2) the party's actual or constructive knowledge of its existence; and (3) the party's actual intent to relinquish the right or intentional conduct inconsistent with the right (which can be inferred from the conduct). *Sedona Contracting, Inc.*, 995 S.W.2d at 195.

The Advisors don't dispute that they signed the SSAs and were aware of the terms of the SSAs.

Again, similar to waiver under the PRAs, the third element requires the most analysis here. The Advisors have admitted that Mr. Waterhouse oversaw and authorized all payments made

under the SSAs. The Advisors never made objections to making such payments under the SSAs as they were making them. Further, the Advisors never raised any objection to the payments with Highland to put them on notice. In fact, quite the opposite, the Advisors made representations to the Retail Board, detailed above, that everything was running smoothly with regard to the services provided under the SSAs. The Advisors knowingly and intentionally made payments every month under the SSAs until November 30, 2020 but decided not to raise the issue at any point with Highland until they stopped paying under the SSAs.

The Advisors' conduct is inconsistent with asserting rights under the SSA. The Advisors hired two new employees to perform certain services under the SSAs, allegedly indicating that they thought the SSAs were being breached. Yet, the Advisors continued authorizing the same payments to Highland. The Advisors did not tell Highland that it believed required services were not being provided and did not assert an administrative expense claim at the time.

If silence were not enough, as detailed above, the Advisors made numerous representations to the Retail Board after the supposed breach that everything was operating as normal under the SSAs, and Highland's service were of the same "quality and level" as always.

The Advisors conducted themselves intentionally in a manner inconsistent with asserting their claims of breach of the SSAs. Accordingly, the court concludes the Advisors have waived their claims resulting from the payments under the SSAs.

D. Highlands' Breach of Contract Claims Relating to All Four Agreements

Finally, Highland has claimed breaches of contract by the Advisors under all four of the Agreements due to nonpayment under each Agreement for certain months, starting in November

2020. The months in which Highland claims nonpayment are as follows:

Agreement	Months of Nonpayment	Amounts Unpaid
HCMFA SSA	November 2020, December 2020, and January 2021	$924,000[122]
HCMFA PRA	December 2020 and January 2021	$832,000 ($416,000/month)
NexPoint SSA	December 2020 and January 2021	$336,000 ($168,000/month)
NexPoint PRA	December 2020 and January 2021	$504,000 ($252,000/month)

Highland also sought damages relating to the nonpayment of fees under its Shared Service Agreement with NREA. NREA is a wholly owned subsidiary of NexPoint. The SSA with NREA apparently had a monthly fee of $80,000 every month, the payment on which also ceased in November 2020. While there was evidence to support this arrangement existed (for example, Mr. Waterhouse confirmed there was an SSA between Highland and NREA),[123] the NREA SSA itself was not submitted into evidence and NREA is not listed as a defendant to this Adversary Proceeding. The court concludes that, even though NREA is apparently a subsidiary of NexPoint, no sufficient theory of liability has been argued as to why NexPoint should be held liable for an agreement Highland made with NREA. As such, the court will not grant relief related to the alleged NREA SSA in connection with this Trial.

The burden of proving the elements of breach of contract for its claims asserted now switches to Highland. As stated above, the elements are: (1) the existence of a valid contract; (2)

[122] The HCMFA SSA was the one and only agreement with a variable fee arrangement. Highland made this calculation by taking the most recent payment due in November of $308,000 and multiplying that number by three for the three months of nonpayment.
[123] Tr. Transcript 4/12/22, Part 2 of 2, at 70:6-17 [DE # 113}.

performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff as a result of the defendant's breach. *Williams*, 884 F.3d at 244 (internal citations omitted).

Element one is quickly satisfied as neither party disputes the existence of valid contracts here.

The court relies on its Findings of Facts and previous Conclusions of Law to satisfy element two. As stated by the court above, the PRAs unambiguously established a fixed payment arrangement that was not variable based on the termination of certain Dual Employees. The remaining Dual Employees continued to provide front-office services and, thus, Highland performed under the PRAs. Further, Highland clearly performed under the SSAs at all times according to the Advisors' own representations to the third-party Retail Board that Highland was sufficiently performing at all times. The representations were constant and continued from July 2020 through early 2021, the entire period in which the Advisors now claim legal and compliance services were not being provided.

The third element is uncontested. The Advisors do not contest that they stopped making payments under all of the Agreements in November 2020 at the direction of Mr. Dondero.

The last element, damages, is also present and easily calculable. The nonpayment by the Advisors establishes Highland's alleged compensatory damages. Highland's damages are: (a) the amounts that were not paid in December 2020 and January 2021 under all four Agreement, plus for November 2020 in the case of the HCMFA SSA.

The court concludes that Highland has met its burden on breach of contract by the Advisors on each of the Agreements due to their nonpayment of amounts required.

E. Do Equities Matter at All Here?

This court often states that "facts matter". Occasionally, facts suggest a certain equitable result contrary to what the law requires. This can sometimes make a court wrestle with a result. Are the Advisors being treated inequitably or unfairly here—by having to pay a fixed amount under the PRAs when the number of employees at Highland dropped precipitously during the term of the PRAs?

Putting aside for a moment the fact that the Advisors had a right to seek modification of the PRAs—a fact about which they profess confusion, because of the Bankruptcy Code's automatic stay—here are a few facts that detract from any equitable arguments that the Advisors might have.

First, prior to 2018—for six years—Highland provided "front-office" sub-advisory services to the Advisors for free. ***For free***. Perhaps this is the real reason why folks were not too worried about potential overpayments under the new PRAs that were executed in May 2018—at least not until the Advisors and Highland began their corporate divorce. Sounds like the Advisors had been getting a windfall.

Additionally, Mr. Seery credibly testified (and no one ever disagreed) that the SSAs (in contrast to the PRAs) were ***money-losers*** for Highland. The SSAs were unprofitable for Highland. If the PRAs were profitable, well, that arguably balanced things out a bit.

The fact is that the Agreements were not arms-length agreements, and this cannot be overlooked here. They were intercompany agreements—i.e., entered into between parties that were friendly and affiliated, back at their time of execution. The arrangements were all about the perceived needs of the Highland complex at a time when there was no bankruptcy. The evidence

suggests that everyone was just fine with the agreements for years. But the parties are now hostile and disagree on just about everything.

The fact is that the Agreements, by their terms, could have been renegotiated or terminated by either party during the bankruptcy case. But the Advisors would have had to file a motion to lift stay and ask court permission. This would not necessarily have been a good strategy for them, because the Advisors and Mr. Dondero thought/hoped he might gain back control of Highland eventually (and, therefore, would have the whole complex back under his control). Thus, it might not make sense to change the status quo on the Agreements. In any event, in such a scenario. the court might have denied relief from the stay (depending on the merits of arguments made). Or, the court might have granted relief to the Advisors, in which case Highland might have decided it had to abruptly liquidate—due to a loss of a steady cash stream—which might have caused an abrupt departure of employees or, at best, an abrupt transition of employees away from Highland to the Advisors or an entity with whom the Advisors would contract (such as Skyview). This abrupt transition might not have been pretty.

Equities? Ultimately, the court has interpreted the contracts here (and other evidence—in case the Agreements should be construed as ambiguous) as it thinks is required. But again, these were not arms-length contracts. They were contracts among insiders, made at a time when everyone was friendly. Made at a time when Highland needed cash, and at a time when Highland had been providing ***free*** front-office services to the Advisors for years. Free services when—meanwhile--the Advisors were parties to investment contracts with Retail Funds, whereby the Advisors were no doubt earning many millions of dollars of fees therefrom for themselves (considering that they were managing many billions of dollars of assets). If equities matter at all here, the result reached here seems entirely fair.

IV. DAMAGES COMPUTATION FOR JUDGMENT

The court will grant damages in favor of Highland of: (i) $924,000 for unpaid fees under the HCMFA SSA for November 2020, December 2020, and January 2021; (ii) $832,000 for unpaid amounts under the HCMFA PRA for December 2020 and January 2021; (iii) $336,000 for unpaid fees under the NexPoint SSA for December 2020 and January 2021; and (iv) $504,000 for unpaid amounts under the NexPoint PRA for December 2020 and January 2021.

All relief requested by the Advisors for administrative expense claims for (i) alleged overpayments and (2) alleged breaches of contract by Highland under the Agreements are ***denied***.

Additionally, Highland has asserted that it is entitled to costs and expenses, including attorneys' fees, in connection with prosecuting its claims and defenses against the Advisors. No evidence was presented on the shifting of expenses, including attorney's fees. The parties agreed in their Joint Pretrial Order that "[t]he quantification of any attorney's fees awarded in this Adversary Proceeding, subject to defenses, will be handled through post-trial motion practice under Rule 54(d)(2), and no Party need present evidence on any attorney fee claim at the trial of this Adversary Proceeding."[124] Accordingly, Highland may file its post-trial motion forthwith. Unless the parties otherwise agree, Highland's post-trial motion for fees, costs, and expenses is due within 21 days of entry of these Findings of Fact and Conclusions of Law; with a Responses of the Advisors due 21 days thereafter, and any reply do 10 days thereafter. The parties may seek a hearing thereafter.

 # # # END OF FINDINGS OF FACT AND CONCLUSIONS OF LAW # # #

[124] DE # 96 in the AP at p. 16.

Tab 4

United States District Court

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NEXPOINT ADVISORS, L.P., and HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.	§	
v.	§	CIVIL ACTION NO. 3:22-CV-2170-S
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	
IN RE:	§	BANKRUPTCY CASE NO. 19-34054-SGJ11; 21-03010-SGJ
HIGHLAND CAPITAL MANAGEMENT, L.P.	§	

MEMORANDUM OPINION AND ORDER

Before the Court is an appeal from the Judgment entered by the United States Bankruptcy Court for the Northern District of Texas ("Bankruptcy Court") in an adversary proceeding between Appellants NexPoint Advisors, L.P. ("NexPoint") and Highland Capital Management Fund Advisors, L.P. ("HCMFA") and Appellee Highland Capital Management, L.P. The Court has considered the Brief of Appellants ("Appellants' Brief") [ECF No. 6], Answering Brief of Appellee ("Answering Brief") [ECF No. 10], Appellants' Reply Brief [ECF No. 14], the record on appeal ("Record") [ECF Nos. 2, 5, 33-1], the arguments of counsel at the January 30, 2024, hearing, and the applicable law. For the following reasons, the Court finds the Bankruptcy Court did not err and **AFFIRMS** the Judgment.

I. BACKGROUND

Appellants are registered investment advisors that contracted Appellee to provide certain services that enabled Appellants to operate as a business and to manage funds for their clients. R. 254-56. This adversary proceeding arises from competing breach of contract claims concerning

four intercompany agreements (collectively, "Agreements"): two Shared Services Agreements ("SSAs") and two Payroll Reimbursement Agreements ("PRAs"). Appellee entered into the SSAs, one with each of the Appellants, for the provision of "back-office" and "middle-office" services such as finance and accounting, payments, operations, bookkeeping, cash management, accounts payable, and accounts receivable. *See id.* at 2282, 2295-97. At issue are the two amended SSAs: the Second Amended and Restated Shared Services Agreement between Appellee and HCMFA ("HCMFA SSA") and the Amended and Restated Shared Services Agreement between Appellee and NexPoint ("NexPoint SSA"). *Id.* at 2280-92, 2293-311.

Appellee also entered into two PRAs, one with each of the Appellants, for the provision of "front-office" advisory services: the Payroll Reimbursement Agreement between Appellee and HCMFA ("HCMFA PRA") and the Payroll Reimbursement Agreement between Appellee and NexPoint ("NexPoint PRA"). *Id.* at 2245-51, 2265-71. Each PRA contains one amendment: Amendment Number One to Payroll Reimbursement Agreement ("HCMFA PRA Amendment") and Amendment Number One to Payroll Reimbursement Agreement ("NexPoint PRA Amendment"). *Id.* at 2274-77. The HCMFA PRA Amendment and NexPoint PRA Amendment were the only changes to the PRAs, and each represented "a one time payment of estimated additional Actual Costs owed to [Appellee] for additional resources used." *Id.* at 2274, 2276. Pursuant to the HCMFA PRA Amendment, HCMFA paid Appellee an extra $1,200,000, and pursuant to the NexPoint PRA Amendment, NexPoint paid Appellee an extra $1,300,000. *Id.*

On October 16, 2019, Appellee filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware ("Bankruptcy Case"), and that court transferred venue to the United States Bankruptcy Court for the Northern District of Texas. *Charitable DAF Fund, L.P. v. Highland Cap. Mgmt., L.P.* (*In re Highland Cap. Mgmt. L.P.*), No. 19-34054-SGJ-

11, 2022 WL 780991, at *1 (Bankr. N.D. Tex. Mar. 11, 2022). On November 30, 2020, Appellee provided written notice to Appellants of its intention to terminate the SSAs as of January 31, 2021. R. 255. The termination date was extended twice through February 28, 2021, in exchange for Appellants' advance payment for services Appellee provided in February 2021. *Id.* at 256. On January 9, 2020, the Bankruptcy Court entered "an order removing [Appellee's] founder, James Dondero . . ., from control [over Appellee] and replacing him with an independent board of directors." *Id.* at 253. Although Dondero ceded control of Appellee, he retained control of Appellants. *Id.* at 254. And later during the Bankruptcy Case, the relationship between Appellee and Dondero became contentious. *Id.* at 267.

On February 17, 2021, Appellee commenced the adversary proceeding by filing its Verified Original Complaint for Damages and for Declaratory and Injunctive Relief ("Complaint") in the United States Bankruptcy Court for the Northern District of Texas. R. 28-44. Appellee alleged that Appellants breached the Agreements by failing to pay for services rendered by Appellee pursuant to the contracts.[1] *Id.* at 39. Shortly before the filing of the Complaint, Appellants filed their Application for Allowance of Administrative Expense Claim ("Application") in the Bankruptcy Case. *Id.* at 324-35. In their Application, and contrary to Appellee's claims, Appellants alleged post-petition overpayments under all four Agreements and further alleged that Appellee breached the Agreements by failing to provide certain services owed.[2] *Id.* at 327-29. The Application was later consolidated with the adversary proceeding pursuant to the parties' stipulation. *Id.* at 129-30.

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[1] Appellee's Complaint included additional claims for declaratory and injunctive relief; however, those claims were resolved by stipulation of the parties and are not the subject of the instant appeal. *See* R. 124.

[2] Although the Application alleges Appellee did not perform under the PRAs, *see* R. 329, Appellants clarified at oral argument that "under the PRAs, which were the front office services, [Appellee] kept providing . . . front office services to the [Appellants]." Tr. of Jan. 30, 2024, Hr'g, ECF No. 32 at 90:9-15.

The competing claims were tried before the Bankruptcy Court on April 12 and April 13, 2022, with closing argument on April 27, 2022. R. 268. The Bankruptcy Court heard testimony from six witnesses and admitted nearly 200 exhibits. *Id.* Following trial, the Bankruptcy Court entered judgment in favor of Appellee and issued Findings of Fact and Conclusions of Law in Support of a Judgment: (A) Granting Breach of Contract Claims Asserted by the Reorganized Debtor; and (B) Denying Defendants' Requests for Allowance of Administrative Expense Claims ("Findings"). *Id.* at 4-6, 264-323. The Bankruptcy Court denied the Application, finding that Appellants failed to meet their burden of proving post-petition overpayments and proving that Appellee breached the SSAs. *Id.* at 268-69. The Bankruptcy Court concluded that even if Appellants had met their burden of proving post-petition overpayments, Appellants waived such claims under the Agreements. *Id.* In addition, the Bankruptcy Court found that Appellee met its burden of proving that Appellants breached the Agreements via nonpayment in late 2020 and early 2021. *Id.* at 269. The Bankruptcy Court awarded Appellee an aggregate $2.596 million in damages. *See id.* at 323. Appellants timely appealed. *Id.* at 1.

II. ANALYSIS

District courts have jurisdiction to hear appeals from final judgments of bankruptcy courts pursuant to 28 U.S.C. § 158(a). In reviewing the judgment of a bankruptcy court, the district court "functions as a[n] appellate court and applies the standard of review generally applied in federal court appeals." *Webb v. Reserve Life Ins. Co.* (*In re Webb*), 954 F.2d 1102, 1103-04 (5th Cir. 1992) (citation omitted). "[R]eviewing courts—district and courts of appeals alike—must accept the findings of fact of the bankruptcy court unless the findings are clearly erroneous." *Coston v. Bank Malvern* (*In re Coston*), 987 F.2d 1096, 1098 (5th Cir. 1992) (citation omitted). "A finding of fact is clearly erroneous only if on the entire evidence, the court is left with the definite and firm

conviction that a mistake has been committed." *Robertson v. Dennis* (*In re Dennis*), 330 F.3d 696, 701 (5th Cir. 2003) (internal quotation marks and citation omitted). Conclusions of law and mixed questions of law and fact are reviewed de novo. *Lavie v. Ran* (*In re Ran*), 607 F.3d 1017, 1020 (5th Cir. 2010) (citation omitted); *Cowin v. Countrywide Home Loans, Inc.* (*In re Cowin*), 864 F.3d 344, 349 (5th Cir. 2017) (citation omitted).

The Court agrees with the decisions of the Bankruptcy Court. In affirming the Judgment, the Court will first consider Appellants' arguments related to the PRAs and then will consider Appellants' arguments related to the SSAs.

A. Payroll Reimbursement Agreements

The Court begins with the PRAs, analyzing first the construction of PRAs. Finding that the Bankruptcy Court properly construed them as fixed-fee contracts, the Court next analyzes whether Appellee had a duty to modify the PRAs and whether Appellants breached the PRAs. Because the Court affirms the Bankruptcy Court's construction of the PRAs, the Court concludes by rejecting Appellants' appeal of the Bankruptcy Court's denial of the Application.

i. Construction of the PRAs

The Bankruptcy Court concluded that the PRAs were unambiguous contracts for the provision of front-office services in exchange for fixed monthly fees. R. 281-82. On appeal, Appellants challenge the Bankruptcy Court's construction of the PRAs, arguing that the PRAs were reimbursement contracts wherein the payment for front-office services was based on costs actually incurred. Appellants' Br. 25-31. Appellants also argue that the Bankruptcy Court erred by relying on extrinsic evidence to determine the meaning of the PRAs because "there is no way to reach the same conclusions the Bankruptcy Court did without considering extraneous evidence." *Id.* at 25-26.

When construing a contract, courts must ascertain and give effect to the parties' intentions as expressed in the writing itself. *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 805 (Tex. 2012) (citation omitted). "Consideration of surrounding circumstances is limited by the parol evidence rule, which prohibits a party to an integrated written contract from presenting extrinsic evidence 'for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports.'" *URI, Inc. v. Kleberg County*, 543 S.W.3d 755, 764 (Tex. 2018) (footnote and citations omitted).

Appellants contend the Bankruptcy Court erroneously relied on extrinsic evidence in construing the Agreements. Appellants' Br. 25-26. The Court disagrees. The Bankruptcy Court first analyzed the PRAs "[w]ithout considering any extrinsic evidence" and found that "the clear and unambiguous language of the definition of 'Actual Cost' in the PRAs indicates that these were intended to be fixed amount contracts." R. 281-82. Thereafter, the Bankruptcy Court provided its *alternate* conclusion, assuming that the Agreements are ambiguous. *Id.* at 284, 286. However, even throughout this secondary analysis, the Bankruptcy Court explained that it was "hard-pressed to find any ambiguity in the ***content*** of the Agreements." *Id.* at 284; *see also id.* at 307 ("As stated above, the [Bankruptcy Court] concludes that the PRAs are not ambiguous, and that the only reasonable interpretation is they contemplate a fixed monthly payment."). Although the Bankruptcy Court considered extrinsic evidence in reaching its alternate conclusion, the Bankruptcy Court did not err by first analyzing the plain language of the PRAs without considering any extrinsic evidence.

As to the proper construction of the PRAs, Appellants argue that it was error to construe the PRAs as fixed-fee monthly contracts. Appellants' Br. 26-31. Although the parties contend that the PRAs are unambiguous, each party offered a competing interpretation of the PRAs. *Id.* at 25.

Appellants claim that the PRAs were reimbursement agreements that required them to reimburse Appellee for the "actual costs" incurred for certain employees who were (i) dual employees of Appellee and Appellants and (ii) "provide[d] advice to any investment company registered under the Investment Company Act of 1940, as amended . . . pursuant to an investment advisory agreement between [Appellants] and such investment company . . . under [each of the Appellants'] direction and supervision (each, a '***Dual Employee***')." *Id.* at 24-25; R. 2246, 2266. Appellee, however, maintains Appellants were obligated to pay a flat monthly fee for the provision of investment advisory services rendered. Answering Br. 36-39. "A contract is not ambiguous merely because the parties disagree about its meaning and may be ambiguous even though the parties agree it is not." *URI, Inc.*, 543 S.W.3d at 763 (citation omitted).

The Court will conduct a de novo analysis of the PRAs by looking first at the plain language of the contracts themselves and without considering any extrinsic evidence. In both the HCMFA PRA and NexPoint PRA, Section 2.01 provides that "[d]uring the term, [each of the Appellants] shall reimburse [Appellee] for the Actual Cost to [Appellee] of certain employees." R. 2246, 2266. Neither of the PRAs define "reimburse," so the Court interprets it according to its "plain, ordinary, and generally accepted meaning." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). Merriam-Webster defines "reimburse" as "to pay back to someone: repay." *Reimburse*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/reimburse (last visited Feb. 27, 2024). Based on this definition, Appellants argue for a rigid construction of the term "reimburse"; however, "words are simply implements of communication, and imperfect ones at that. Oftentimes they cannot be assigned a rigid meaning, inherent in themselves. Rather, their meaning turns upon use, adaptation and context as they are employed to fit various and varying situations." *URI, Inc.*, 543 S.W.3d 755 at 763 (quoting *Cal. Dep't of Mental*

Hygiene v. Bank of Sw. Nat'l Ass'n, 354 S.W.2d 576, 579 (1962)). Accordingly, the Court's analysis does not end there. The Court must objectively determine the terms of the reimbursement.

Section 2.01 of the PRAs provides that each of the Appellants were to pay back Appellee "for the Actual Cost . . . of certain [Dual] [E]mployees. . . ." R. 2246, 2266. The HCMFA PRA defines "Actual Cost" as "the actual costs and expenses caused by, incurred or otherwise arising from or relating to each Dual Employee, in each case during such period. Absent any changes to employee reimbursement, as set forth in Section 2.02, *such* costs and expenses are equal to $416,000 per month." *Id.* at 2245 (emphasis added). The definition in the NexPoint PRA is identical, except "*such* costs and expenses" under the NexPoint PRA "are equal to $252,000 per month." *Id.* at 2265 (emphasis added). The Court "cannot interpret a contract to ignore clearly defined terms, and, thus, [the Court] must accord [Actual Cost] its due meaning." *FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 64 (Tex. 2014) (citation omitted).

The Court finds that the PRAs are unambiguous as a matter of law and that the plain language of the "Actual Cost" definition provides that the PRAs were fixed-fee contracts. The Court declines to adopt Appellants' proposed interpretation of the PRAs. Their interpretation would be dependent on a rigid construction of the term "reimburse" and would wholly ignore the parties' own definition of "Actual Cost," which specifies that what "*such* costs and expenses are equal to." *Id.* at 2245, 2265 (emphasis added). Because the Court's "primary objective is to ascertain and give effect to the parties' intent as expressed in the instrument," the Court finds that each of the PRAs is a fixed-fee contract. *URI, Inc.*, 543 S.W.3d 755 at 763 (citation omitted). Accordingly, the Court agrees with the Bankruptcy Court in construing the PRAs as fixed-fee contracts.

Having concluded the PRAs are unambiguous as a matter of law, the Court need not address the Bankruptcy Court's alternate conclusion or the parties' sources of extrinsic evidence. Because each of the PRAs' unambiguous terms must be enforced as written, without regard to extraneous facts, parol evidence of the parties' alleged intent behind the PRAs cannot be considered where it "contradict[s] or var[ies] the meaning of the explicit [contract] language." *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 521 (Tex. 1995) (citation omitted). To the extent the Bankruptcy Court's alternate conclusions must be reached, the Court agrees with the Findings for the reasons articulated therein.

ii. Duty to Modify the PRAs

Appellants next argue that even if the PRAs were fixed-fee contracts, Appellee is at fault for not catching their alleged overpayments. Appellants' Br. 31. According to Appellants, Appellee had an obligation under the SSAs to monitor any changes to the status of the Dual Employees and make corresponding adjustments to the monthly amount owed under the PRAs. *Id.* at 31-35. This argument misses the mark for three reasons.

First, this argument assumes the PRAs provided for payment of costs actually incurred with respect to Dual Employees rather than a fixed monthly fee. For the reasons explained above, the Court finds that the PRAs are fixed-fee contracts.

Second, for the reasons articulated by the Bankruptcy Court, this Court finds that the PRAs did not impose a duty on Appellee to unilaterally modify the PRAs as a result of changes to the employment status of the individuals on the Dual Employees lists. R. 306-07.

Third, the Court concludes that the SSAs did not impose a duty on Appellee to modify the PRAs. Appellants argue that the Bankruptcy Court misinterpreted their argument by focusing solely on the PRAs. *See* Appellants' Br. 34-35. Appellants contend that Appellee's duty to modify

the Agreements arises under the SSAs and applies equally to the PRAs, but (1) there is no evidence that the service standards under the SSAs included a requirement that Appellee monitor changes to the Dual Employees' statuses and (2) Appellants fail to identify any other provision of the Agreements that imposes such a duty. Pursuant to Section 6.01 of the HCMFA SSA, Appellee was to "provide the Shared Services and the Shared Assets in the same manner as if it were providing such services and assets on its own account." R. 2285. Pursuant to Section 2.02(a) of the NexPoint SSA, Appellee was to provide "[a]ssistance and advice with respect to back- and middle-office functions including, but not limited to, . . . finance and accounting, payments, operations, book keeping, cash management, cash forecasting, accounts payable, accounts receivable, [and] expense reimbursement . . . ." *Id.* at 2295-96. The Record indicates that Appellee performed accordingly. The Bankruptcy Court found, and the Court agrees, that Appellants made consistent monthly payments under the Agreements for a thirty-five-month period, from January 1, 2018, to November 30, 2020. *See id.* at 298. The only changes that took place during this period were the additional payments of $1.2 and $1.3 million made through the HCMFA PRA Amendment and NexPoint PRA Amendment, respectively. *Id.* at 298, 2274, 2276. Thus, the Court finds that Appellee administered the Agreements pursuant to their terms and thereby satisfied the service standards under the SSAs.

The SSAs do not contain provisions that required Appellee to monitor the status of the Dual Employees and absent such representations, Appellants fail to show how the services rendered fell short of the articulated service standards. Contrary to Appellants' contention, the HCMFA SSA contained a limited warranty, which cautioned, "[e]xcept as specifically provided in this Agreement, [Appellee] makes no express or implied representations, warranties or guarantees relating to its performance of the Shared Services." *Id.* at 2286. Moreover, Section 2.06

of the NexPoint SSA makes clear that Appellee, as the staff and services provider, "shall not have any duties or obligations to [NexPoint] unless those duties and obligations are specifically provided for in this Agreement (or in any amendment, modification or novation hereto or hereof to which [Appellee] is a party)." *Id.* at 2300. Neither SSA specifically provides that Appellee has a duty to monitor the Dual Employees' statuses or modify the PRAs based on changes in such employees' statuses.

Accordingly, the Court finds that Appellee had no duty to monitor changes to the status of the Dual Employees or make corresponding adjustments to the monthly payment under the Agreements.

iii. Appellee's Breach of Contract Claim

Appellants further challenge the Bankruptcy Court's ruling on Appellee's breach of contract claim, which required Appellee to establish: "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff as a result of the defendant's breach." *Williams v. Wells Fargo Bank, N.A.*, 884 F.3d 239, 244 (5th Cir. 2018) (citation omitted). To recover compensatory damages, the plaintiff must prove that he suffered some pecuniary loss as a result of the breach. *Abraxas Petroleum Corp. v. Hornburg*, 20 S.W.3d 741, 758 (Tex. App.—El Paso 2000, no pet.) (citation omitted); *Multi-Moto Corp. v. ITT Com. Fin. Corp.*, 806 S.W.2d 560, 569 (Tex. App.—Dallas 1990, writ denied) (citation omitted).

The first three elements are undisputed. The parties agree that (1) the PRAs were valid contracts, (2) Appellee tendered performance by providing the services it owed Appellants under the PRAs,[3] and (3) at the direction of Dondero, Appellants stopped making payments under the

[3] Appellants conceded during oral argument that "under the PRAs, . . . [Appellee] kept providing . . . front office services to [Appellants]." Tr. of Jan. 30, 2024, Hr'g, ECF No. 32 at 90:13-15.

PRAs in December 2020 and January 2021 and thus breached the PRAs. R. 3019-20. With respect to the fourth element, the Court concludes that Appellee proved it suffered a pecuniary loss resulting from Appellants' breach of the PRAs in December 2020 and January 2021. The Court finds that Appellee established that its compensatory damages were $832,000 for unpaid amounts under the HCMFA PRA and $504,000 for unpaid amounts under the NexPoint PRA. *Id.* at 320, 323.

The Court now evaluates Appellants' argument that Appellee committed the first material breach of the PRAs. "It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance." *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004) (citing *Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994)). "[O]ne consideration in determining the materiality of a breach is 'the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance.'" *Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 378 (Tex. 2009) (citation omitted).

According to Appellants, Appellee materially breached the PRAs by not engaging in good faith negotiations. Appellants argue that the Bankruptcy Court ignored evidence that, by raising the overpayment issue with Appellee, they triggered Section 2.02 of the PRAs, which required Appellee to negotiate modifications of the PRAs in good faith. Appellants' Br. 35-37; R. 2246, 2266. Specifically, Appellants contend that the Bankruptcy Court overlooked (1) testimony from Frank Waterhouse, who served as Appellee's Chief Financial Officer and as Treasurer to each of the Appellants, that he first raised the issue of overpayments in 2019, (2) a December 1, 2020, email from Dustin Norris, who served as Head of Distribution and Chief Product Strategist for

NexPoint and as an Executive Vice President of HCMFA, to Waterhouse and others, asking to "discuss next steps" on the PRAs, and (3) a letter sent to Appellee on December 11, 2020, requesting a modification of the amount owed under the PRAs. Appellants' Br. 35-37; R. 2447-49; ECF No. 33-1.

The Bankruptcy Court found that "[Appellants] failed to provide sufficient evidence that they made a formal request of [Appellee] to modify the fixed monthly amount, pursuant to the terms of the PRAs." R. 309. Even considering Waterhouse's testimony, the Bankruptcy Court emphasized that Waterhouse "never recalled requesting amendment of the PRAs." *Id.* n.113. This Court, on review, "defers to the bankruptcy court's determinations of witness credibility." *Saenz v. Gomez* (*In re Saenz*), 899 F.3d 384, 392 (5th Cir. 2018) (citing *In re Dennis*, 330 F.3d at 701); *see also First Nat'l Bank LaGrange v. Martin* (*In re Martin*), 963 F.2d 809, 814 (5th Cir. 1992) ("If the bankruptcy judge finds one version of events more credible than other versions, [the reviewing court] is in no position to dispute the finding."). On review of the evidence as a whole, the Court does not have a "definite and firm conviction that a mistake has been committed" in this respect. *In re Dennis*, 330 F.3d at 701 (citation omitted).

The second piece of evidence Appellants identify—the December 1, 2020, email—is also insufficient evidence of a request to modify the amount Appellants owed under the PRAs. Although Appellants concede that the December 1, 2020, email "is not a formal request signed off by a lawyer," they argue that the email was "an informal request" to renegotiate. Tr. of Jan. 30, 2024, Hr'g, ECF No. 32 at 19:5-20:8. The Court finds that while Norris's email does ask Waterhouse and another employee of Appellee to discuss the PRAs, it fails in any specific terms to request a modification of the Agreements. *See* R. 2447-49 ("[L]et's discuss next steps on these contracts, since they didn't submit termination notices for these, but did for the shared services.").

Finally, Appellants argue that the December 11, 2020, letter was an additional request to renegotiate the PRAs. Appellants' Br. 36-37. The letter referenced Section 2.02, noting that, "NexPoint and HCMFA are prepared to engage in good faith negotiations with [Appellee] regarding this issue, including, without limitation, regarding the appropriate reimbursement for [Appellee] for the months for which NexPoint and HCMFA have not yet made reimbursement payments." ECF No. 33-1 at 3. Additionally, "[t]o make negotiations productive, NexPoint and HCMFA request that [Appellee] provide data regarding the employees listed on the Exhibits A to the [PRAs] for the period during the chapter 11 case." *Id.* at 3-4.

The Bankruptcy Court did not address whether the letter triggered Appellee's obligation to negotiate in good faith or whether Appellants carried their burden of proving that Appellee breached this obligation. The Court finds that the December 11, 2020, letter triggered Appellee's obligation to negotiate the terms of the PRAs. However, given the timing of the letter, the Court finds that Appellants did not prove that Appellee breached its obligation because there is no evidence that Appellee acted in bad faith by not responding to the letter prior to the termination of the PRAs in January 2021. The PRAs do not require retroactive modification, so any modification to the PRAs would have been prospective. As a result, the only period subject to renegotiation was the period beginning January 2021. And there is insufficient evidence that Appellee refused to negotiate in the twenty days that remained in December 2020 after receiving the letter or that the lack of response was in bad faith.

Even if the Court were to find that Appellee breached the PRAs for failing to renegotiate, which it does not, the alleged breach was not material for two reasons. First, the Texas Supreme Court has held that "agreements to negotiate toward a future contract are not legally enforceable." *Dallas/Fort Worth Int'l Airport Bd. v. Vizant Techs., LLC*, 576 S.W.3d 362, 371 (Tex. 2019)

(citing *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 242 (Tex. 2016)); *see also John Wood Grp. USA, Inc. v. ICO, Inc.*, 26 S.W.3d 12, 21 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) ("[A]n agreement to negotiate in the future is unenforceable, even if the agreement calls for a 'good faith effort' in the negotiations." (citation omitted)).

Second, the requirement to negotiate in good faith did not commit the parties to reach an agreement, and the parties could not have reasonably anticipated that renegotiations would guarantee modification despite good faith efforts. *See* R. 3109 (noting that Appellee's relationship with Dondero "had really gone . . . south" amid the Chapter 11 bankruptcy proceedings in 2020). Therefore, even if Appellee breached the PRAs, the breach was not material because it did not deprive Appellants of the benefit they could have reasonably anticipated from full performance. *Prodigy Commc'ns*, 288 S.W.3d at 378 (citation omitted).

iv. Appellants' Administrative Expense Claim for Alleged Overpayments[4]

Appellants seek an administrative expense claim for alleged overpayments they made under the PRAs from October 16, 2019 (the date Appellee filed its voluntary petition in the Bankruptcy Case) until November 30, 2020. Appellants' Br. 44-46. Because the Court concluded above that the PRAs are fixed-fee contracts and Appellee had no duty to adjust the monthly payment under the Agreements, the Court finds that Appellants did not meet their burden of proving that they made any overpayments under the PRAs. Further, the Court finds that the Bankruptcy Court did not err in concluding that through their conduct, Appellants waived their right to assert claims under the PRAs for the reasons articulated in the Bankruptcy Court's Findings.

[4] Appellants concede that Appellee "kept providing . . . front office services to [Appellants]." Accordingly, the Court need not address Appellants' claim that Appellee breached the PRAs by failing to provide front-office services. Tr. of Jan. 30, 2024, Hr'g, ECF No. 32 at 90:13-15; R. 327.

B. Shared Services Agreements

Appellants finally challenge the Bankruptcy Court's rulings on the parties' breach of contract claims under the SSAs, which, again, require the moving party to establish: (1) a valid contract; (2) performance by the plaintiff; (3) the defendant's breach; and (4) damages resulting from the defendant's breach. *Williams*, 884 F.3d at 244.

i. Appellee's Breach of Contract Claim

The Court finds that the Bankruptcy Court did not err in concluding that Appellants breached the SSAs by failing to pay the requisite amounts. The first element is satisfied because it is undisputed that the SSAs were valid contracts. The parties agree that the NexPoint SSA contemplated a fixed monthly fee of $168,000 per month for the provision of front-office services and that while the HCMFA SSA was a variable fee contract, Appellee only charged Appellants according to the allocation formula for "Actual Cost." R. 274; Appellants' Br. 9; Answering Br. 9. The amounts owed under the HCMFA SSA generally ranged between $300,000 to $310,000 each month. Answering Br. 9.

As to the second element, Appellee argues that it performed the services it owed Appellants under the SSAs. *Id.* at 47-49. The Court agrees. The Bankruptcy Court scrutinized the evidence presented at trial and found that Appellants made numerous representations to the third-party Retail Board that Appellee was sufficiently performing all services under the Agreements. R. 296. On review, the Court agrees with the Bankruptcy Court. *See Taylor-Travis v. Jackson State Univ.*, 984 F.3d 1107, 1116 (5th Cir. 2021) ("Under clear error review, if the trial court's factual findings are 'plausible in light of the record viewed in its entirety, we must accept them[.]'" (quoting *Ali v. Stephens*, 822 F.3d 776, 783 (5th Cir. 2016))). Accordingly, the Court finds that Appellee carried its burden of proving it performed under the SSAs, satisfying the second element.

The third element is also satisfied. Appellants do not contest that they stopped making payments under the Agreements in November 2020.[5]

Finally, the Court concludes that the fourth element is satisfied because Appellee proved it suffered a pecuniary loss resulting from Appellants' breach of the SSAs. As the Bankruptcy Court did, the Court finds that Appellee's damages are the amounts that were not paid under the SSAs: $924,000 for unpaid amounts under the HCMFA SSA in November 2020, December 2020, and January 2021, and $336,000 for unpaid amounts under the NexPoint SSA for December 2020 and January 2021. R. 323.

ii. Appellants' Administrative Expense Claim for Alleged Overpayments and Breach of Contract

Appellants also seek an administrative expense claim for alleged overpayments under the SSAs. Appellants' Br. 44-46. Appellants argue that Appellee failed to perform certain services owed under the SSAs, including legal and compliance services, and that such failure constituted a breach of the SSAs. Appellants' Br. 38-42. Relying on the analysis above, the Court finds that Appellants did not carry their burden of proving that Appellee breached the SSAs. Specifically, Appellants did not prove that Appellee withheld legal and compliance services it owed under the SSAs in light of multiple contemporaneous representations to the Retail Board that Appellee was, in fact, providing all services required under the Agreements. R. 286-92. In opposition, Appellants cite testimony from Norris that Appellants did not receive certain legal services owed, which resulted in $425,000 in cover damages. Appellants' Br. 39 & n.105-06; *see also* R. 2757, 2814-15. However, Norris's testimony alone does not leave the Court with the "definite and firm

[5] Appellants did not make payments under the NexPoint SSA for services rendered in December 2020 and January 2021. Answering Br. 32. Because the HCMFA SSA was paid in arrears, Appellants did not make payments under the HCMFA SSA for services rendered in the months of November 2020, December 2020, and January 2021. *Id.*

conviction that a mistake has been committed." *In re Dennis*, 330 F.3d at 701 (citation omitted). Accordingly, the Court finds that the Bankruptcy Court did not err by denying the Application.

For the reasons articulated by the Bankruptcy Court, the Court also finds that Appellants' claims under the SSAs were barred by the doctrine of waiver.

III. CONCLUSION

For the foregoing reasons, the Judgment of the Bankruptcy Court is **AFFIRMED**.

SO ORDERED.

SIGNED February 28, 2024.

KAREN GREN SCHOLER
UNITED STATES DISTRICT JUDGE

Tab 5

SECOND AMENDED AND RESTATED
SHARED SERVICES AGREEMENT

THIS SECOND AMENDED AND RESTATED SHARED SERVICES AGREEMENT (this "***Agreement***") is entered into to be effective as of 8th day of February, 2013 (the "***Effective Date***") by and among Highland Capital Management, L.P., a Delaware limited partnership ("***HCMLP***"), and Highland Capital Management Fund Advisors, L.P., formerly known as Pyxis Capital, L.P., a Delaware limited partnership ("***HCMFA***"), and any affiliate of HCMFA that becomes a party hereto. Each of the signatories hereto is individually a "***Party***" and collectively the "***Parties***".

RECITALS

A. During the Term, HCMLP will provide to HCMFA certain services as more fully described herein and the Parties desire to allocate the costs incurred for such services and assets among them in accordance with the terms and conditions in this Agreement.

AGREEMENT

In consideration of the foregoing recitals and the mutual covenants and conditions contained herein, the Parties agree, intending to be legally bound, as follows:

ARTICLE I
DEFINITIONS

"***Actual Cost***" means, with respect to any period hereunder, one hundred percent (100%) of the actual costs and expenses caused by, incurred or otherwise arising from or relating to (i) the Shared Services and (ii) the Shared Assets, in each case during such period.

"***Affiliate***" means a Person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, a specified Person. The term "***control***" (including, with correlative meanings, the terms "***controlled by***" and "***under common control with***") means the possession of the power to direct the management and policies of the referenced Person, whether through ownership interests, by contract or otherwise.

"***Agreement***" has the meaning set forth in the preamble.

"***Allocation Percentage***" has the meaning set forth in Section 4.01.

"***Applicable Margin***" shall mean an additional amount equal to 5% of all costs allocated by Service Provider to the other parties hereto under Article IV; provided that the parties may agree on a different margin percentage as to any item or items to the extent the above margin percentage, together with the allocated cost of such item or service, would not reflect an arm's length value of the particular service or item allocated.

"***Change***" has the meaning set forth in Section 2.02(a).

"***Change Request***" has the meaning set forth in Section 2.02(b).

"***Code***" means the Internal Revenue Code of 1986, as amended, and the related regulations and published interpretations.

"***Effective Date***" has the meaning set forth in the preamble.

"***Governmental Entity***" means any government or any regulatory agency, bureau, board, commission, court, department, official, political subdivision, tribunal or other instrumentality of any government, whether federal, state or local, domestic or foreign.

"***Liabilities***" means any cost, liability, indebtedness, obligation, co-obligation, commitment, expense, claim, deficiency, guaranty or endorsement of or by any Person of any nature (whether direct or indirect, known or unknown, absolute or contingent, liquidated or unliquidated, due or to become due, accrued or unaccrued, matured or unmatured).

"***Loss***" means any cost, damage, disbursement, expense, liability, loss, obligation, penalty or settlement, including interest or other carrying costs, legal, accounting and other professional fees and expenses incurred in the investigation, collection, prosecution and defense of claims and amounts paid in settlement, that may be imposed on or otherwise incurred or suffered by the referenced Person; provided, however, that the term "***Loss***" will not be deemed to include any special, exemplary or punitive damages, except to the extent such damages are incurred as a result of third party claims.

"***New Shared Service***" has the meaning set forth in Section 2.03.

"***Party***" or "***Parties***" has the meaning set forth in the preamble.

"***Person***" means an association, a corporation, an individual, a partnership, a limited liability company, a trust or any other entity or organization, including a Governmental Entity.

"***Quarterly Report***" has the meaning set forth in Section 5.01.

"***Recipient***" means HCMFA and any of HCMFA's direct or indirect Subsidiaries or managed funds or accounts in their capacity as a recipient of the Shared Services and/or Shared Assets.

"***Service Provider***" means any of HCMLP and its direct or indirect Subsidiaries in its capacity as a provider of Shared Services or Shared Assets.

"***Service Standards***" has the meaning set forth in Section 6.01.

"***Shared Assets***" shall have the meaning set forth in Section 3.02.

"***Shared Services***" shall have the meaning set forth in Section 2.01.

"***Subsidiary***" means, with respect to any Person, any Person in which such Person has a direct or indirect equity ownership interest in excess of 50%.

"***Tax***" or "***Taxes***" means: (i) all state and local sales, use, value-added, gross receipts, foreign, privilege, utility, infrastructure maintenance, property, federal excise and similar levies, duties and other similar tax-like charges lawfully levied by a duly constituted taxing authority against or upon the Shared Services and the Shared Assets; and (ii) tax-related surcharges or fees that are related to the Shared Services and the Shared Assets identified and authorized by applicable tariffs.

"***Term***" has the meaning set forth in Section 7.01.

ARTICLE II
SHARED SERVICES

Section 2.01 Services. During the Term, Service Provider will provide Recipient with Shared Services, including without limitation, all of the (i) finance and accounting services, (ii) human resources services, (iii) marketing services, (iv) legal services, (v) corporate services, (vi) information technology services, and (vii) operations services; each as requested by HCMFA and as described more fully on **Annex A** attached hereto, the "***Shared Services***"), it being understood that personnel providing Shared Services may be deemed to be employees of HCMFA to the extent necessary for purposes of the Investment Advisers Act of 1940, as amended.

Section 2.02 Changes to the Shared Services.

(a) During the Term, the Parties may agree to modify the terms and conditions of a Service Provider's performance of any Shared Service in order to reflect new procedures, processes or other methods of providing such Shared Service, including modifying the applicable fees for such Shared Service to reflect the then current fair market value of such service (a "***Change***"). The Parties will negotiate in good faith the terms upon which a Service Provider would be willing to provide such New Shared Service to Recipient.

(b) The Party requesting a Change will deliver a description of the Change requested (a "***Change Request***") and no Party receiving a Change Request may unreasonably withhold, condition or delay its consent to the proposed Change.

(c) Notwithstanding any provision of this Agreement to the contrary, a Service Provider may make: (i) Changes to the process of performing a particular Shared Service that do not adversely affect the benefits to Recipient of Service Provider's provision or quality of such Shared Service in any material respect or increase Recipient's cost for such Shared Service; (ii) emergency Changes on a temporary and short-term basis; and/or (iii) Changes to a particular Shared Service in order to comply with applicable law or regulatory requirements, in each case without obtaining the prior consent of Recipient. A Service Provider will notify Recipient in writing of any such Change as follows: in the case of clauses (i) and (iii) above, prior to the implementation of such Change, and, in the case of clause (ii) above, as soon as reasonably practicable thereafter.

Section 2.03 New Shared Services. The Parties may, from time to time during the Term of this Agreement, negotiate in good faith for Shared Services not otherwise specifically listed in Section 2.01 (a "***New Shared Service***"). Any agreement between the Parties on the terms for a New Shared Service must be in accordance with the provisions of Article IV and Article V hereof, will be deemed to be an amendment to this Agreement and such New Shared Service will then be a "***Shared Service***" for all purposes of this Agreement.

Section 2.04 Subcontractors. Nothing in this Agreement will prevent Service Provider from, with the consent of Recipient, using subcontractors, hired with due care, to perform all or any part of a Shared Service hereunder. A Service Provider will remain fully responsible for the performance of its obligations under this Agreement in accordance with its terms, including any obligations it performs through subcontractors, and a Service Provider will be solely responsible for payments due to its subcontractors.

ARTICLE III
SHARED ASSETS

Section 3.01 Shared IP Rights. Each Service Provider hereby grants to Recipient a non-exclusive right and license to use the intellectual property and other rights granted or licensed, directly or indirectly, to such Service Provider (the "***Shared IP Rights***") pursuant to third party intellectual property Agreements ("***Third Party IP Agreements***"), provided that the rights granted to Recipient hereunder are subject to the terms and conditions of the applicable Third Party IP Agreement, and that such rights shall terminate, as applicable, upon the expiration or termination of the applicable Third Party IP Agreement. Recipient shall be licensed to use the Shared IP Rights only for so long as it remains an Affiliate of HCMLP. In consideration of the foregoing licenses, Recipient agrees to take such further reasonable actions as a Service Provider deems to be necessary or desirable to comply with its obligations under the Third Party IP Agreements.

Section 3.02 Other Shared Assets. Subject to Section 3.01, each Service Provider hereby grants Recipient the right, license or permission, as applicable, to use and access the benefits under the agreements, contracts and licenses that such Service Provider will purchase, acquire, become a party or beneficiary to or license on behalf of Recipient (the "***Future Shared Assets***" and collectively with the Shared IP Rights, the "***Shared Assets***").

ARTICLE IV
COST ALLOCATION

Section 4.01 Actual Cost Allocation Formula. The Actual Cost of any item relating to any Shared Services or Shared Assets shall be allocated based on the Allocation Percentage. For purposes of this Agreement, "***Allocation Percentage***" means:

(a) To the extent 100% of such item is demonstrably attributable to HCMFA, 100% of the Actual Cost of such item shall be allocated to HCMFA as agreed by HCMFA;

(b) To the extent a specific percentage of use of such item can be determined (e.g., 70% for HCMLP and 30% for HCMFA), that specific percentage of the Actual Cost of such item will be allocated to HCMLP or HCMFA, as applicable and as agreed by HCMFA; and

(c) All other portions of the Actual Cost of any item that cannot be allocated pursuant to clause (a) or (b) above shall be allocated between HCMLP and HCMFA in such proportion as is agreed in good faith between the parties.

Section 4.02 Non-Cash Cost Allocation. The actual, fully burdened cost of any item relating to any Shared Services or Shared Assets that does not result in a direct, out of pocket cash expense may be allocated to HCMLP and HCMFA for financial statement purposes only, as agreed by HCMFA, without any corresponding cash reimbursement required, in accordance with generally accepted accounting principles, based on the Allocation Percentage principles described in Section 4.01 hereof.

ARTICLE V
PAYMENT OF COST AND REVENUE SHARE; TAXES

Section 5.01 Quarterly Statements. Within thirty (30) days following the end of each calendar qaurter during the Term (or at such time as may be otherwise agreed by the parties), each Service Provider shall furnish the other Parties hereto with a written statement with respect to the Actual Cost paid by it in respect of Shared Services and Shared Assets provided by it, in each case, during such

period, setting forth (i) the cost allocation in accordance with Article IV hereof together with the Applicable Margin on such allocated amounts, and (ii) any amounts paid pursuant to Section 5.02 hereof, together with such other data and information necessary to complete the items described in Section 5.03 hereof (hereinafter referred to as the "***Quarterly Report***").

Section 5.02 Settlement Payments. At any time during the Term, any Party may make payment of the amounts that are allocable to such Party together with the Applicable Margin related thereto, regardless of whether an invoice pursuant to Section 5.03 hereof has been issued with respect to such amounts.

Section 5.03 Determination and Payment of Cost and Revenue Share.

(a) Within ten (10) days of the submission of the Quarterly Report described in Section 5.02 hereof (or at such other time as may be agreed by the parties), the Parties shall (i) agree on the cost share of each of the Parties and Applicable Margin as calculated pursuant to the provisions of this Agreement; and (ii) prepare and issue invoices for the cost share and Applicable Margin payments that are payable by any of the Parties.

(b) Within ten (10) days of preparation of the agreement and the issuance of the invoice described in Section 5.03(a) (or at such other time as may be agreed by the parties), the Parties shall promptly make payment of the amounts that are set forth on such cost allocation invoice. Notwithstanding anything in this Agreement to the contrary, provision of the Shared Services shall commence from the Effective Date, but no fees shall be payable from Recipient or otherwise accrue with respect to such services provided during the month of December 2011.

Section 5.04 Taxes.

(a) Recipient is responsible for and will pay all Taxes applicable to the Shared Services and the Shared Assets provided to Recipient, provided, that such payments by Recipient to Service Provider will be made in the most tax-efficient manner and provided further, that Service Provider will not be subject to any liability for Taxes applicable to the Shared Services and the Shared Assets as a result of such payment by Recipient. Service Provider will collect such Tax from Recipient in the same manner it collects such Taxes from other customers in the ordinary course of Service Provider's business, but in no event prior to the time it invoices Recipient for the Shared Services and Shared Assets, costs for which such Taxes are levied. Recipient may provide Service Provider with a certificate evidencing its exemption from payment of or liability for such Taxes.

(b) Service Provider will reimburse Recipient for any Taxes collected from Recipient and refunded to Service Provider. In the event a Tax is assessed against Service Provider that is solely the responsibility of Recipient and Recipient desires to protest such assessment, Recipient will submit to Service Provider a statement of the issues and arguments requesting that Service Provider grant Recipient the authority to prosecute the protest in Service Provider's name. Service Provider's authorization will not be unreasonably withheld. Recipient will finance, manage, control and determine the strategy for such protest while keeping Service Provider reasonably informed of the proceedings. However, the authorization will be periodically reviewed by Service Provider to determine any adverse impact on Service Provider, and Service Provider will have the right to reasonably withdraw such authority at any time. Upon notice by Service Provider that it is so withdrawing such authority, Recipient will expeditiously terminate all proceedings. Any adverse consequences suffered by Recipient as a result of the withdrawal will be submitted to arbitration pursuant to Section 9.14. Any contest for Taxes brought by Recipient may not result in any lien attaching to any property or rights of Service Provider or otherwise jeopardize Service Provider's interests or rights in any of its property. Recipient agrees to

indemnify Service Provider for all Losses that Service Provider incurs as a result of any such contest by Recipient.

(c) The provisions of this Section 5.04 will govern the treatment of all Taxes arising as a result of or in connection with this Agreement notwithstanding any other Article of this Agreement to the contrary.

ARTICLE VI
SERVICE PROVIDER RESPONSIBILITIES

Section 6.01 Service Provider General Obligations. Service Provider will provide the Shared Services and the Shared Assets to Recipient on a non-discriminatory basis and will provide the Shared Services and the Shared Assets in the same manner as if it were providing such services and assets on its own account (the "***Service Standards***"). Service Provider will conduct its duties hereunder in a lawful manner in compliance with applicable laws, statutes, rules and regulations and in accordance with the Service Standards, including, for avoidance of doubt, laws and regulations relating to privacy of customer information.

Section 6.02 Books and Records; Access to Information. Service Provider will keep and maintain books and records on behalf of Recipient in accordance with past practices and internal control procedures. Recipient will have the right, at any time and from time to time upon reasonable prior notice to Service Provider, to inspect and copy (at its expense) during normal business hours at the offices of Service Provider the books and records relating to the Shared Services and Shared Assets, with respect to Service Provider's performance of its obligations hereunder. This inspection right will include the ability of Recipient's financial auditors to review such books and records in the ordinary course of performing standard financial auditing services for Recipient (but subject to Service Provider imposing reasonable access restrictions to Service Provider's and its Affiliates' proprietary information and such financial auditors executing appropriate confidentiality agreements reasonably acceptable to Service Provider). Service Provider will promptly respond to any reasonable requests for information or access. For the avoidance of doubt, all books and records kept and maintained by Service Provider on behalf of Recipient shall be the property of Recipient, and Service Provider will surrender promptly to Recipient any of such books or records upon Recipient's request (provided that Service Provider may retain a copy of such books or records) and shall make all such books and records available for inspection and use by the Securities and Exchange Commission or any person retained by Recipient at all reasonable times. Such records shall be maintained by Service Provider for the periods and in the places required by laws and regulations applicable to Recipient.

Section 6.03 Return of Property and Equipment. Upon expiration or termination of this Agreement, Service Provider will be obligated to return to Recipient, as soon as is reasonably practicable, any equipment or other property or materials of Recipient that is in Service Provider's control or possession.

ARTICLE VII
TERM AND TERMINATION

Section 7.01 Term. The term of this Agreement will commence as of the Effective Date and will continue in full force and effect until the first anniversary of the Effective Date (the "***Term***"), unless terminated earlier in accordance with Section 9.02. The Term shall automatically renew for successive one year periods unless sooner terminated under Section 7.02.

Section 7.02 Termination. Either Party may terminate this Agreement, with or without cause, upon at least 60 days advance written notice at any time prior to the expiration of the Term.

ARTICLE VIII
LIMITED WARRANTY

Section 8.01 Limited Warranty. Service Provider will perform the Shared Services hereunder in accordance with the Service Standards. Except as specifically provided in this Agreement, Service Provider makes no express or implied representations, warranties or guarantees relating to its performance of the Shared Services and the granting of the Shared Assets under this Agreement, including any warranty of merchantability, fitness, quality, non-infringement of third party rights, suitability or adequacy of the Shared Services and the Shared Assets for any purpose or use or purpose. Service Provider will (to the extent possible and subject to Service Provider's contractual obligations) pass through the benefits of any express warranties received from third parties relating to any Shared Service and Shared Asset, and will (at Recipient's expense) assist Recipient with any warranty claims related thereto.

ARTICLE IX
MISCELLANEOUS

Section 9.01 No Partnership or Joint Venture; Independent Contractor. Nothing contained in this Agreement will constitute or be construed to be or create a partnership or joint venture between or among HCMLP or HCMFA or their respective successors or assigns. The Parties understand and agree that, with the exception of the procurement by Service Provider of licenses or other rights on behalf of Recipient pursuant to Section 3.01, this Agreement does not make any of them an agent or legal representative of the other for any purpose whatsoever. With the exception of the procurement by Service Provider of licenses or other rights on behalf of Recipient pursuant to Section 3.01, no Party is granted, by this Agreement or otherwise, any right or authority to assume or create any obligation or responsibilities, express or implied, on behalf of or in the name of any other Party, or to bind any other Party in any manner whatsoever. The Parties expressly acknowledge that Service Provider is an independent contractor with respect to Recipient in all respects, including with respect to the provision of the Shared Services.

Section 9.02 Amendments; Waivers. Except as expressly provided herein, this Agreement may be amended only by agreement in writing of all Parties. No waiver of any provision nor consent to any exception to the terms of this Agreement or any agreement contemplated hereby will be effective unless in writing and signed by all of the Parties affected and then only to the specific purpose, extent and instance so provided. No failure on the part of any Party to exercise or delay in exercising any right hereunder will be deemed a waiver thereof, nor will any single or partial exercise preclude any further or other exercise of such or any other right.

Section 9.03 Schedules and Exhibits; Integration. Each Schedule and Exhibit delivered pursuant to the terms of this Agreement must be in writing and will constitute a part of this Agreement, although schedules need not be attached to each copy of this Agreement. This Agreement, together with such Schedules and Exhibits constitutes the entire agreement among the Parties pertaining to the subject matter hereof and supersedes all prior agreements and understandings of the Parties in connection therewith.

Section 9.04 Further Assurances. Each Party will take such actions as any other Party may reasonably request or as may be necessary or appropriate to consummate or implement the transactions contemplated by this Agreement or to evidence such events or matters.

Section 9.05 Governing Law. This Agreement and the legal relations between the Parties will be governed by and construed in accordance with the laws of the State of Texas applicable to contracts made and performed in such State and without regard to conflicts of law doctrines unless certain matters are preempted by federal law.

Section 9.06 Assignment. Except as otherwise provided hereunder, neither this Agreement nor any rights or obligations hereunder are assignable by one Party without the express prior written consent of the other Parties.

Section 9.07 Headings. The descriptive headings of the Articles, Sections and subsections of this Agreement are for convenience only and do not constitute a part of this Agreement.

Section 9.08 Counterparts. This Agreement and any amendment hereto or any other agreement delivered pursuant hereto may be executed in one or more counterparts and by different Parties in separate counterparts. All counterparts will constitute one and the same agreement and will become effective when one or more counterparts have been signed by each Party and delivered to the other Parties.

Section 9.09 Successors and Assigns; No Third Party Beneficiaries. This Agreement is binding upon and will inure to the benefit of each Party and its successors or assigns, and nothing in this Agreement, express or implied, is intended to confer upon any other Person or Governmental Entity any rights or remedies of any nature whatsoever under or by reason of this Agreement.

Section 9.10 Notices. All notices, demands and other communications to be given or delivered under or by reason of the provisions of this Agreement will be in writing and will be deemed to have been given: (i)immediately when personally delivered; (ii) when received by first class mail, return receipt requested; (iii) one day after being sent for overnight delivery by Federal Express or other overnight delivery service; or (iv) when receipt is acknowledged, either electronically or otherwise, if sent by facsimile, telecopy or other electronic transmission device. Notices, demands and communications to the other Parties will, unless another address is specified by such Parties in writing, be sent to the addresses indicated below:

If to HCMLP, addressed to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: General Counsel
Fax: (972) 628-4147

If to HCMFA, addressed to:

Highland Capital Management Fund Advisors, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: General Counsel
Fax: (972) 628-4147

Section 9.11 Expenses. Except as otherwise provided herein, the Parties will each pay their own expenses incident to the negotiation, preparation and performance of this Agreement, including the fees, expenses and disbursements of their respective investment bankers, accountants and counsel.

Section 9.12 Waiver. No failure on the part of any Party to exercise or delay in exercising any right hereunder will be deemed a waiver thereof, nor will any single or partial exercise preclude any further or other exercise of such or any other right.

Section 9.13 Severability. If any provision of this Agreement is held to be unenforceable for any reason, it will be adjusted rather than voided, if possible, to achieve the intent of the Parties. All other provisions of this Agreement will be deemed valid and enforceable to the extent possible.

Section 9.14 Arbitration; Jurisdiction. Notwithstanding anything contained in this Agreement or the Annexes hereto to the contrary, in the event there is an unresolved legal dispute between the parties and/or any of their respective officers, directors, partners, employees, agents, affiliates or other representatives that involves legal rights or remedies arising from this Agreement, the parties agree to submit their dispute to binding arbitration under the authority of the Federal Arbitration Act; provided, however, that either party or such applicable affiliate thereof may pursue a temporary restraining order and/or preliminary injunctive relief in connection with confidentiality covenants or agreements binding on the other party, with related expedited discovery for the parties, in a court of law, and, thereafter, require arbitration of all issues of final relief. The Arbitration will be conducted by the American Arbitration Association, or another, mutually agreeable arbitration service. The arbitrator(s) shall be duly licensed to practice law in the State of Texas. The discovery process shall be limited to the following: Each side shall be permitted no more than (i) two party depositions of six hours each. Each deposition is to be taken pursuant to the Texas Rules of Civil Procedure; (ii) one non-party deposition of six hours; (iii) twenty-five interrogatories; (iv) twenty-five requests for admission; (v) ten requests for production. In response, the producing party shall not be obligated to produce in excess of 5,000 total pages of documents. The total pages of documents shall include electronic documents; (vi) one request for disclosure pursuant to the Texas Rules of Civil Procedure. Any discovery not specifically provided for in this paragraph, whether to parties or non-parties, shall not be permitted. The arbitrator(s) shall be required to state in a written opinion all facts and conclusions of law relied upon to support any decision rendered. No arbitrator will have authority to render a decision that contains an outcome determinative error of state or federal law, or to fashion a cause of action or remedy not otherwise provided for under applicable state or federal law. Any dispute over whether the arbitrator(s) has failed to comply with the foregoing will be resolved by summary judgment in a court of law. In all other respects, the arbitration process will be conducted in accordance with the American Arbitration Association's dispute resolution rules or other mutually agreeable, arbitration service rules. The party initiating arbitration shall pay all arbitration costs and arbitrator's fees, subject to a final arbitration award on who should bear costs and fees. All proceedings shall be conducted in Dallas, Texas, or another mutually agreeable site. Each party shall bear its own attorneys fees, costs and expenses, including any costs of experts, witnesses and/or travel, subject to a final arbitration award on who should bear costs and fees. The duty to arbitrate described above shall survive the termination of this Agreement. Except as otherwise provided above, the parties hereby waive trial in a court of law or by jury. All other rights, remedies, statutes of limitation and defenses applicable to claims asserted in a court of law will apply in the arbitration.

Section 9.15 General Rules of Construction. For all purposes of this Agreement and the Exhibits and Schedules delivered pursuant to this Agreement: (i) the terms defined in Article I have the meanings assigned to them in Article I and include the plural as well as the singular; (ii) all accounting terms not otherwise defined herein have the meanings assigned under GAAP; (iii) all references in this Agreement to designated "Articles," "Sections" and other subdivisions are to the designated Articles, Sections and other subdivisions of the body of this Agreement; (iv) pronouns of either gender or neuter will include, as appropriate, the other pronoun forms; (v) the words "herein,""hereof" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section or other subdivision; (vi) "or" is not exclusive; (vii) "including" and "includes" will be deemed to be followed by "but not limited to" and "but is not limited to, "respectively; (viii) any definition of or

reference to any law, agreement, instrument or other document herein will be construed as referring to such law, agreement, instrument or other document as from time to time amended, supplemented or otherwise modified; and (ix) any definition of or reference to any statute will be construed as referring also to any rules and regulations promulgated thereunder.

IN WITNESS HEREOF, each of the Parties has caused this Agreement to be executed by its duly authorized officers as of the day and year first above written.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By:_____
Name: James Dondero
Title: President

HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.

By: Strand Advisors XVI, Inc., its general partner

By:_____
Name: Brian Mitts
Title: Assistant Secretary

Annex A

Shared Services

Compliance
- General compliance
- Compliance systems

Facilities
- Equipment
- General Overhead
- Office Supplies
- Rent & Parking

Finance & Accounting
- Book keeping
- Cash management
- Cash forecasting
- Credit facility reporting
- Financial reporting
- Accounts payable
- Accounts receivable
- Expense reimbursement
- Vendor management

HR
- Drinks/snacks
- Lunches
- Recruiting

IT
- General support & maintenance (OMS, development, support)
- Telecom (cell, phones, broadband)
- WSO

Legal
- Corporate secretarial services
- Document review and preparation
- Litigation support
- Management of outside counsel

Marketing and PR
- Public relations

Tax
- Tax audit support
- Tax planning
- Tax prep and filing

Investments
- Investment research on an ad hoc basis as requested by HCMFA

Valuation Committee

Trading

Trading desk services

Operations

Trade settlement

Tab 6

AMENDED AND RESTATED SHARED SERVICES AGREEMENT

This Amended and Restated Shared Services Agreement (as amended, modified, waived, supplemented or restated from time to time in accordance with the terms hereof, this "Agreement"), dated effective as of January 1, 2018, is entered into by and between NexPoint Advisors, L.P., a Delaware limited partnership, as the management company hereunder (in such capacity, the "Management Company"), and Highland Capital Management, L.P., a Delaware limited partnership ("Highland"), as the staff and services provider hereunder (in such capacity, the "Staff and Services Provider" and together with the Management Company, the "Parties").

RECITALS

WHEREAS, the Staff and Services Provider is a registered investment adviser under the Investment Advisers Act of 1940, as amended (the "Advisers Act");

WHEREAS, the Staff and Services Provider and the Management Company are engaged in the business of providing investment management services;

WHEREAS, the Parties entered into that certain Shared Services Agreement, dated effective as of January 1, 2013 (the "Original Agreement");

WHEREAS, the Parties desire to amend and restated the Original Agreement and the Staff and Services Provider is hereby being retained to provide certain back- and middle-office services and administrative, infrastructure and other services to assist the Management Company in conducting its business, and the Staff and Services Provider is willing to make such services available to the Management Company, in each case, on the terms and conditions hereof;

WHEREAS, the Management Company may employ certain individuals to perform portfolio selection and asset management functions for the Management Company, and certain of these individuals may also be employed simultaneously by the Staff and Services Provider during their employment with the Management Company; and

WHEREAS, each Person employed by both the Management Company and the Staff and Services Provider as described above (each, a "Shared Employee"), if any, is and shall be identified on the books and records of each of the Management Company and the Staff and Services Provider (as amended, modified, supplemented or restated from time to time).

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree, and the Original Agreement is hereby amended, restated and replaced in its entirety as follows.

ARTICLE I

DEFINITIONS

Section 1.01 Certain Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

"Affiliate" shall mean with respect to a Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the first Person. The term "control" means (i) the legal or beneficial ownership of securities representing a majority of the voting power of any person or (ii) the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether by contract or otherwise.

"Applicable Asset Criteria and Concentrations" means any applicable eligibility criteria, portfolio concentration limits and other similar criteria or limits which the Management Company instructs in writing to the Staff and Services Provider in respect of the Portfolio or one or more Accounts, as such criteria or limits may be modified, amended or supplemented from time to time in writing by the Management Company;

"Applicable Law" shall mean, with respect to any Person or property of such Person, any action, code, consent decree, constitution, decree, directive, enactment, finding, guideline, law, injunction, interpretation, judgment, order, ordinance, policy statement, proclamation, formal guidance, promulgation, regulation, requirement, rule, rule of law, rule of public policy, settlement agreement, statute, writ, or any particular section, part or provision thereof of any Governmental Authority to which the Person in question is subject or by which it or any of its property is bound.

"Client or Account" shall mean any fund, client or account advised by the Management Company, as applicable.

"Covered Person" shall mean the Staff and Services Provider, any of its Affiliates, and any of their respective managers, members, principals, partners, directors, officers, shareholders, employees and agents (but shall not include the Management Company, its subsidiaries or member(s) and any managers, members, principals, partners, directors, officers, shareholders, employees and agents of the Management Company or its subsidiaries or member(s) (in their capacity as such)).

"Governmental Authority" shall mean (i) any government or quasi-governmental authority or political subdivision thereof, whether national, state, county, municipal or regional, whether U.S. or non-U.S.; (ii) any agency, regulator, arbitrator, board, body, branch, bureau, commission, corporation, department, master, mediator, panel, referee, system or instrumentality of any such government, political subdivision or other government or quasi-government entity, whether non-U.S. or U.S.; and (iii) any court, whether U.S. or non-U.S.

"Indebtedness" shall mean: (a) all indebtedness for borrowed money and all other obligations, contingent or otherwise, with respect to surety bonds, guarantees of borrowed money, letters of credit and bankers' acceptances whether or not matured, and hedges and other derivative contracts and financial instruments; (b) all obligations evidenced by notes, bonds, debentures, or similar instruments, or incurred under bank guaranty or letter of credit facilities or credit agreements; (c) all indebtedness created or arising under any conditional sale or other title retention agreement with respect to any property of the Management Company or any subsidiary; (d) all capital lease obligations; (e) all indebtedness guaranteed by such Person or any of its subsidiaries; and (f) all indebtedness guaranteed by such Person or any of its subsidiaries.

"Operating Guidelines" means any operating guidelines attached to any portfolio management agreement, investment management agreement or similar agreement entered into between the Management Company and a Client or Account.

"Portfolio" means the portfolio of securities and other assets, including without limitation, financial instruments, equity investments, collateral loan obligations, debt securities, preferred return notes and other similar obligations held directly or indirectly by, or on behalf of, Clients and Accounts from time to time;

"Securities Act" shall mean the Securities Act of 1933, as amended.

Section 1.02 Interpretation. The following rules apply to the use of defined terms and the interpretation of this Agreement: (i) the singular includes the plural and the plural includes the singular; (ii) "or" is not exclusive (unless preceded by "either") and "include" and "including" are not limiting; (iii) unless the context otherwise requires, references to agreements shall be deemed to mean and include such agreements as the same may be amended, supplemented, waived and otherwise modified from time to time; (iv) a reference to a law includes any amendment or modification to such law and any rules or regulations issued thereunder or any law enacted in substitution or replacement therefor; (v) a reference to a Person includes its successors and assigns; (vi) a reference to a Section without further reference is to the relevant Section of this Agreement; (vii) the headings of the Sections and subsections are for convenience and shall not affect the meaning of this Agreement; (viii) "writing", "written" and comparable terms refer to printing, typing, lithography and other shall mean of reproducing words in a visible form (including telefacsimile and electronic mail); (ix) "hereof", "herein", "hereunder" and comparable terms refer to the entire instrument in which such terms are used and not to any particular article, section or other subdivision thereof or attachment thereto; and (x) references to any gender include any other gender, masculine, feminine or neuter, as the context requires.

ARTICLE II

SERVICES

Section 2.01 General Authority. Highland is hereby appointed as Staff and Services Provider for the purpose of providing such services and assistance as the Management Company may request from time to time to, and if applicable, to make available the Shared Employees to, the Management Company in accordance with and subject to the provisions of this Agreement and the Staff and Services Provider hereby accepts such appointment. The Staff and Services Provider hereby agrees to such engagement during the term hereof and to render the services described herein for the compensation provided herein, subject to the limitations contained herein.

Section 2.02 Provision of Services. Without limiting the generality of Section 2.01 and subject to Section 2.04 (Applicable Asset Criteria and Concentrations) below, the Staff and Services Provider hereby agrees, from the date hereof, to provide the following back- and middle-office services and administrative, infrastructure and other services to the Management Company.

(a) *Back- and Middle-Office*: Assistance and advice with respect to back- and middle-office functions including, but not limited to, investment research, trade desk services,

including trade execution and settlement, finance and accounting, payments, operations, book keeping, cash management, cash forecasting, accounts payable, accounts receivable, expense reimbursement, vendor management, and information technology (including, without limitation, general support and maintenance (OMS, development, support), telecom (cellphones, telephones and broadband) and WSO);

(b) *Legal/Compliance/Risk Analysis.* Assistance and advice with respect to legal issues, litigation support, management of outside counsel, compliance support and implementation and general risk analysis;

(c) *Tax.* Assistance and advice with respect to tax audit support, tax planning and tax preparation and filing.

(d) *Management of Clients and Accounts.* Assistance and advice with respect to (i) the adherence to Operating Guidelines by the Management Company, and (ii) performing any obligations of the Management Company under or in connection with any back- and middle-office function set forth in any portfolio management agreement, investment management agreement or similar agreement in effect between the Management Company and any Client or Account from time to time.

(e) *Valuation.* Advice relating to the appointment of suitable third parties to provide valuations on assets comprising the Portfolio and including, but not limited to, such valuations required to facilitate the preparation of financial statements by the Management Company or the provision of valuations in connection with, or preparation of reports otherwise relating to, a Client or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity;

(f) *Execution and Documentation.* Assistance relating to the negotiation of the terms of, and the execution and delivery by the Management Company of, any and all documents which the Management Company considers to be necessary in connection with the acquisition and disposition of an asset in the Portfolio by the Management Company or a Client or Account managed by the Management Company, transactions involving the Management Company or a Client or Account managed by the Management Company, and any other rights and obligations of the Management Company or a Client or Account managed by the Management Company;

(g) *Marketing.* Provide access to marketing team representatives to assist with the marketing of the Management Company and any specified Clients or Accounts managed by the Management Company conditional on the Management Company's agreement that any incentive compensation related to such marketing shall be borne by the Management Company;

(h) *Reporting.* Assistance relating to any reporting the Management Company is required to make in relation to the Portfolio or any Client or Account, including reports relating to (i) credit facility reporting and purchases, sales, liquidations, acquisitions, disposals, substitutions and exchanges of assets in the Portfolio, (ii) the requirements of an applicable regulator, or (iii) other type of reporting which the Management Company and Staff and Services Provider may agree from time to time;

(i) *Administrative Services.* The provision of office space, information technology services and equipment, infrastructure, rent and parking and other related services requested or utilized by the Management Company from time to time;

(j) *Shared Employees.* To the extent applicable, the provision of Shared Employees and such additional human capital as may be mutually agreed by the Management Company and the Staff and Services Provider in accordance with the provisions of Section 2.03 hereof;

(k) *Ancillary Services.* Assistance and advice on all things ancillary or incidental to the foregoing; and

(l) *Other.* Assistance and advice relating to such other back- and middle-office services in connection with the day-to-day business of the Management Company as the Management Company and the Staff and Services Provider may from time to time agree.

For the avoidance of doubt, none of the services contemplated hereunder shall constitute investment advisory services, and the Staff & Services Provider shall not provide any advice to the Management Company or perform any duties on behalf of the Management Company, other than the back- and middle-office services contemplated herein, with respect to (a) the general management of the Management Company, its business or activities, (b) the initiation or structuring of any Client or Account or similar securitization, (c) the substantive investment management decisions with respect to any Client or Account or any related collateral obligations or securitization, (d) the actual selection of any collateral obligation or assets by the Management Company, (e) binding recommendations as to any disposal of or amendment to any Collateral Obligation or (f) any similar functions.

Section 2.03 Shared Employees.

(a) The Staff and Services Provider hereby agrees and consents that each Shared Employee, if any, shall be employed by the Management Company, and the Management Company hereby agrees and consents that each Shared Employee shall be employed by the Staff and Services Provider. Except as may otherwise separately be agreed in writing between the applicable Shared Employee and the Management Company and/or the Staff and Services Provider, in each of their discretion, each Shared Employee is an at-will employee and no guaranteed employment or other employment arrangement is agreed or implied by this Agreement with respect to any Shared Employee, and for avoidance of doubt this Agreement shall not amend, limit, constrain or modify in any way the employment arrangements as between any Shared Employee and the Staff and Services Provider or as between any Shared Employee and the Management Company, it being understood that the Management Company may enter into a short-form employment agreement with any Shared Employee memorializing such Shared Employee's status as an employee of the Management Company. To the extent applicable, the Staff and Services Provider shall ensure that the Management Company has sufficient access to the Shared Employees so that the Shared Employees spend adequate time to provide the services required hereunder. The Staff and Services Provider may also employ the services of persons other than the Specified Persons as it deems fit in its sole discretion

(b) Notwithstanding that the Shared Employees, if any, shall be employed by both the Staff and Services Provider and the Management Company, the Parties acknowledge and agree that any and all salary and benefits of each Shared Employee shall be paid exclusively by the Staff and Services Provider and shall not be paid or borne by the Management Company and no additional amounts in connection therewith shall be due from the Management Company to the Staff and Services Provider.

(c) To the extent that a Shared Employee participates in the rendering of services to the Management Company's clients, the Shared Employee shall be subject to the oversight and control of the Management Company and such services shall be provided by the Shared Employee exclusively in his or her capacity as a "supervised person" of, or "person associated with", the Management Company (as such terms are defined in Sections 202(a)(25) and 202(a)(17), respectively, of the Advisers Act).

(d) Each Party may continue to oversee, supervise and manage the services of each Shared Employee in order to (1) ensure compliance with the Party's compliance policies and procedures, (2) ensure compliance with regulations applicable to the Party and (3) protect the interests of the Party and its clients; *provided* that Staff and Services Provider shall (A) cooperate with the Management Company's supervisory efforts and (B) make periodic reports to the Management Company regarding the adherence of Shared Employees to Applicable Law, including but not limited to the 1940 Act, the Advisers Act and the United States Commodity Exchange Act of 1936, as amended, in performing the services hereunder.

(e) Where a Shared Employee provides services hereunder through both Parties, the Parties shall cooperate to ensure that all such services are performed consistently with Applicable Law and relevant compliance controls and procedures designed to prevent, among other things, breaches in information security or the communication of confidential, proprietary or material non-public information.

(f) The Staff and Services Provider shall ensure that each Shared Employee has any registrations, qualifications and/or licenses necessary to provide the services hereunder.

(g) The Parties will cooperate to ensure that information about the Shared Employees is adequately and appropriately disclosed to clients, investors (and potential investors), investment banks operating as initial purchaser or placement agent with respect to any Client or Account, and regulators, as applicable. To facilitate such disclosure, the Staff and Services Provider agrees to provide, or cause to be provided, to the Management Company such information as is deemed by the Management Company to be necessary or appropriate with respect to the Staff and Services Provider and the Shared Employees (including, but not limited to, biographical information about each Shared Employee).

(h) The Parties shall cooperate to ensure that, when so required, each has adopted a Code of Ethics meeting the requirements of the Advisers Act ("Code of Ethics") that is consistent with applicable law and which is substantially similar to the other Party's Code of Ethics.

(i) The Staff and Services Provider shall make reasonably available for use by the Management Company, including through Shared Employees providing services pursuant to this Agreement, any relevant intellectual property and systems necessary for the provision of the services hereunder.

(j) The Staff and Services Provider shall require that each Shared Employee:

(i) certify that he or she is subject to, and has been provided with, a copy of each Party's Code of Ethics and will make such reports, and seek prior clearance for such actions and activities, as may be required under the Codes of Ethics;

(ii) be subject to the supervision and oversight of each Party's officers and directors, including without limitation its Chief Compliance Officer ("CCO"), which CCO may be the same Person, with respect to the services provided to that Party or its clients;

(iii) provide services hereunder and take actions hereunder only as approved by the Management Company;

(iv) provide any information requested by a Party, as necessary to comply with applicable disclosure or regulatory obligations;

(v) to the extent authorized to transact on behalf of the Management Company or a Client or Account, take reasonable steps to ensure that any such transaction is consistent with any policies and procedures that may be established by the Parties and all Applicable Asset Criteria and Concentrations; and

(vi) act, at all times, in a manner consistent with the fiduciary duties and standard of care owed by the Management Company to its members and direct or indirect investors or to a Client or Account as well as clients of Staff and Services Provider by seeking to ensure that, among other things, information about any investment advisory or trading activity applicable to a particular client or group of clients is not used to benefit the Shared Employee, any Party or any other client or group of clients in contravention of such fiduciary duties or standard of care.

(k) Unless specifically authorized to do so, or appointed as an officer or authorized person of the Management Company with such authority, no Shared Employee may contract on behalf or in the name of the Management Company, acting as principal.

Section 2.04 Applicable Asset Criteria and Concentrations. The Management Company will promptly inform the Staff and Services Provider in writing of any Applicable Asset Criteria and Concentrations to which it agrees from time to time and the Staff and Services Provider shall take such Applicable Asset Criteria and Concentrations into account when providing assistance and advice in accordance with Section 2.02 above and any other assistance or advice provided in accordance with this Agreement.

Section 2.05 Compliance with Management Company Policies and Procedures. The Management Company will from time to time provide the Staff and Services Provider and the

Shared Employees, if any, with any policy and procedure documentation which it establishes internally and to which it is bound to adhere in conducting its business pursuant to regulation, contract or otherwise. Subject to any other limitations in this Agreement, the Staff and Services Provider will use reasonable efforts to ensure any services it and the Shared Employees provide pursuant to this Agreement complies with or takes account of such internal policies and procedures.

Section 2.06 Authority. The Staff and Services Provider's scope of assistance and advice hereunder is limited to the services specifically provided for in this Agreement. The Staff and Services Provider shall not assume or be deemed to assume any rights or obligations of the Management Company under any other document or agreement to which the Management Company is a party. Notwithstanding any other express or implied provision to the contrary in this Agreement, the activities of the Staff and Services Provider pursuant to this Agreement shall be subject to the overall policies of the Management Company, as notified to the Staff and Services Provider from time to time. The Staff and Services Provider shall not have any duties or obligations to the Management Company unless those duties and obligations are specifically provided for in this Agreement (or in any amendment, modification or novation hereto or hereof to which the Staff and Services Provider is a party).

Section 2.07 Third Parties.

(a) The Staff and Services Provider may employ third parties, including its affiliates, to render advice, provide assistance and to perform any of its duties under this Agreement; *provided* that notwithstanding the employment of third parties for any such purpose, the Staff and Services Provider shall not be relieved of any of its obligations or liabilities under this Agreement.

(b) In providing services hereunder, the Staff and Services Provider may rely in good faith upon and will incur no liability for relying upon advice of nationally recognized counsel (which may be counsel for the Management Company, a Client or Account or any Affiliate of the foregoing), accountants or other advisers as the Staff and Services Provider determines, in its sole discretion, is reasonably appropriate in connection with the services provided by the Staff and Services Provider under this Agreement.

Section 2.08 Management Company to Cooperate with the Staff and Services Provider. In furtherance of the Staff and Services Provider's obligations under this Agreement the Management Company shall cooperate with, provide to, and fully inform the Staff and Services Provider of, any and all documents and information the Staff and Services Provider reasonably requires to perform its obligations under this Agreement.

Section 2.09 Power of Attorney. If the Management Company considers it necessary for the provision by the Staff and Services Provider of the assistance and advice under this Agreement (after consultation with the Staff and Services Provider), it may appoint the Staff and Services Provider as its true and lawful agent and attorney, with full power and authority in its name to sign, execute, certify, swear to, acknowledge, deliver, file, receive and record any and all documents that the Staff and Services Provider reasonably deems appropriate or necessary in connection with the execution and settlement of acquisitions of assets as directed by the Management Company

and the Staff and Services Provider's powers and duties hereunder (which for the avoidance of doubt shall in no way involve the discretion and/or authority of the Management Company with respect to investments). Any such power shall be revocable in the sole discretion of the Management Company.

ARTICLE III

CONSIDERATION AND EXPENSES

Section 3.01 Consideration. As compensation for its performance of its obligations as Staff and Services Provider under this Agreement, the Staff and Services Provider will be entitled to receive a flat fee of $168,000 per month (the "Staff and Services Fee"), payable monthly in advance on the first business day of each month.

Section 3.02 Costs and Expenses. Each party shall bear its own expenses; *provided* that the Management Company shall reimburse the Staff and Services Provider for any and all costs and expenses that may be borne properly by the Management Company.

Section 3.03 Deferral. Notwithstanding anything to the contrary contained herein, if on any date the Management Company determines that it would not have sufficient funds available to it to make a payment of Indebtedness, it shall have the right to defer any all and amounts payable to the Staff and Services Provider pursuant to this Agreement, including any fees and expenses; *provided* that the Management Company shall promptly pay all such amounts on the first date thereafter that sufficient amounts exist to make payment thereof.

ARTICLE IV

REPRESENTATIONS AND COVENANTS

Section 4.01 Representations. Each of the Parties hereto represents and warrants that:

(a) It has full power and authority to execute and deliver, and to perform its obligations under, this Agreement;

(b) this Agreement has been duly authorized, executed and delivered by it and constitutes its valid and binding, obligation, enforceable in accordance with its terms except as the enforceability hereof may be subject to (i) bankruptcy, insolvency, reorganization moratorium, receivership, conservatorship or other similar laws now or hereafter in effect relating to creditors' rights and (ii) general principles of equity (regardless of whether such enforcement is considered in a proceeding, in equity or at law);

(c) no consent, approval, authorization or order of or declaration or filing with any Governmental Authority is required for the execution of this Agreement or the performance by it of its duties hereunder, except such as have been duly made or obtained; and

(d) neither the execution and delivery of this Agreement nor the fulfillment of the terms hereof conflicts with or results in a breach or violation of any of the terms or provisions of, or constitutes a default under, (i) its constituting and organizational documents; or (ii) the terms

of any material indenture, contract, lease, mortgage, deed of trust, note, agreement or other evidence of indebtedness or other material agreement, obligation, condition, covenant or instrument to which it is a party or by which it is bound.

ARTICLE V

COVENANTS

Section 5.01 Compliance; Advisory Restrictions.

(a) The Staff and Services Provider shall reasonably cooperate with the Management Company in connection with the Management Company's compliance with its policies and procedures relating to oversight of the Staff and Services Provider. Specifically, the Staff and Services Provider agrees that it will provide the Management Company with reasonable access to information relating to the performance of Staff and Services Provider's obligations under this Agreement.

(b) This Agreement is not intended to and shall not constitute an assignment, pledge or transfer of any portfolio management agreement or any part thereof. It is the express intention of the parties hereto that this Agreement and all services performed hereunder comply in all respects with all (a) applicable contractual provisions and restrictions contained in each portfolio management agreement, investment management agreement or similar agreement and each document contemplated thereby; and (b) Applicable Laws (collectively, the "Advisory Restrictions"). If any provision of this Agreement is determined to be in violation of any Advisory Restriction, then the services to be provided under this Agreement shall automatically be limited without action by any person or entity, reduced or modified to the extent necessary and appropriate to be enforceable to the maximum extent permitted by such Advisory Restriction.

Section 5.02 Records; Confidentiality.

The Staff and Services Provider shall maintain or cause to be maintained appropriate books of account and records relating to its services performed hereunder, and such books of account and records shall be accessible for inspection by representatives of the Management Company and its accountants and other agents at any time during normal business hours and upon not less than three (3) Business Days' prior notice; *provided* that the Staff and Services Provider shall not be obligated to provide access to any non-public information if it in good faith determines that the disclosure of such information would violate any applicable law, regulation or contractual arrangement.

The Staff and Services Provider shall follow its customary procedures to keep confidential any and all information obtained in connection with the services rendered hereunder that is either (a) of a type that would ordinarily be considered proprietary or confidential, such as information concerning the composition of assets, rates of return, credit quality, structure or ownership of securities, or (b) designated as confidential obtained in connection with the services rendered by the Staff and Services Provider hereunder and shall not disclose any such information to non-affiliated third parties, except (i) with the prior written consent of the Management Company, (ii) such information as a rating agency shall reasonably request in connection with its

rating of notes issued by a CLO or supplying credit estimates on any obligation included in the Portfolio, (iii) in connection with establishing trading or investment accounts or otherwise in connection with effecting transactions on behalf of the Management Company or any Client or Account for which the Management Company serves as portfolio manager or investment manager or in a similar capacity, (iv) as required by (A) Applicable Law or (B) the rules or regulations of any self-regulating organization, body or official having jurisdiction over the Staff and Services Provider or any of its Affiliates, (v) to its professional advisors (including, without limitation, legal, tax and accounting advisors), (vi) such information as shall have been publicly disclosed other than in known violation of this Agreement or shall have been obtained by the Staff and Services Provider on a non-confidential basis, (vii) such information as is necessary or appropriate to disclose so that the Staff and Services Provider may perform its duties hereunder, (viii) as expressly permitted in the final offering memorandum or any definitive transaction documents relating to any Client or Account, (ix) information relating to performance of the Portfolio as may be used by the Staff and Services Provider in the ordinary course of its business or (xx) such information as is routinely disclosed to the trustee, custodian or collateral administrator of any Client or Account in connection with such trustee's, custodian's or collateral administrator's performance of its obligations under the transaction documents related to such Client or Account. Notwithstanding the foregoing, it is agreed that the Staff and Services Provider may disclose without the consent of any Person (1) that it is serving as staff and services provider to the Management Company, (2) the nature, aggregate principal amount and overall performance of the Portfolio, (3) the amount of earnings on the Portfolio, (4) such other information about the Management Company, the Portfolio and the Clients or Accounts as is customarily disclosed by staff and services providers to management vehicles similar to the Management Company, and (5) the United States federal income tax treatment and United States federal income tax structure of the transactions contemplated by this Agreement and the related documents and all materials of any kind (including opinions and other tax analyses) that are provided to them relating to such United States federal income tax treatment and United States income tax structure. This authorization to disclose the U.S. tax treatment and tax structure does not permit disclosure of information identifying the Staff and Services Provider, the Clients or Accounts or any other party to the transactions contemplated by this Agreement (except to the extent such information is relevant to U.S. tax structure or tax treatment of such transactions).

ARTICLE VI

EXCULPATION AND INDEMNIFICATION

Section 6.01 Standard of Care. Except as otherwise expressly provided herein, each Covered Person shall discharge its duties under this Agreement with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. To the extent not inconsistent with the foregoing, each Covered Person shall follow its customary standards, policies and procedures in performing its duties hereunder. No Covered Person shall deal with the income or assets of the Management Company in such Covered Person's own interest or for its own account. Each Covered Person in its respective sole and absolute discretion may separately engage or invest in any other business ventures, including those that may be in competition with the Management Company, and the Management Company will not have any rights in or to such ventures or the income or profits derived therefrom

Section 6.02 Exculpation. To the fullest extent permitted by law, no Covered Person will be liable to the Management Company, any Member, or any shareholder, partner or member thereof, for (i) any acts or omissions by such Covered Person arising out of or in connection with the conduct of the business of the Management Company or its General Partner, or any investment made or held by the Management Company or its General Partner, unless it is determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, to be the result of gross negligence or to constitute fraud or willful misconduct (as interpreted under the laws of the State of Delaware) (each, a "Disabling Conduct") on the part of such Covered Person, (ii) any act or omission of any Investor, (iii) any mistake, gross negligence, misconduct or bad faith of any employee, broker, administrator or other agent or representative of such Covered Person, *provided* that such employee, broker, administrator or agent was selected, engaged or retained by or on behalf of such Covered Person with reasonable care, or (iv) any consequential (including loss of profit), indirect, special or punitive damages. To the extent that, at law or in equity, any Covered Person has duties (including fiduciary duties) and liabilities relating thereto to the Management Company or any Member, no Covered Person acting under this Agreement shall be liable to the Management Company or to any such Member for its good-faith reliance on the provisions of this Agreement. The exculpations set forth in this Section 6.02 shall exculpate any Covered Person regardless of such Covered Person's sole, comparative, joint, concurrent, or subsequent negligence.

To the fullest extent permitted by law, no Covered Person shall have any personal liability to the Management Company or any Member solely by reason of any change in U.S. federal, state or local or foreign income tax laws, or in interpretations thereof, as they apply to the Management Company or the Members, whether the change occurs through legislative, judicial or administrative action.

Any Covered Person in its sole and absolute discretion may consult legal counsel, accountants or other advisers selected by it, and any act or omission taken, or made in good faith by such Person on behalf of the Management Company or in furtherance of the business of the Management Company in good-faith reliance on and in accordance with the advice of such counsel, accountants or other advisers shall be full justification for the act or omission, and to the fullest extent permitted by applicable law, no Covered Person shall be liable to the Management Company or any Member in so acting or omitting to act if such counsel, accountants or other advisers were selected, engaged or retained with reasonable care.

Section 6.03 Indemnification by the Management Company. The Management Company shall and hereby does, to the fullest extent permitted by applicable law, indemnify and hold harmless any Covered Person from and against any and all claims, causes of action (including, but not limited to, strict liability, negligence, statutory violation, regulatory violation, breach of contract, and all other torts and claims arising under common law), demands, liabilities, costs, expenses, damages, losses, suits, proceedings, judgments, assessments, actions and other liabilities, whether judicial, administrative, investigative or otherwise, of whatever nature, known or unknown, liquidated or unliquidated ("Claims"), that may accrue to or be incurred by any Covered Person, or in which any Covered Person may become involved, as a party or otherwise, or with which any Covered Person may be threatened, relating to or arising out of the investment or other activities of the Management Company or its General Partner, or activities undertaken in connection with the Management Company or its General Partner, or otherwise relating to or

arising out of this Agreement, including amounts paid in satisfaction of judgments, in compromise or as fines or penalties, and attorneys' fees and expenses incurred in connection with the preparation for or defense or disposition of any investigation, action, suit, arbitration or other proceeding (a "Proceeding"), whether civil or criminal (all of such Claims, amounts and expenses referred to therein are referred to collectively as "Damages"), except to the extent that it shall have been determined ultimately by a court of competent jurisdiction, in a final nonappealable judgment, that such Damages arose primarily from Disabling Conduct of such Covered Person. The termination of any Proceeding by settlement, judgment, order, conviction or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that any Damages relating to such settlement, judgment, order, conviction or plea of nolo contendere or its equivalent or otherwise relating to such Proceeding arose primarily from Disabling Conduct of any Covered Persons. Any Covered Person shall be indemnified under the terms of this Section 6.03 regardless of such Covered Person's sole, comparative, joint, concurrent, or subsequent negligence.

Expenses (including attorneys' fees) incurred by a Covered Person in defense or settlement of any Claim that may be subject to a right of indemnification hereunder shall be advanced by the Management Company prior to the final disposition thereof upon receipt of a written undertaking by or on behalf of the Covered Person to repay the amount advanced to the extent that it shall be determined ultimately by a court of competent jurisdiction that the Covered Person is not entitled to be indemnified hereunder. The right of any Covered Persons to the indemnification provided herein shall be cumulative of, and in addition to, any and all rights to which the Covered Person may otherwise be entitled by contract or as a matter of law or equity and shall be extended to the Covered Person's successors, assigns and legal representatives. Any judgments against the Management Company and/or any Covered Persons in respect of which such Covered Person is entitled to indemnification shall first be satisfied from the assets of the Management Company, including Drawdowns, before such Covered Person is responsible therefor.

Notwithstanding any provision of this Agreement to the contrary, the provisions of this Section 6.03 shall not be construed so as to provide for the indemnification of any Covered Person for any liability (including liability under Federal securities laws which, under certain circumstances, impose liability even on persons that act in good faith), to the extent (but only to the extent) that such indemnification would be in violation of applicable law, but shall be construed so as to effectuate the provisions of this Section 6.03 to the fullest extent permitted by law.

Section 6.04 Other Sources of Recovery etc. The indemnification rights set forth in Section 6.03 are in addition to, and shall not exclude, limit or otherwise adversely affect, any other indemnification or similar rights to which any Covered Person may be entitled. If and to the extent that other sources of recovery (including proceeds of any applicable policies of insurance or indemnification from any Person in which any of the Clients or Accounts has an investment) are available to any Covered Person, such Covered Person shall use reasonable efforts to obtain recovery from such other sources before the Company shall be required to make any payment in respect of its indemnification obligations hereunder; *provided* that, if such other recovery is not available without delay, the Covered Person shall be entitled to such payment by the Management Company and the Management Company shall be entitled to reimbursement out of such other recovery when and if obtained.

Section 6.05 Rights of Heirs, Successors and Assigns. The indemnification rights provided by Section 6.03 shall inure to the benefit of the heirs, executors, administrators, successors and assigns of each Covered Person.

Section 6.06 Reliance. A Covered Person shall incur no liability to the Management Company or any Member in acting upon any signature or writing reasonably believed by him, her or it to be genuine, and may rely in good faith on a certificate signed by an officer of any Person in order to ascertain any fact with respect to such Person or within such Person's knowledge. Each Covered Person may act directly or through his, her or its agents or attorneys.

ARTICLE VII

TERMINATION

Section 7.01 Termination. Either Party may terminate this Agreement at any time upon at least thirty (30) days' written notice to the other.

ARTICLE VIII

MISCELLANEOUS

Section 8.01 Amendments. This Agreement may not be amended or modified except by an instrument in writing signed by each Party.

Section 8.02 Assignment and Delegation.

(a) Neither Party may assign, pledge, grant or otherwise encumber or transfer all or any part of its rights or responsibilities under this Agreement, in whole or in part, except (i) as provided in clauses (b) and (c) of this Section 8.02, without the prior written consent of the other Party and (ii) in accordance with Applicable Law.

(b) Except as otherwise provided in this Section 8.02, the Staff and Services Provider may not assign its rights or responsibilities under this Agreement unless (i) the Management Company consents in writing thereto and (ii) such assignment is made in accordance with Applicable Law.

(c) The Staff and Services Provider may, without satisfying any of the conditions of Section 8.02(a) other than clause (ii) thereof, (1) assign any of its rights or obligations under this Agreement to an Affiliate; *provided* that such Affiliate (i) has demonstrated ability, whether as an entity or by its principals and employees, to professionally and competently perform duties similar to those imposed upon the Staff and Services Provider pursuant to this Agreement and (ii) has the legal right and capacity to act as Staff and Services Provider under this Agreement, or (2) enter into (or have its parent enter into) any consolidation or amalgamation with, or merger with or into, or transfer of all or substantially all of its assets to, another entity; *provided* that, at the time of such consolidation, merger, amalgamation or transfer the resulting, surviving or transferee entity assumes all the obligations of the Staff and Services Provider under this Agreement generally (whether by operation of law or by contract) and the other entity is a continuation of the Staff and Services Provider in another corporate or similar form and has

substantially the same staff; *provided further* that the Staff and Services Provider shall deliver ten (10) Business Days' prior notice to the Management Company of any assignment or combination made pursuant to this sentence. Upon the execution and delivery of any such assignment by the assignee, the Staff and Services Provider will be released from further obligations pursuant to this Agreement except to the extent expressly provided herein.

Section 8.03 Non-Recourse; Non-Petition.

(a) The Staff and Services Provider agrees that the payment of all amounts to which it is entitled pursuant to this Agreement shall be payable by the Management Company only to the extent of assets held in the Portfolio.

(b) Notwithstanding anything to the contrary contained herein, the liability of the Management Company to the Staff and Services Provider hereunder is limited in recourse to the Portfolio, and if the proceeds of the Portfolio following the liquidation thereof are insufficient to meet the obligations of the Management Company hereunder in full, the Management Company shall have no further liability in respect of any such outstanding obligations, and such obligations and all claims of the Staff and Services Provider or any other Person against the Management Company hereunder shall thereupon extinguish and not thereafter revive. The Staff and Services Provider accepts that the obligations of the Management Company hereunder are the corporate obligations of the Management Company and are not the obligations of any employee, member, officer, director or administrator of the Management Company and no action may be taken against any such Person in relation to the obligations of the Management Company hereunder.

(c) Notwithstanding anything to the contrary contained herein, any Staff and Services Provider agrees not to institute against, or join any other Person in instituting against, the Management Company any bankruptcy, reorganization, arrangement, insolvency, moratorium or liquidation proceedings, or other proceedings under United States federal or state bankruptcy laws, or similar laws until at least one year and one day (or, if longer, the then applicable preference period plus one day) after the payment in full all amounts payable in respect of any Indebtedness incurred to finance any portion of the Portfolio; *provided* that nothing in this provision shall preclude, or be deemed to stop, the Staff and Services Provider from taking any action prior to the expiration of the aforementioned one year and one day period (or, if longer, the applicable preference period then in effect plus one day) in (i) any case or proceeding voluntarily filed or commenced by the Management Company, or (ii) any involuntary insolvency proceeding filed or commenced against the Management Company by a Person other than the Staff and Services Provider.

(d) The Management Company hereby acknowledges and agrees that the Staff and Services Provider's obligations hereunder shall be solely the corporate obligations of the Staff and Services Provider, and are not the obligations of any employee, member, officer, director or administrator of the Staff and Services Provider and no action may be taken against any such Person in relation to the obligations of the Staff and Services Provider hereunder.

(e) The provisions of this Section 8.03 shall survive termination of this Agreement for any reason whatsoever.

Section 8.04 Governing Law.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas. The Parties unconditionally and irrevocably consent to the exclusive jurisdiction of the courts located in the State of Texas and waive any objection with respect thereto, for the purpose of any action, suit or proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

(b) The Parties irrevocably agree for the benefit of each other that the courts of the State of Texas and the United States District Court located in the Northern District of Texas in Dallas are to have exclusive jurisdiction to settle any disputes (whether contractual or non-contractual) which may arise out of or in connection with this Agreement and that accordingly any action arising out of or in connection therewith (together referred to as "Proceedings") may be brought in such courts. The Parties irrevocably submit to the jurisdiction of such courts and waive any objection which they may have now or hereafter to the laying of the venue of any Proceedings in any such court and any claim that any Proceedings have been brought in an inconvenient forum and further irrevocably agree that a judgment in any Proceedings brought in such courts shall be conclusive and binding upon the Parties and may be enforced in the courts of any other jurisdiction.

Section 8.05 WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT IT HAS RECEIVED FULL AND SUFFICIENT CONSIDERATION FOR THIS PROVISION AND THAT THIS PROVISION IS A MATERIAL INDUCEMENT FOR ITS ENTERING INTO THIS AGREEMENT.

Section 8.06 Severability. The provisions of this Agreement are independent of and severable from each other, and no provision shall be affected or rendered invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties.

Section 8.07 No Waiver. The performance of any condition or obligation imposed upon any Party may be waived only upon the written consent of the Parties. Such waiver shall be limited to the terms thereof and shall not constitute a waiver of any other condition or obligation of the other Party. Any failure by any Party to enforce any provision shall not constitute a waiver of that or any other provision or this Agreement.

Section 8.08 Counterparts. This Agreement may be executed in any number of counterparts by facsimile or other written or electronic form of communication, each of which shall be deemed to be an original as against any Party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the Parties reflected hereon as the signatories.

Section 8.09 Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties hereto and their permitted assigns and nothing herein express or implied shall give or be construed to give to any Person, other than the Parties hereto and such permitted assigns, any legal or equitable rights hereunder. For avoidance of doubt, this Agreement is not for the benefit or and is not enforceable by any Shared Employee, Client or Account or any investor (directly or indirectly) in the Management Company.

Section 8.10 No Partnership or Joint Venture. Nothing set forth in this Agreement shall constitute, or be construed to create, an employment relationship, a partnership or a joint venture between the Parties. Except as expressly provided herein or in any other written agreement between the Parties, no Party has any authority, express or implied, to bind or to incur liabilities on behalf of, or in the name of, any other Party.

Section 8.11 Independent Contractor. Notwithstanding anything to the contrary, the Staff and Services Provider shall be deemed to be an independent contractor and, except as expressly provided or authorized herein, shall have no authority to act for or represent the Management Company or any Client or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity in any manner or otherwise be deemed an agent of the Management Company or any Client or Account in which the Management Company acts as portfolio manager or investment manager or in a similar capacity.

Section 8.12 Written Disclosure Statement. The Management Company acknowledges receipt of Part 2 of the Staff and Services Provider's Form ADV, as required by Rule 204-3 under the Advisers Act, on or before the date of execution of this Agreement.

Section 8.13 Headings. The descriptive headings contained in this Agreement are for convenience of reference only and shall not affect in any way the meaning or interpretation of this Agreement.

Section 8.14 Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior agreements and undertakings, both written and oral, between the Parties with respect to such subject matter.

Section 8.15 Notices. Any notice or demand to any Party to be given, made or served for any purposes under this Agreement shall be given, made or served by sending the same by overnight mail or email transmission or by delivering it by hand as follows:

(a) If to the Management Company:

NexPoint Advisors, L.P.
200 Crescent Court
Suite 700
Dallas, TX 75201

(b) If to the Staff and Services Provider:

Highland Capital Management, L.P.
300 Crescent Court
Suite 700
Dallas, TX 75201

or to such other address or email address as shall have been notified to the other Parties.

[The remainder of this page intentionally left blank.]

IN WITNESS WHEREOF, each Party has caused this Agreement to be executed as of the date hereof by its duly authorized representative.

NEXPOINT ADVISORS, L.P.

By: NexPoint Advisors GP, LLC, its General Partner

By: _____
Name: Frank Waterhouse
Title: Treasurer

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its General Partner

By: _____
Name: Frank Waterhouse
Title: Treasurer

Tab 7

PAYROLL REIMBURSEMENT AGREEMENT

THIS PAYROLL REIMBURSEMENT AGREEMENT (this "***Agreement***") entered into on this 1st day of May, 2018 by and among Highland Capital Management, L.P., a Delaware limited partnership ("***HCMLP***"), and NexPoint Advisors, L.P., a Delaware limited partnership ("***NexPoint***"), and any affiliate of NexPoint that becomes a party hereto, is effective as of January 1, 2018 (the "***Effective Date***"). Each of the signatories hereto is individually a "***Party***" and collectively the "***Parties***".

RECITALS

A. During the Term, HCMLP will seek reimbursement from NexPoint for the cost of certain employees who are dual employees of HCMLP and NexPoint and who provide advice to registered investment companies advised by NexPoint under the direction and supervision of NexPoint as more fully described in this Agreement.

AGREEMENT

In consideration of the foregoing recitals and the mutual covenants and conditions contained herein, the Parties agree, intending to be legally bound, as follows:

ARTICLE I
DEFINITIONS

"***Actual Cost***" means, with respect to any period hereunder, the actual costs and expenses caused by, incurred or otherwise arising from or relating to each Dual Employee, in each case during such period. Absent any changes to employee reimbursement, as set forth in Section 2.02, such costs and expenses are equal to $252,000 per month.

"***Affiliate***" means a Person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, a specified Person. The term "***control***" (including, with correlative meanings, the terms "***controlled by***" and "***under common control with***") means the possession of the power to direct the management and policies of the referenced Person, whether through ownership interests, by contract or otherwise.

"***Agreement***" has the meaning set forth in the preamble.

"***Allocation Percentage***" has the meaning set forth in Section 3.01.

"***Dual Employee***" has the meaning set forth in Section 2.01.

"***Effective Date***" has the meaning set forth in the preamble.

"***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.

"***Tax***" or "***Taxes***" means: (i) all state and local sales, use, value-added, gross receipts, foreign, privilege, utility, infrastructure maintenance, property, federal excise and similar levies, duties and other similar tax-like charges lawfully levied by a duly constituted taxing authority against or upon the Shared Services and the Shared Assets; and (ii) tax-related surcharges or fees that are related to the Shared Services

and the Shared Assets identified and authorized by applicable tariffs.

ARTICLE II
EMPLOYEE REIMBURSEMENT

Section 2.01 Employee Reimbursement. During the Term, NexPoint shall reimburse HCMLP for the Actual Cost to HCMLP of certain employees who (i) are dual employees of HCMLP and NexPoint and (ii) provide advice to any investment company registered under the Investment Company Act of 1940, as amended (the "***1940 Act***") pursuant to an investment advisory agreement between NexPoint and such investment company (each, a "***Fund***") under the direction and supervision of NexPoint (each, a "***Dual Employee***").

Section 2.02 Changes to Employee Reimbursement. During the Term, the Parties may agree to modify the terms and conditions of NexPoint's reimbursement in order to reflect new procedures or processes, including modifying the Allocation Percentage (defined below) applicable to such Dual Employee to reflect the then current fair market value of such Dual Employee's employment. The Parties will negotiate in good faith the terms of such modification.

ARTICLE III
COST ALLOCATION

Section 3.01 Actual Cost Allocation Formula. The Actual Cost of any Dual Employee relating to the investment advisory services provided to a Fund shall be allocated based on the Allocation Percentage. For purposes of this Agreement, "***Allocation Percentage***" means the Parties' good faith determination of the percentage of each Dual Employee's aggregate hours worked during a quarter that were spent on NexPoint matters, as listed on Exhibit A.

ARTICLE IV
PAYMENT OF COST AND REVENUE SHARE; TAXES

Section 4.01 Settlement Payments. At any time during the Term, NexPoint may make payment of the amounts that are allocable to it.

Section 4.02 Determination and Payment of Cost. NexPoint shall promptly make payment of the Actual Cost within ten (10) days of the end of each calendar month. Should either Party determine that a change to employee reimbursement is appropriate, as set forth in Section 2.02, the Party requesting the modification shall notify the other Party on or before the last business day of the calendar month.

Section 4.03 Taxes.

(a) NexPoint is responsible for and will pay all Taxes applicable to it, provided, that such payments by NexPoint to HCMLP will be made in the most tax-efficient manner and provided further, that HCMLP will not be subject to any liability for Taxes applicable to the cost of a Dual Employee of NexPointas a result of such payment by NexPoint. HCMLP will collect such Tax from NexPoint in the same manner it collects such Taxes from other customers in the ordinary course of its business, but in no event prior to the time it invoices NexPoint for costs for which such Taxes are levied. NexPoint may provide HCMLP with a certificate evidencing its exemption from payment of or liability for such Taxes.

(b) NexPoint will reimburse HCMLP for any Taxes collected from HCMLP and refunded to NexPoint. In the event a Tax is assessed against NexPoint that is solely the responsibility of HCMLP and HCMLP desires to protest such assessment, HCMLP will submit to NexPoint a statement of

the issues and arguments requesting that NexPoint grant HCMLP the authority to prosecute the protest in NexPoint's name. NexPoint's authorization will not be unreasonably withheld. HCMLP will finance, manage, control and determine the strategy for such protest while keeping NexPoint reasonably informed of the proceedings. However, the authorization will be periodically reviewed by NexPoint to determine any adverse impact on NexPoint, and NexPoint will have the right to reasonably withdraw such authority at any time. Upon notice by NexPoint that it is so withdrawing such authority, HCMLP will expeditiously terminate all proceedings. Any adverse consequences suffered by HCMLP as a result of the withdrawal will be submitted to litigation pursuant to Section 6.14. Any contest for Taxes brought by HCMLP may not result in any lien attaching to any property or rights of NexPoint or otherwise jeopardize NexPoint's interests or rights in any of its property.

(c) The provisions of this Section 4.03 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 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 5.02. 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
MISCELLANEOUS

Section 6.01 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 NexPoint 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. Neither 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.

Section 6.02 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 6.03 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 6.04 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 6.05 Governing Law. This Agreement and the legal relations between the Parties will be governed by and construed in accordance with the laws of the State of Texas applicable to contracts made and performed in such State and without regard to conflicts of law doctrines unless certain matters are preempted by federal law.

Section 6.06 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 6.07 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 6.08 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 6.09 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 any rights or remedies of any nature whatsoever under or by reason of this Agreement.

Section 6.10 Notices. All notices, demands and other communications to be given or delivered under or by reason of the provisions of this Agreement will be in writing and will be deemed to have been given: (i)immediately when personally delivered; (ii) when received by first class mail, return receipt requested; (iii) one day after being sent for overnight delivery by Federal Express or other overnight delivery service; or (iv) when receipt is acknowledged, either electronically or otherwise, if sent by facsimile, telecopy or other electronic transmission device. Notices, demands and communications to the other Parties will, unless another address is specified by such Parties in writing, be sent to the addresses indicated below:

If to HCMLP, addressed to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: General Counsel
Fax: (972) 628-4147

If to NexPoint, addressed to:

NexPoint Advisors, L.P.
200 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: General Counsel
Fax: (972) 628-4147

Section 6.11 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 6.12 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 6.13 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 6.14 Dispute Resolution; Jurisdiction. 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, including, but not limited to, claims sounding in contract, equity, tort, fraud and statute ("Dispute") shall be submitted exclusively to the the courts located in Dallas County, Texas, 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, but not limited to, administrative, arbitration, or litigation, other than the Enforcement Court.

Section 6.15 General Rules of Construction. For all purposes of this Agreement and the Exhibits and Schedules delivered pursuant to this Agreement: (i) the terms defined in Article I have the meanings assigned to them in Article I and include the plural as well as the singular; (ii) all accounting terms not otherwise defined herein have the meanings assigned under GAAP; (iii) all references in this Agreement to designated "Articles," "Sections" and other subdivisions are to the designated Articles, Sections and other subdivisions of the body of this Agreement; (iv) pronouns of either gender or neuter will include, as appropriate, the other pronoun forms; (v) the words "herein,""hereof" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section or other subdivision; (vi) "or" is not exclusive; (vii) "including" and "includes" will be deemed to be followed by "but not limited to" and "but is not limited to, "respectively; (viii) any definition of or reference to any law, agreement, instrument or other document herein will be construed as referring to such law, agreement, instrument or other document as from time to time amended, supplemented or otherwise modified; and (ix) any definition of or reference to any statute will be construed as referring also to any rules and regulations promulgated thereunder.

IN WITNESS HEREOF, each of the Parties has caused this Agreement to be executed by its duly authorized officers as of the day and year first above written.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By:_____
Name:_____
Title:_____

NEXPOINT ADVISORS, L.P.

By: NexPoint Advisors GP, LLC, its general partner

By:_____
Name:_____
Title:_____

EXHIBIT A

EMPLOYEE ALLOCATIONS
(AS OF JANUARY 1, 2018)

EMPLOYEE NAME	PERCENTAGE (%) ALLOCATION TO NEXPOINT ADVISORS, L.P.
Abayarathna, Sahan	9%
Baynard, Cameron	9%
Burns, Nathan	70%
Covitz, Hunter	25%
Desai, Neil	25%
Fedoryshyn, Eric	9%
Gray, Matthew	9%
Hayes, Christopher	9%
Hill, Robert	5%
McFarling, Brandon	9%
Moore, Carl	10%
Nikolayev, Yegor	9%
Okada, Mark	20%
Owens, David	9%
Parker, Trey	15%
Parmentier, Andrew	40%
Phillips, Michael	9%
Poglitsch, Jon	10%
Ryder, Phillip	5%
Sachdev, Kunal	9%
Smallwood, Allan	9%
Staltari, Mauro	9%
Tomlin, Jake	9%
Vira, Sagar	9%
Wilson, Scott	5%

Tab 8

PAYROLL REIMBURSEMENT AGREEMENT

THIS PAYROLL REIMBURSEMENT AGREEMENT (this "***Agreement***") entered into on this 1st day of May, 2018 by and among Highland Capital Management, L.P., a Delaware limited partnership ("***HCMLP***"), and Highland Capital Management Fund Advisors, L.P., a Delaware limited partnership ("***HCMFA***"), and any affiliate of HCMFA that becomes a party hereto, is effective as of January 1, 2018 (the "***Effective Date***"). Each of the signatories hereto is individually a "***Party***" and collectively the "***Parties***".

RECITALS

A. During the Term, HCMLP will seek reimbursement from HCMFA for the cost of certain employees who are dual employees of HCMLP and HCMFA and who provide advice to registered investment companies advised by HCMFA under the direction and supervision of HCMFA as more fully described in this Agreement.

AGREEMENT

In consideration of the foregoing recitals and the mutual covenants and conditions contained herein, the Parties agree, intending to be legally bound, as follows:

ARTICLE I
DEFINITIONS

"***Actual Cost***" means, with respect to any period hereunder, the actual costs and expenses caused by, incurred or otherwise arising from or relating to each Dual Employee, in each case during such period. Absent any changes to employee reimbursement, as set forth in Section 2.02, such costs and expenses are equal to $416,000 per month.

"***Affiliate***" means a Person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, a specified Person. The term "***control***" (including, with correlative meanings, the terms "***controlled by***" and "***under common control with***") means the possession of the power to direct the management and policies of the referenced Person, whether through ownership interests, by contract or otherwise.

"***Agreement***" has the meaning set forth in the preamble.

"***Allocation Percentage***" has the meaning set forth in Section 3.01.

"***Dual Employee***" has the meaning set forth in Section 2.01.

"***Effective Date***" has the meaning set forth in the preamble.

"***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.

"***Tax***" or "***Taxes***" means: (i) all state and local sales, use, value-added, gross receipts, foreign, privilege, utility, infrastructure maintenance, property, federal excise and similar levies, duties and other similar tax-like charges lawfully levied by a duly constituted taxing authority against or upon the Shared

Services and the Shared Assets; and (ii) tax-related surcharges or fees that are related to the Shared Services and the Shared Assets identified and authorized by applicable tariffs.

ARTICLE II
EMPLOYEE REIMBURSEMENT

Section 2.01 Employee Reimbursement. During the Term, HCMFA shall reimburse HCMLP for the Actual Cost to HCMLP of certain employees who (i) are dual employees of HCMLP and HCMFA and (ii) provide advice to any investment company registered under the Investment Company Act of 1940, as amended (the "***1940 Act***") pursuant to an investment advisory agreement between HCMFA and such investment company (each, a "***Fund***") under the direction and supervision of HCMFA (each, a "***Dual Employee***").

Section 2.02 Changes to Employee Reimbursement. During the Term, the Parties may agree to modify the terms and conditions of HCMFA's reimbursement in order to reflect new procedures or processes, including modifying the Allocation Percentage (defined below) applicable to such Dual Employee to reflect the then current fair market value of such Dual Employee's employment. The Parties will negotiate in good faith the terms of such modification.

ARTICLE III
COST ALLOCATION

Section 3.01 Actual Cost Allocation Formula. The Actual Cost of any Dual Employee relating to the investment advisory services provided to a Fund shall be allocated based on the Allocation Percentage. For purposes of this Agreement, "***Allocation Percentage***" means the Parties' good faith determination of the percentage of each Dual Employee's aggregate hours worked during a quarter that were spent on HCMFA matters, as listed on Exhibit A.

ARTICLE IV
PAYMENT OF COST AND REVENUE SHARE; TAXES

Section 4.01 Settlement Payments. At any time during the Term, HCMFA may make payment of the amounts that are allocable to it.

Section 4.02 Determination and Payment of Cost. HCMFA shall promptly make payment of the Actual Cost within ten (10) days of the end of each calendar month. Should either Party determine that a change to employee reimbursement is appropriate, as set forth in Section 2.02, the Party requesting the modification shall notify the other Party on or before the last business day of the calendar month.

Section 4.03 Taxes.

(a) HCMFA is responsible for and will pay all Taxes applicable to it, provided, that such payments by HCMFA to HCMLP will be made in the most tax-efficient manner and provided further, that HCMLP will not be subject to any liability for Taxes applicable to the cost of a Dual Employee of HCMFAas a result of such payment by HCMFA. HCMLP will collect such Tax from HCMFA in the same manner it collects such Taxes from other customers in the ordinary course of its business, but in no event prior to the time it invoices HCMFA for costs for which such Taxes are levied. HCMFA may provide HCMLP with a certificate evidencing its exemption from payment of or liability for such Taxes.

(b) HCMFA will reimburse HCMLP for any Taxes collected from HCMLP and refunded to HCMFA. In the event a Tax is assessed against HCMFA that is solely the responsibility of

HCMLP and HCMLP desires to protest such assessment, HCMLP will submit to HCMFA a statement of the issues and arguments requesting that HCMFA grant HCMLP the authority to prosecute the protest in HCMFA's name. HCMFA's authorization will not be unreasonably withheld. HCMLP will finance, manage, control and determine the strategy for such protest while keeping HCMFA reasonably informed of the proceedings. However, the authorization will be periodically reviewed by HCMFA to determine any adverse impact on HCMFA, and HCMFA will have the right to reasonably withdraw such authority at any time. Upon notice by HCMFA that it is so withdrawing such authority, HCMLP will expeditiously terminate all proceedings. Any adverse consequences suffered by HCMLP as a result of the withdrawal will be submitted to litigation pursuant to Section 6.14. Any contest for Taxes brought by HCMLP may not result in any lien attaching to any property or rights of HCMFA or otherwise jeopardize HCMFA's interests or rights in any of its property.

(c) The provisions of this Section 4.03 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 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 5.02. 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
MISCELLANEOUS

Section 6.01 No Partnership or Joint Venture; Independent Contractor. Nothing contained in this Agreement will constitute or be construed to be or create a partnership or joint venture between or among HCMLP or HCMFA or their respective successors or assigns. The Parties understand and agree that this Agreement does not make any of them an agent or legal representative of the other for any purpose whatsoever. Neither 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.

Section 6.02 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 6.03 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 6.04 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.

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Section 6.06 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 6.07 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 6.08 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 6.09 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 any rights or remedies of any nature whatsoever under or by reason of this Agreement.

Section 6.10 Notices. All notices, demands and other communications to be given or delivered under or by reason of the provisions of this Agreement will be in writing and will be deemed to have been given: (i)immediately when personally delivered; (ii) when received by first class mail, return receipt requested; (iii) one day after being sent for overnight delivery by Federal Express or other overnight delivery service; or (iv) when receipt is acknowledged, either electronically or otherwise, if sent by facsimile, telecopy or other electronic transmission device. Notices, demands and communications to the other Parties will, unless another address is specified by such Parties in writing, be sent to the addresses indicated below:

If to HCMLP, addressed to:

Highland Capital Management, L.P.
300 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: General Counsel
Fax: (972) 628-4147

If to HCMFA, addressed to:

Highland Capital Management Fund Advisors, L.P.
200 Crescent Court, Suite 700
Dallas, Texas 75201
Attention: General Counsel
Fax: (972) 628-4147

Section 6.11 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 6.12 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 6.13 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 6.14 Dispute Resolution; Jurisdiction. 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, including, but not limited to, claims sounding in contract, equity, tort, fraud and statute ("Dispute") shall be submitted exclusively to the the courts located in Dallas County, Texas, 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, but not limited to, administrative, arbitration, or litigation, other than the Enforcement Court.

Section 6.15 General Rules of Construction. For all purposes of this Agreement and the Exhibits and Schedules delivered pursuant to this Agreement: (i) the terms defined in Article I have the meanings assigned to them in Article I and include the plural as well as the singular; (ii) all accounting terms not otherwise defined herein have the meanings assigned under GAAP; (iii) all references in this Agreement to designated "Articles," "Sections" and other subdivisions are to the designated Articles, Sections and other subdivisions of the body of this Agreement; (iv) pronouns of either gender or neuter will include, as appropriate, the other pronoun forms; (v) the words "herein," "hereof" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section or other subdivision; (vi) "or" is not exclusive; (vii) "including" and "includes" will be deemed to be followed by "but not limited to" and "but is not limited to, "respectively; (viii) any definition of or reference to any law, agreement, instrument or other document herein will be construed as referring to such law, agreement, instrument or other document as from time to time amended, supplemented or otherwise modified; and (ix) any definition of or reference to any statute will be construed as referring also to any rules and regulations promulgated thereunder.

IN WITNESS HEREOF, each of the Parties has caused this Agreement to be executed by its duly authorized officers as of the day and year first above written.

HIGHLAND CAPITAL MANAGEMENT, L.P.

By: Strand Advisors, Inc., its general partner

By:_____
Name:_____
Title:_____

HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P.

By: Strand Advisors XVI, Inc., its general partner

By:_____
Name:_____
Title:_____

EXHIBIT A

EMPLOYEE ALLOCATIONS
(AS OF JANUARY 1, 2018)

EMPLOYEE NAME	PERCENTAGE (%) ALLOCATION TO HCMFA ADVISORS, L.P.
Abayarathna, Sahan	29%
Baynard, Cameron	29%
Burns, Nathan	10%
Covitz, Hunter	5%
Desai, Neil	5%
Dondero, James	30%
Fedoryshyn, Eric	29%
Gray, Matthew	29%
Gulati, Sanjay	100%
Hayes, Christopher	29%
Hill, Robert	5%
McFarling, Brandon	29%
Moore, Carl	5%
Nikolayev, Yegor	29%
Owens, David	29%
Parker, Trey	30%
Parmentier, Andrew	40%
Phillips, Michael	29%
Poglitsch, Jon	75%
Ryder, Phillip	5%
Sachdev, Kunal	29%
Smallwood, Allan	29%
Staltari, Mauro	29%
Tomlin, Jake	29%
Vira, Sagar	29%