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

In re: Highland Capital Management, L.P.[1] *Debtor*.	Chapter 11 Case No. 19-34054 (SGJ)
Charitable DAF Fund, L.P., *Plaintiff*, v. Alvarez & Marsal CRF Management, LLC *Defendant*.	Adversary No. 24-03073

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF STANDING AND JUDGMENT ON THE PLEADINGS

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

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Defendant Alvarez & Marsal CRF Management, LLC ("A&M") respectfully submits this brief in support of its motion to dismiss Plaintiff's claim for breach of fiduciary duty relating to A&M's handling of bankruptcy claims on behalf of the "Crusader Funds" against debtor Highland Capital Management, L.P. ("Highland"). The claim asserted by Plaintiff Charitable DAF Fund, L.P. ("DAF") is a derivative claim belonging to a Bermuda company, in which DAF claims to be a shareholder. Because DAF does not satisfy the requirements that would permit DAF to maintain a derivative claim under Federal Rule of Bankruptcy Procedure 7023.1 or Bermuda law, DAF lacks standing and its fiduciary duty claim must be dismissed. A&M is also entitled to judgment on the pleadings dismissing DAF's fiduciary duty claim because DAF fails to state a claim against A&M for matters relating to its handling of the bankruptcy claim.

FACTUAL BACKGROUND

DAF commenced this action on August 15, 2022, by filing a Petition in the District Court for the 116th Judicial District, Dallas County, Texas. *See* Ex. 1 p. 1, Pet. As initially pled in its Petition and in a First Amended Petition filed on November 6, 2023 (Ex. 2 p. 14, First Am. Pet.), DAF's claims arose out of its assertion that it was a shareholder in Highland Crusader Fund II, Ltd. ("Crusader Fund II"), a Bermuda company for which A&M serves as investment manager, and that A&M had improperly "refused to make distributions to DAF and treated DAF's Direct Interest as having been extinguished." Ex. 2 p. 17, First Am. Pet. ¶ 11; *see also* Ex. 1 p. 5, Pet. ¶ 11 ("DAF's damages arise out of A&M's refusal to recognize DAF's right to control DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, and A&M's decision, instead, to unlawfully withhold the same even though it should be distributed to DAF.").[2]

[2] Crusader Fund II was one of four investment funds collectively referred to as the "Crusader Funds." Ex. 3 p. 30, Second Am. Pet. ¶ 8 n.1.

A&M filed an Answer to Petition including a general denial of all allegations, demands, causes of action, and claims for relief set forth in the Petition. Ex. 4 p. 6, Answer ¶ 1. Pursuant to Texas Rule of Civil Procedure 92, "[w]hen the defendant has pleaded a general denial, and the plaintiff shall afterward amend his pleading, such original denial shall be presumed to extend to all matters subsequently set up by the plaintiff." TEX. R. CIV. P. 92.

As DAF's First Amended Petition acknowledged, after the filing of this lawsuit, A&M caused Crusader Fund II to distribute to DAF its previously withheld distributions, and included DAF in subsequent distributions. Ex. 2 p. 18, First Am. Pet. ¶ 16. Those distributions should have mooted the action, but DAF refused to dismiss the action and instead tried to use the pendency of this action to seek discovery about entirely unrelated matters—specifically, A&M's handling of the Crusader Funds' bankruptcy claims against Highland, and the subsequent sale of those claims to a third party.

Thus, on July 29, 2024, DAF served on A&M a Second Set of Interrogatories and Requests for Production (Ex. 5 pp. 53, 66, Second Set of Interrogs. and Reqs. for Produc.) that sought extensive information and document production relating to A&M's efforts to market and the ultimate consummation of a sale of the bankruptcy claims, the terms of offers and the final sale agreement, and the involvement of James Seery, the Debtor's then-CEO, in that process (*Id.* pp. 60-65). But in apparent recognition that such matters were outside the scope of its then-pending claims, DAF filed a Second Amended Petition on August 28, 2024. Ex. 3 pp. 28–44, Second Am. Pet.

The Second Amended Petition added a new batch of factual allegations in a section entitled "Sale of Claims." *Id.* pp. 33–36, ¶¶ 17–26. DAF alleges that A&M and the Redeemer Committee initially filed proofs of claim on behalf of the Crusader Funds against Highland in

excess of $214 million, but then A&M improperly allowed the Redeemer Committee to negotiate a settlement reducing the allowed claims to $136.7 million. *Id.* pp. 33–34, ¶¶ 20–22. DAF further alleges that A&M then sold the Crusader Funds' claims for only 50% of the allowed amount. *Id.* pp. 34–35, ¶ 23. DAF claims that if A&M had simply held the claims rather than sell them, "the Crusader Funds' investors would have received an additional $30 million over what was paid for the Claims." *Id.* p. 35, ¶ 24. DAF asserts that this constituted a breach of A&M's fiduciary duty to "ensure that the sale of the Claims was in the best interests of all investors." *Id.* p. 37, ¶ 31.

Following the assertion of this new claim, A&M removed the action to this Court on September 13, 2024. Dkt. 1.

LEGAL STANDARD

A plaintiff cannot bring a direct claim against a company as an individual shareholder where that claim properly belongs to the company itself and must be brought derivatively. *Erie Cnty. Emps. Ret. Sys. v. Isenberg*, 2012 WL 3100463 (S.D. Tex. 2012), at *3–4 (applying Bermuda law); *see Smith v. Waste Mgmt. Inc.*, 407 F.3d 381, 384–85 (5th Cir. 2005) (applying Delaware law and requiring that a direct claim must "allege a 'special injury' distinct from that suffered by other shareholders or a wrong involving one of his contractual rights as a shareholder"); Ex. 6 p. 79, Decl. Christian Luthi ¶ 27. To bring a derivative claim in this Court, a plaintiff must satisfy the strict requirements of Federal Rule of Bankruptcy Procedure 7023.1, which applies Federal Rule of Civil Procedure 23.1 to adversary proceedings. FED. R. BANKR. P. 7023.1.

To satisfy the requirements of Rule 23.1, a plaintiff must "state with particularity: (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and,

if necessary, from the shareholders or members; and (B) the reasons for not obtaining the action or not making the effort." FED. R. CIV. P. 23.1(b)(3)(A–B). The substance of any required demand is to be determined by the law of the place of incorporation of the company, here, Bermuda law. TEX. BUS. ORGS. CODE ANN. § 1.102 (West 2023) ("…[T]he law of the state or other jurisdiction in which that foreign governmental authority is located governs the formation and internal affairs of the entity."); *Cruz v. Reid-Anderson*, 711 F. Supp. 3d 642, 645 (N.D. Tex. 2024) (citing *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 92–99 (1991)) (federal courts look to the law of the place of incorporation in evaluating the substance of a shareholder's derivative claim and demand).

Federal Rule of Bankruptcy Procedure 7012 applies Federal Rule of Civil Procedure 12(c) to an adversary proceeding. FED. R. BANKR. P. 7012. Under Rule 12(c), a motion for judgment on the pleadings is evaluated under the same standard "as that applied to Rule 12(b)(6)." *Vardeman v. City of Houston*, 55 F.4th 1045, 1049 (5th Cir. 2022) (citing *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312, 313 n. 8 (5th Cir. 2002)). To survive a motion for judgment on the pleadings, a plaintiff must plead facts sufficient "to state a claim to relief that is plausible on its face." *Laviage v. Fite*, 47 F.4th 402, 405 (5th Cir. 2022) (citing *Waller v. Hanlon*, 922 F.3d 590, 599 (5th Cir. 2019)). A claim is plausible only when "the plaintiff has pleaded factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Bunker v. Dow Chemical Co.*, 111 F.4th 683, 685 (5th Cir. 2024) (quotations omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

ARGUMENT

A&M moves to dismiss DAF's fiduciary duty claim for lack of standing under Federal Rule of Bankruptcy Procedure 7023.1 and for failure to state a claim under Federal Rule of

Bankruptcy Procedure 7012. FED. R. BANKR. P. 7012, 7023.1. Plaintiff attempts to assert a claim on its own behalf that is, in reality, a derivative claim belonging to Crusader Fund II.

Plaintiff makes no attempt to characterize its claim, made on behalf of all shareholders, as a derivative claim. Plaintiff pleads no facts demonstrating any effort to "obtain the desired action" from the Crusader Fund II board or shareholders. FED. R. CIV. P. 23.1(b)(3)(A). Plaintiff has also not pled any facts, let alone particularized facts, demonstrating "the reasons for not obtaining [] action" from the board. *Id.* 23.1(b)(3)(B). For these reasons, DAF's breach of fiduciary duty claim related to the Highland bankruptcy claims must be dismissed for lack of standing and failure to state a claim.

A. Bermuda Law Applies to DAF's Claim

Bermuda law governs Plaintiff's derivative claim on behalf of Crusader Fund II. *Cruz*, 711 F. Supp. 3d at 645. Federal courts in the Fifth Circuit look to the state where the action was filed and apply its choice of law rules. *Centerboard Secs., L.L.C. v. Benefuel, Inc.*, 730 F. App'x 179, 182 (5th Cir. 2018) ("A federal court is required to follow the choice of law rules of the state in which it sits.") (quoting *Resolution Tr. Corp. v. Northpark Joint Venture*, 958 F.2d 1313, 1318 (5th Cir. 1992)); *see Cruz*, 711 F. Supp. 3d, at 645.

The Second Amended Petition was filed in the State of Texas; therefore, this Court should apply Texas choice of law principles. Under Texas law, the law of the state of incorporation of a company governs the internal affairs of a company and therefore controls the substance of the derivative claim and demand requirement. TEX. BUS. ORGS. CODE ANN. § 1.102 (West 2023); *Cruz*, 711 F. Supp. 3d at 645 (citing *Kamen*, 500 U.S. at 92–99). Crusader Fund II is a Bermuda mutual fund company. Ex. 6 p. 73, Luthi Decl. ¶ 8. The law of Crusader Fund II's place of incorporation will determine the substantive derivative claim and demand requirements. TEX. BUS. ORGS. CODE ANN. § 1.102 (West 2023); *Cruz*, 711 F. Supp. 3d at 645. Demand on the

company or explanation of the futility of demand, in compliance with Bermuda law, must be pled in this Court with particularity under Federal Rule of Bankruptcy Procedure 7023.1. FED. R. BANKR. P. 7023.1; *see* Ex. 6 p. 85, Luthi Decl. ¶ 37.

B. DAF's Claim Is Derivative and Not Direct

DAF's claim that A&M breached its fiduciary duties when it mismanaged and/or received inadequate compensation for the bankruptcy claims against Highland is derivative and must be dismissed for lack of derivative standing. A claim is derivative where the harm being alleged is attributable to the company and not to an individual shareholder. *Cruz*, 711 F. Supp. 3d at 645 ("A shareholder has 'no standing to bring [a] civil action at law against faithless directors and managers,' because the corporation—not the shareholder—suffers the injury.") (quoting *Lewis v. Knutson*, 699 F.2d 230, 237–38 (5th Cir. 1983)); Ex. 6 pp. 79–80, Luthi Decl. ¶¶ 27–30 (differentiating between direct and derivative claims under Bermuda law). Furthermore, a claim is derivative and not direct where the company alone is entitled to the recovery. *Cruz*, 711 F. Supp. 3d at 645; *see* Ex. 6 p. 79, Luthi Decl. ¶ 28.

DAF alleges that "A&M abdicated—to the Redeemer Committee—its duties to manage Crusader Fund II's assets, thereby failing to ensure fair treatment of all interest holders and maximization of recovery." Ex. 3 p. 34, Second Am. Pet. ¶ 22. Where a claim by a company's shareholder is made on a basis that is not unique to itself, but is common to all shareholders, it must be brought derivatively on behalf of the company. *Cruz*, 711 F. Supp. 3d at 645 (citing *Lewis*, 699 F.2d at 238 (5th Cir. 1983)); *see* Ex. 6 pp. 81-83, Luthi Decl. ¶¶ 31–33. Under Bermuda law, courts apply the proper plaintiff rule of *Foss v. Harbottle*. Ex. 6 p. 79, Luthi Decl. ¶ 27. Under the proper plaintiff rule, only the company can seek redress for a loss by the company, unless the suing shareholder pleads an exception to the rule. *Id.* pp. 79–80, ¶¶ 27–30. Exceptions to the rule in *Foss v. Harbottle* allow shareholders of a Bermuda company to bring

derivative claims under very limited circumstances. *Id.* pp. 81, ¶ 33. A derivative claim is the only means by which a shareholder can seek redress for a harm to the company. *Id.* pp. 81–83, ¶¶ 31–33. With respect to the alleged mismanagement of the Crusader Funds' bankruptcy claim, DAF is not alleging that it was harmed separately and apart from the way other shareholders of Crusader Fund II were harmed. *See* Ex. 3 pp. 34, 37–38, Second Am. Pet. ¶¶ 22, 31. Instead, the loss that DAF alleges occurred is a loss to the company itself. DAF makes clear that the alleged "abdicat[ion]" of A&M's fiduciary duties as investment manager of Crusader Fund II allegedly harmed "all interest holders." *Id.* p. 34, ¶ 22. A claim for breach of fiduciary duty on behalf of "all interest holders" is a loss by the company, not by the shareholder, and any claim for that loss must be derivative. *Id.*; *see Cruz*, 711 F. Supp. 3d at 645; Ex. 6 pp. 79, 81–83, Luthi Decl. ¶¶ 27, 33.

DAF purports to allege a direct claim based on the fact that "the Crusader Funds' investors would have received an additional $10 million" had A&M held the claims for a year after confirmation of the plan, and had it held the claims until 2024, "investors would have received an additional $30 million" above the amount A&M sold the claims for. Ex. 3, Second Am. Pet. ¶ 24. This allegation is further evidence that the alleged harm is to Crusader Fund II and not direct harm to DAF. DAF does not allege any facts that had A&M waited, it would uniquely be entitled to more than its pro rata share of the Crusader Fund II's recovery. *See Smith*, 407 F.3d at 384–85; *Cruz*, 711 F. Supp. 3d at 645; Ex. 6 p. 87, Luthi Decl. ¶¶ 42–44.

DAF's allegation that A&M's sale of the Claims was "deliberately timed to either (a) avoid any distributions to DAF, or (b) appease the Redeemer Committee's apparent need for liquidity rather than holding onto the Claims to maximize the realization on those assets" does not create a direct claim against A&M. Ex. 3 p. 35, Second Am. Pet. ¶ 25. Plaintiff attempts to

bolster this allegation by further alleging that such action was part of a purported scheme to "allow[] the Redeemer Committee to dominate the management of the Claims in derogation of A&M's fiduciary duties as investment manager, to DAF's detriment . . ., rather than managing the Claims to maximize the return on those assets." *Id.* p. 38, ¶ 31. To make a direct claim, DAF needed to allege facts that demonstrate how A&M's action were harmful exclusively to DAF and were not a loss incurred by the company. *Cruz*, 711 F. Supp. 3d at 645; *see Smith*, 407 F.3d at 384–85; Ex. 6 pp. 79, 87, Luthi Decl. ¶¶ 27, 42–44. What DAF fails to acknowledge is that any failure to "maximize returns" on the sale of the claims would be a harm suffered solely by Crusader Fund II. Any harm suffered by DAF would only be because of its interest in Crusader Fund II. DAF goes so far as to say that A&M's actions needed to be "in the best interest[] of all investors[.]" Ex. 3 p. 37, Second Am. Pet. ¶ 31. Such an allegation essentially admits that any harm supposedly suffered by DAF was in fact a harm to "all investors" and not a direct harm to DAF. DAF's claim is derivative because it is solely based on a purported loss incurred by the company.

C. DAF Cannot Satisfy the Requirements to Bring a Derivative Claim under Bermuda Law or Federal Rule of Bankruptcy Procedure 7023.1

Because DAF's fiduciary duty claim with respect to the bankruptcy claims is derivative and not direct, it must satisfy the particularized pleading requirements for a derivative claim under Federal Rule of Bankruptcy Procedure 7023.1. Plainly, having not even acknowledged that the claim is derivative rather than direct, it has not satisfied the derivative pleading requirement.

As a preliminary matter, DAF did not make a pre-suit demand on Crusader Fund II under Federal Rule of Bankruptcy Procedure 7023.1 or Bermuda law. FED. R. BANKR. P. 7023.1; *see* Ex. 6 p. 87, Luthi Decl. ¶ 45. Thus, the analysis begins and ends with whether DAF has pled

with particularity "the reasons for not obtaining the [desired] action" from Crusader Fund II. FED. R. CIV. P. 23.1(b)(3)(B). DAF has not pled any facts, let alone particularized facts, to support a showing that it satisfies the "fraud on the minority" exception to the rule in *Foss v. Harbottle*, or that it was otherwise excused from seeking action from Crusader Fund II on its breach fiduciary duty claim. Ex. 6 pp. 87–89, Luthi Decl. ¶¶ 45–47. Therefore, DAF's derivative claim must be dismissed.

Bermuda law, which follows English common law, creates a high bar for a shareholder to bring a derivative claim. *See Erie Cnty. Emps. Ret. Sys.*, 2012 WL 3100463, at *3–4 (discussing Bermuda derivative law); Ex. 6 pp. 83–86, Luthi Decl. ¶¶ 35–41. Derivative actions in "Bermuda follow[] the rule in *Foss v. Harbottle*, which holds that the proper plaintiff in a suit addressing a wrong done to a company is the company itself." *Erie Cnty. Emps. Ret. Sys.*, 2021 WL 3100463, at *3 (quotations omitted) (citing *Clark v. Energia Global Int'l, Ltd.*, [2001] S.C. 173 at 10 (Berm. Sup. Ct.)); *see City of Harper Woods Emps. Ret. Sys. v. Olver*, 589 F.3d 1292, 1294–95 (D.C. Cir. 2009) ("[T]he rule of *Foss v. Harbottle* [] establishes that the company, not a shareholder, is the proper plaintiff in a suit seeking redress for wrongs allegedly committed against the company."); Ex. 6 p. 79, Luthi Decl. ¶ 27. There are only a handful of recognized exceptions to the rule in *Foss*; here, the only one that could conceivably apply is "if the alleged wrong qualifies as a 'fraud on the minority,'" *Erie Cnty. Emps. Ret. Sys.*, 2012 WL 3100463, at *4; Ex. 6 pp. 81–82, Luthi Decl. ¶ 33. It is the plaintiff's burden to show that the company is not the "proper plaintiff" with respect to a loss by the company. Ex. 6 pp. 85–86, Luthi Decl. ¶ 39. Furthermore, any claim by a shareholder cannot move forward derivatively unless the plaintiff can "establish a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in Foss v Harbottle."

Id. ¶ 41 (quoting *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No 2)* [1982] Ch 204 at 219).

Here, DAF does not plead any facts, let alone particularized facts, that the company is entitled to the relief sought or that DAF has met the fraud on the minority exception under *Foss v. Harbottle*. To plead fraud on the minority under Bermuda law, in compliance with the derivative claim requirements of this Court, DAF must allege particularized facts showing that A&M "exercise[d] *de facto* control over" Crusader Fund II and "engage[d] in conduct sufficient to establish the requisite self-dealing[.]" *Erie Cnty. Emps. Ret. Sys.*, 2012 WL 3100463, at *6 (quotations omitted); FED. R. BANKR. P. 7023.1; Ex. 6 p. 83, Luthi Decl. ¶ 36 (under Bermuda law "[m]ere negligence is not sufficient to bring a case within the '*fraud on the minority*' exception unless the negligence is coupled with a personal benefit to the wrongdoer").

Fraud in this context "is not actual fraud but instead is self-dealing 'in which control is misused to benefit the wrongdoers at the company's expense.'" *Erie Cnty. Emps. Ret. Sys.*, 2012 WL 3100463, at *5 (quoting *In re Tyco Int'l, Ltd.*, 340 F. Supp. 2d 94, 99 (D.N.H. 2004)); Ex. 6 pp. 83–85, Luthi Decl. ¶¶ 35–38 (fraud on the minority is encapsulated by conduct that is wrongful, and where those in control of the voting power of the company received an improper benefit corresponding to a loss to the company). Specifically, a plaintiff seeking to pursue a derivative claim under this exception must show that the alleged wrongdoers "profited at the expense of the company through self-dealing" and that "the wrongdoers are in voting control of the company." *In re BP p.l.c. Derivative Litig.*, 507 F. Supp. 2d 302, 311 (S.D.N.Y. 2007); Ex. 6 pp. 83–85, Luthi Decl. ¶¶ 35–38.

A&M lacks the requisite "control" over Crusader Fund II to fall within the exception to *Foss v. Harbottle*. *Erie Cnty. Emps. Ret. Sys.*, 2012 WL 3100463, at *4; Ex. 6, Luthi Decl. ¶¶ 38,

46. Here, DAF has alleged only that A&M is the investment manager of Crusader Fund II, which is not enough to show control under Bermuda law. Ex. 6 pp. 85, 87–89, Luthi Decl. ¶¶ 38, 46 (Bermuda law requires showing of control with respect to the voting power of shareholders); *see* Ex. 3 pp. 30–31, Second Am. Pet. ¶ 10. Under Bermuda law and Rule 7023.1, DAF must plead particularized facts showing that A&M "commanded a majority of" the voting power of the shares of Crusader Fund II. A&M is not the majority shareholder in Crusader Fund II—and indeed is not alleged to own any shares at all. Therefore, DAF cannot plead with particularity that the fraud on the minority exception applies to its derivative claim because A&M does not exercise voting control over Crusader Fund II.

Independently, DAF has failed to plead particularized facts showing that A&M "misused [its control] to benefit [A&M] at the company's expense." *Erie Cnty. Emps. Ret. Sys.*, 2012 WL 3100463, at *5 (quoting *Tyco*, 340 F. Supp. 2d at 99); Ex. 6 pp. 87–89, Luthi Decl. ¶ 46. DAF alleges that "A&M breached its fiduciary duties to Crusader Fund II's other shareholders like DAF" when it negotiated the sale of the bankruptcy claims. Ex. 3 p. 37, Second Am. Pet. ¶ 31. Conspicuously lacking, however, is any allegation that A&M stood to benefit at the expense of the company by selling the claims when it did, or for the (allegedly) insufficient amount. DAF makes illusory references to how A&M is compensated, but that is not sufficient to show that A&M's actions were self-dealing. In fact, other than on information and belief, DAF has not made any specific allegations as to how or why A&M supposedly preferred the Redeemer Committee over DAF and other shareholders. Its conclusory allegations are plainly lacking the particularity required by Rule 7023.1. DAF's breach of fiduciary duty claim must be dismissed for lack of standing because DAF does not allege any facts, let alone particularized facts, that

A&M had control of the company that it misused to its benefit as required by the "fraud on the minority" exception.

D. DAF Fails to State a Claim for Breach of Fiduciary Duty

In addition to lacking standing to bring the derivative claim on behalf of Crusader Fund II, DAF's breach of fiduciary duty claim related to the sale of the Highland bankruptcy claims fails to state a claim for which relief can be granted. In order to survive a motion for judgment on the pleadings, DAF must "state a claim to relief that is plausible on its face." *Taylor v. Root Ins. Co.*, 109 F.4th 806, 808 (5th Cir. 2024) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *Laviage*, 47 F.4th at 405 (applying the Rule 12(b)(6) standard to a motion for judgment on the pleadings under Rule 12(c)). For DAF's breach of fiduciary duty claim to be plausible, it must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Bunker*, 111 F.4th at 685 (quoting *Iqbal*, 556 U.S. at 678). Here, DAF has not pled sufficient facts to show that A&M acted in bad faith or wholly irrationally, and therefore, the Court should not interfere with the "bona fide management decisions made by the directors (or those in control of management)." Ex. 6 p. 89, Luthi Decl. ¶ 49.

Under Bermuda law, "it is for the directors themselves to determine acting in good faith how best to promote the success of" the company. Ex. 6 p. 89, Luthi Decl. ¶ 51 (parentheses omitted). To show that a decision was not "bona fide" a plaintiff must plead facts showing that management of the company acted "other than in good faith[.]" *Id.* p. 90, ¶¶ 53–54. The intentions of management are paramount and "an absence of good faith can be inferred from the irrational nature of the conduct in issue, but it remains the case that the state of mind of the director concerned is what matters[.]" *Id.* p. 90, ¶ 54. Even if management's actions were irrational, "unreasonable or taken in mistaken belief that the course of action [was] in the best

interests of the company," Bermuda courts will not second guess management's actions. *Id.* p. 90, ¶ 55.

DAF pleads no facts that support an inference that A&M's purported abdication of responsibility for the recovery and sale of the bankruptcy claims to the Redeemer Committee breached A&M's fiduciary duties. For a court applying Bermuda law, to inquire into the propriety of management decisions, there must be a showing of bad faith, or the decision must be so irrational as to indicate bad faith. *Id.* p. 90, ¶¶ 53–55. Here, DAF fails to show that A&M acted in bad faith or wholly irrationally. First, DAF fails to show that A&M's purported abdication took place; merely stating that it occurred does not make it so. *See* Ex. 3 pp. 31, 34, 37, Second Am. Pet. ¶¶ 11–12, 22, 30. Second, DAF does not allege any facts to show how such an abdication, if it took place, was improper. *See id.* In fact, any purported abdication could not be improper because it would not be outside A&M's authority under Bermuda law and the Investment Management Agreement. Ex. 6 pp. 89, 91–92, Luthi Decl. ¶¶ 50 n. 14, 57; Ex. 7 p. 97, August 4, 2016, Investment Management Agreement ("IMA") § 1.(b) (granting A&M broad discretion to manage the assets and liabilities of the Crusader Funds and to delegate its authority). DAF cannot state a claim for breach of fiduciary duty because it has not shown that any purported abdication was improper or presented any basis to challenge A&M's ability to delegate authority to the Redeemer Committee. Ex. 6 pp. 91–92, Luthi Decl. ¶ 57; Ex. 7 p. 97, IMA § 1.(b).

DAF does not allege any facts showing that A&M actually preferred the Redeemer Committee's interests in a way that breached its fiduciary duties. *See* Ex. 6 pp. 91–92, Luthi Decl. ¶ 57. To state a claim for breach of fiduciary duty based on this purported preference, DAF would need to plead facts showing that A&M not only preferred the Redeemer Committee,

but that such preference was in bad faith or so irrational as to imply bad faith. *Id.* pp. 90, 91–92, ¶¶ 54–55, 57.

Here, DAF does not allege any facts to support "a claim to relief that is plausible on its face." *Taylor*, 109 F.4th at 808. DAF pleads that A&M orchestrated the timing of the sale of the claims to benefit the Redeemer Committee and harm DAF, but pleads no facts showing how such timing was otherwise than in good faith. Ex. 2 p. 22, First Am. Pet. ¶ 31; Ex. 6 pp. 91–92, Luthi Decl. ¶ 57. Even if A&M could have potentially managed the Highland bankruptcy claims more lucratively, it does not mean that A&M's decision was improper and is subject to judicial scrutiny. *See* Ex. 6 pp. 91–92, Luthi Decl. ¶ 57.

CONCLUSION

For the foregoing reasons, this Court should dismiss DAF's claim for breach of fiduciary duty, under Federal Rules of Bankruptcy Procedure 7023.1 and 7012.

Dated: November 15, 2024

Respectfully submitted,

By: */s/ John T. Cox III*

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EXHIBIT INDEX

Exhibit 1

DC-22-10107

CASE NO. _____

CHARITABLE DAF FUND, L.P., *Plaintiff,*	§	IN THE DISTRICT COURT
VS.	§	DALLAS COUNTY, TEXAS
ALVAREZ & MARSAL, CRF MANAGEMENT, LLC *Defendant.*	§	116th _____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION AND JURY DEMAND

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, Charitable DAF Fund, L.P. ("DAF"), and files this Original Petition and Jury Demand against Defendant Alvarez & Marsal CRF Management, LLC ("A&M" or "Defendant"), and respectfully shows the following:

I. DISCOVERY PLAN

1. Plaintiff asserts that discovery should be conducted under Level 3 pursuant to Texas Rules of Civil Procedure 190.1 and 190.4.

II. PARTIES

2. DAF is a limited partnership organized in the Cayman Islands. DAF conducts charitable activities in the State of Texas.

3. A&M is a foreign limited liability company organized and existing under the laws of the State of Delaware. A&M engages in business in Texas but has not designated or maintained a resident agent for service of process in Texas. A&M may be served with process by serving the Texas Secretary of State at 1019 Brazos Street, Austin,

Texas 78701, who is requested to forward process to A&M's Registered Agent for service in the State of Delaware: Alvarez & Marsal CRF Management, LLC, Corporation Service Company, 251 Little Falls Drive, Wilmington, Delaware 19808. Tex. Civ. Prac. & Rem. Code Ann. § 17.044.

III. JURISDICTION AND VENUE

4. This Court has jurisdiction over this action as DAF seeks monetary relief over $1,000,000.00. The damages sought by DAF are within the jurisdictional limits of the Court.

5. Venue is proper under Texas Civil Practice and Remedies Code § 15.002(a)(1) because all or a substantial part of the events or omissions giving rise to this claim occurred in Dallas County, Texas.

6. This Court has personal jurisdiction over A&M because: (i) A&M is and has been doing business in Texas pursuant to section 17.042 of the Texas Civil Practices and Remedies Code (ii) A&M has purposefully availed itself of the benefits and protections offered by the State of Texas by conducting business in this State; (iii) A&M has committed wrongful acts within this State, and (iv) A&M's conduct in and contacts with this State give rise to or relate to the causes of action alleged herein.

IV. FACTUAL BACKGROUND

7. DAF's exclusive mission involves charity. Since 2012, DAF's supporting organizations committed over $42 million to nonprofit organizations and funded

approximately $32 million of total commitments. These charitable causes include education, military veterans, first responders, health and medical research, economic and community development initiatives, and youth and family programs in the State of Texas. This lawsuit is necessary because of A&M's improper withholding of assets lawfully owned by and due to DAF and A&M's associated interference with DAF's charitable mission.

8. On or about June 30, 2016, DAF purchased shares in the Highland Crusader Fund II, Ltd. ("Crusader Fund II") from the Promethee T Fund (formerly known as Promethee Tremont Fund) ("Promethee") for in excess of $1.0 million ("DAF's Direct Interest"). DAF is the lawful owner of all beneficial right, title, and interest in and to DAF's Direct Interest and to DAF's Full Direct Interest, as described below. The Crusader Fund II is a segregated, identifiable fund held separate from other funds managed by A&M. A&M has no legitimate claim to DAF's Full Direct Interest, as described below.

9. A&M is the investment manager of the Crusader Fund II and has been so at all times relevant to the claims asserted in this lawsuit. As the investment manager, A&M receives payment from the Crusader Fund II for A&M's management services. Upon information and belief, A&M's compensation is based on the value of Crusader Fund II; accordingly, A&M earns more compensation if Crusader Fund II has more available funds. A&M is improperly exercising control over DAF's Full Direct Interest.

10. DAF previously made a written demand to A&M, through A&M's legal counsel, for payment to DAF of the full value of DAF's Direct Interest, plus all related distributions and other withholdings owed DAF in regard to DAF's Direct Interest ("DAF's Full Direct Interest"). A&M refused to comply with this demand without legal justification. In doing so, A&M continues to deprive DAF of DAF's access to and right to possess and use DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest. In short, A&M is depriving DAF of DAF's property without any appropriate legal basis or justification.

11. Upon information and belief, A&M is a registered investment advisor subject to the Investment Advisors Act of 1940. Notwithstanding its role as a registered investment advisor, A&M has continued to improperly withhold DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, and A&M refuses to distribute equivalent funds to the DAF. A&M entered into an informal confidential and special relationship with DAF. A&M controls and manages funds which DAF has a direct interest. DAF places trust and confidence in A&M to control, manage, and distribute DAF's Full Direct Interest. DAF's damages arise out of A&M's refusal to recognize DAF's right to control DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, and A&M's decision, instead, to unlawfully withhold the same even though it should be distributed to DAF.

V. CAUSES OF ACTION

Count One – Breach of Fiduciary Duties

12. DAF incorporates all of the foregoing factual averments by reference as if set fully set forth herein.

13. A&M is exercising dominion and control over DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest. A&M holds a position of special trust and confidence with DAF regarding DAF's Full Direct Interest. A&M owes DAF common law fiduciary duties arising out of A&M's position of trust and confidence.

14. The fiduciary duties A&M owes DAF include, but are not limited to, the duty of loyalty - to always act in the best interest of the investor, the duty to act with utmost good faith, the duty to refrain from self-dealing, the duty of fair and honest dealing, the duty to act with integrity of the strictest kind, and the duty of candor and full disclosure. Central to the fiduciary duties A&M owes DAF is the duty to not deprive DAF of DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest. A&M's failure and refusal to pay and return the same, even after DAF has made specific written demand for DAF's Full Direct Interest, is intentional misconduct that breaches one or more of the fiduciary duties A&M owes DAF and has caused damage to DAF.

15. A&M is, therefore, liable to DAF for actual damages, punitive damages, and all other relief to which DAF is justly and legally entitled as the result of A&M's breach of fiduciary duties owed to DAF.

Count Two – Conversion

16. DAF respectfully incorporates by reference all of the foregoing factual and legal averments as if fully set forth herein.

17. DAF has ownership of and a right to immediate possession of DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest. A&M has no legitimate claim to DAF's Full Direct Interest or to the Crusader Fund II regarding DAF's Full Direct Interest.

18. The Crusader Fund II funds were delivered to A&M for safekeeping and management. The Crusader Fund II funds were intended to be segregated from other funds managed by A&M.

19. Upon information and belief, A&M continues to hold the Crusader Fund II funds in substantially the same form as received.

20. DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, are separate and identifiable funds held by A&M for the benefit of DAF. DAF has made demand upon A&M to immediately relinquish possession of DAF's Full Direct Interest to DAF. A&M has ignored DAF's demand and A&M continues to

wrongfully exercise dominion and control over DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest.

21. DAF has been deprived of its lawful right to ownership and control of DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, by A&M's unauthorized withholding of the same without a legally correct basis to do so.

22. As a proximate and/or direct result of A&M's conversion of DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, DAF has suffered significant damages for which damages DAF now sues.

23. A&M is, therefore, liable to DAF for actual damages, punitive damages, and all other relief to which DAF is justly and legally entitled as the result of A&M's conversion.

Count Three – Money Had and Received

24. DAF incorporates all of the foregoing factual averments, and the factual and legal averments in Counts One and Two above, by reference as if fully set forth herein and further alleges the following in the alternative.

25. A&M has received and wrongfully holds and retains control over DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest. A&M has benefitted and continues to benefit from receipt of the same. Principles of equity and good conscience require that A&M should not be permitted to keep, in

whole or in part, DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest.

VI. DAMAGES

26. DAF incorporates the foregoing factual averments, and the factual and legal averments in Counts One through Four above, as if fully set forth herein and further alleges the following in the alternative.

27. DAF requests judgment against A&M for all of DAF's actual damages, including, without limitation, direct damages, special damages, consequential damages, lost savings, lost profits, out-of-pocket damages, future damages, and incidental damages, to which DAF is entitled, in addition to punitive or exemplary damages, prejudgment and post-judgment interest at the highest legal rate, and costs of Court.

VII. CONDITIONS PRECEDENT

28. All conditions precedent, if any, to the claims asserted herein have been performed, excused, waived, satisfied, or have otherwise occurred.

VIII. JURY DEMAND

29. DAF demands a trial by jury and tenders the jury fee pursuant to Rule 216 of the Texas Rules of Civil Procedure.

IX. DAF'S RULE 193.7 NOTICE

30. Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, DAF intends to use any and all documents produced in A&M's discovery responses as evidence at the time of any hearing or trial in this matter.

X. REQUEST FOR DISCLOSURES

31. Pursuant to Rule 194 of the Texas Rules of Civil Procedure, A&M is requested to disclose, within fifty (50) days of service of this request, the information or material described in Texas Rule of Civil Procedure l 94.2(a)-(I).

PRAYER

Plaintiff, Charitable DAF Fund, L.P., respectfully requests that Defendant Alvarez & Marsal CRF Management, LLC be cited to appear and answer herein, that this Court grant judgment in DAF's favor over and against said Defendant as set forth herein, for all actual damages DAF has suffered, punitive or exemplary damages, prejudgment and post-judgment interest at the highest rate permitted by law, and that DAF be granted all other and further relief, at law and in equity, general and special, to which DAF may be justly entitled.

Dated: August 15, 2022

Respectfully submitted,

/s/ Sawnie A. McEntire

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ATTORNEYS FOR PLAINTIFF CHARITABLE DAF FUND, L.P.

3106604.1

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

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Exhibit 2

FILED
11/6/2023 4:30 PM
FELICIA PITRE
DISTRICT CLERK
DALLAS CO., TEXAS
Rosa Delacerda DEPUTY

CASE NO. DC-22-10107

CHARITABLE DAF FUND, L.P.,	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
VS.	§	DALLAS COUNTY, TEXAS
	§	
ALVAREZ & MARSAL CRF	§	
MANAGEMENT, LLC	§	
Defendant.	§	116th JUDICIAL DISTRICT

PLAINTIFF'S FIRST AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, Charitable DAF Fund, L.P. ("DAF" or "Plaintiff"), and files this First Amended Petition against Defendant Alvarez & Marsal CRF Management, LLC ("A&M" or "Defendant"), and respectfully shows:

I. DISCOVERY PLAN

1. Plaintiff asserts that discovery should be conducted under Level 3 pursuant to Texas Rules of Civil Procedure 190.1 and 190.4.

II. PARTIES

2. DAF is a limited partnership organized in the Cayman Islands. DAF conducts charitable activities in the State of Texas.

3. A&M is a foreign limited liability company organized and existing under the laws of the State of Delaware. A&M engages in business in Texas but has not designated or maintained a resident agent for service of process in Texas. A&M has generally appeared and answered in this lawsuit.

III. JURISDICTION AND VENUE

4. This Court has jurisdiction over this action as DAF currently seeks monetary relief over $250,000 but not more than $1,000,000. The damages sought by DAF are within the jurisdictional limits of the Court.

5. Venue is proper under Texas Civil Practice and Remedies Code §15.002(a)(1) because all or a substantial part of the events or omissions giving rise to this claim occurred in Dallas County, Texas.

6. This Court has personal jurisdiction over A&M because: (i) A&M is and has been doing business in Texas pursuant to § 17.042 of the Texas Civil Practices and Remedies Code (ii) A&M has purposefully availed itself of the benefits and protections offered by the State of Texas by conducting business in this State; (iii) A&M committed wrongful acts within this State, (iv) A&M's conduct in and contacts with this State give rise to or relate to the causes of action alleged herein; and (v) A&M has submitted to this Court's jurisdiction by appearing and answering in this lawsuit.

IV. FACTUAL BACKGROUND

7. DAF's exclusive mission involves charity. Since 2012, DAF's supporting organizations committed over $42 million to nonprofit organizations and funded approximately $32 million of total commitments. These charitable causes include education, veterans, first responders, health and medical research, economic and community development initiatives, and youth and family programs in the State of

Texas. This lawsuit is necessary because of A&M's improper withholding of assets lawfully owned by and due to DAF and A&M's associated interference with DAF's charitable mission.

8. On or about June 30, 2016, DAF purchased shares in the Highland Crusader Fund II, Ltd. ("Crusader Fund II") from the Promethee T Fund (formerly known as Promethee Tremont Fund) ("Promethee") for in excess of $1.0 million ("DAF's Direct Interest"). In connection with DAF's acquisition of its interest in Crusader Fund II, DAF was required to execute certain Subscription Documents and became a party to (or beneficiary of) Crusader Fund II's Offering Memorandum, Memorandum of Association, By-Laws, and various other agreements governing the relationship between Crusader Fund II and its investors.

9. DAF is the lawful owner of all right, title, and interest in and to DAF's Direct Interest and to DAF's Full Direct Interest, as described below. The Crusader Fund II is a segregated, identifiable fund held separate from other funds managed by A&M. A&M has no legitimate claim to DAF's Full Direct Interest, as described below.

10. A&M is the investment manager of the Crusader Fund II and has been so at all times relevant to the claims asserted in this lawsuit. As the investment manager, A&M receives payment from the Crusader Fund II for A&M's management services. Upon information and belief, A&M's compensation is based on the value of Crusader

Fund II; accordingly, A&M earns more compensation if Crusader Fund II has more available funds.

11. On or about July 12, 2021, A&M informed DAF that DAF's Direct Interest "will not exist as of June 30 NAV." A&M then refused to make distributions to DAF and treated DAF's Direct Interest as having been extinguished.

12. DAF previously made a written demand to A&M, through A&M's legal counsel, for payment to DAF of the full value of DAF's Direct Interest, plus all related distributions and other withholdings owed DAF in regard to DAF's Direct Interest ("DAF's Full Direct Interest"). A&M initially refused to comply with this demand without legal justification. In doing so, A&M deprived DAF of DAF's access to and right to possess and use DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest. In short, A&M deprived DAF of DAF's property without any legal basis or justification.

13. A&M's actions have deprived DAF of the use of its funds, namely the ability to earn profits on such funds to promote charitable causes, for the time period when A&M improperly exercised control over and withheld distributions—and, upon information and belief, while A&M continued to charge additional fees based on an inflated value of the Crusader Fund II.

14. Upon information and belief, A&M is a registered investment advisor subject to the Investment Advisors Act of 1940. Notwithstanding its role as a registered

investment advisor, A&M improperly withheld DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, and A&M refused to distribute equivalent funds to DAF.

15. A&M entered into an informal confidential and special relationship with DAF. A&M controls and manages funds in which DAF has a direct interest. DAF placed trust and confidence in A&M to control, manage, and distribute DAF's Full Direct Interest. DAF's damages arise out of A&M's refusal to recognize DAF's right to control DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, and A&M's decision, instead, to unlawfully withhold the same even though it should have been distributed to DAF.

16. On or about February 17, 2023, after this lawsuit was filed, A&M belatedly transferred $951,060.82 to DAF, in acknowledgement of its prior breaches of its duties as manager of the Crusader Fund II. On or about March 29, 2023, A&M again transferred $139,101.94 to DAF in further acknowledgement of DAF's Direct Interests and effectively confirming A&M's prior breaches of duties.

V. CAUSES OF ACTION

Count One – Breach of Fiduciary Duties

17. DAF incorporates all of the foregoing factual averments by reference as if set fully set forth herein.

18. A&M has exercised and continues to exercise dominion and control over DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest. A&M holds a position of special trust and confidence with DAF regarding DAF's Full Direct Interest. A&M owes DAF common law fiduciary duties arising out of A&M's position of trust and confidence. Upon information and belief, as Investment Manager, the governing documents, including the Offering Memorandum and the advisory management agreements, required A&M to act fairly, equitably, and in accordance with reasonable commercial standards. Upon information and belief, these duties further obligated A&M to not unlawfully and improperly withhold investor's interests, including DAF Direct Interest.

19. The fiduciary duties A&M owes DAF include, but are not limited to, the duty of loyalty—to always act in the best interest of the investor, the duty to act with utmost good faith, the duty to refrain from self-dealing, the duty of fair and honest dealing, the duty to act with integrity of the strictest kind, and the duty of candor and full disclosure. Central to the fiduciary duties A&M owed and continues to owe DAF is the duty to not deprive DAF of DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest. A&M's failure and refusal to pay and return the same, even after DAF made specific written demand for DAF's Full Direct Interest, is intentional misconduct that breached one or more of the fiduciary duties A&M owed and continues to owe DAF and has caused damage to DAF.

20. Because A&M knowingly committed a clear and serious breach of its fiduciary duties to garner additional fees for itself, DAF is entitled to disgorge fees, profits, and/or funds received by A&M in connection with its purported management of the Crusader Fund II during the period it unlawfully withheld DAF's funds.

21. DAF also is entitled to an accounting of its interest in the Crusader Fund II to verify the accuracy of the distributions made to DAF by A&M after this suit was originally filed. This audit is also necessary to confirm all other benefits to which the DAF is entitled but which have been withheld by A&M.

22. A&M is, therefore, liable to DAF for actual damages, disgorgement, exemplary damages, an accounting, and all other relief to which DAF is justly and legally entitled as the result of A&M's breach of fiduciary duties owed to DAF.

Count Two – Conversion

23. DAF incorporates by reference all of the foregoing factual and legal averments as if fully set forth herein.

24. DAF owns and has a right to immediate possession of DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest. A&M had no legitimate claim to DAF's Full Direct Interest or to the Crusader Fund II regarding DAF's Full Direct Interest.

25. The Crusader Fund II funds were delivered to A&M for safekeeping and management. The Crusader Fund II funds were intended to be segregated from other funds managed by A&M.

26. Upon information and belief, A&M held the Crusader Fund II funds in substantially the same form as received.

27. DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, were separate and identifiable funds held by A&M for the benefit of DAF. DAF made demand upon A&M to immediately relinquish possession of DAF's Full Direct Interest to DAF. A&M ignored DAF's demand and A&M wrongfully exercised dominion and control over DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest.

28. DAF was deprived of its lawful right to ownership and control of DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, by A&M's unauthorized withholding of the same without a legally correct basis to do so.

29. As a proximate and/or direct result of A&M's conversion of DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, DAF has suffered significant damages for which damages DAF now sues.

30. A&M is, therefore, liable to DAF for actual damages, punitive damages, and all other relief to which DAF is justly and legally entitled as the result of A&M's conversion.

Count Three – Tortious Interference

31. DAF respectfully incorporates by reference all of the foregoing factual and legal averments as if fully set forth herein.

32. DAF's investment in, and relationship with, Crusader Fund II is the subject of various contracts, including, without limitation, the Crusader Fund II's Subscription Documents, Offering Memorandum, Memorandum of Association, and By-Laws.

33. As investment manager of Crusader Fund II, A&M was and is in possession of these agreements and, during all material time, A&M was aware of the terms of these agreements.

34. Despite knowing that A&M had no right to unilaterally cancel DAF's Direct Interest under any of the relevant transactional documents, A&M did so without justification or excuse.

35. A&M's cancellation of DAF's Direct Interest is a direct interference with A&M's rights and expectancies under the relevant transactional documents, which has proximately caused DAF damages.

36. Because A&M had no business justification for cancelling DAF's Direct Interest—a move that was calculated solely to harm DAF—the only conclusion is that

A&M acted with malicious intent in interfering in the relationship between DAF and Crusader Fund II.

37. A&M is, therefore, liable to DAF for actual damages, punitive damages, and all other relief to which DAF is justly and legally entitled as the result of A&M's tortious interference.

VI. DAMAGES

38. DAF incorporates the foregoing factual averments, and the factual and legal averments in Counts One through Three above, as if fully set forth herein and further alleges the following in the alternative.

39. DAF requests judgment against A&M for all of DAF's actual damages, including, without limitation, direct damages, special damages, consequential damages, lost savings, lost profits, out-of-pocket damages, future damages, and incidental damages, to which DAF is entitled, in addition to punitive or exemplary damages, prejudgment and post-judgment interest at the highest legal rate, and costs of Court.

40. DAF further requests judgment against A&M for disgorgement of all of A&M's fees, profits, and/or other funds received in connection with its purported management of the Crusader Fund II with respect to DAF's interest in that fund during the relevant period when A&M unlawfully withheld DAF's funds, and an accounting of DAF's interest in the Crusader Fund II and of the related fees and expenses charged by A&M.

VII. CONDITIONS PRECEDENT

41. All conditions precedent, if any, to the claims asserted herein have been performed, excused, waived, satisfied, or have otherwise occurred.

VIII. JURY DEMAND

42. DAF demands a trial by jury and tenders the jury fee pursuant to Rule 216 of the Texas Rules of Civil Procedure.

IX. RULE 193.7 NOTICE

43. Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, DAF intends to use any and all documents produced in A&M's discovery responses as evidence at the time of any hearing or trial in this matter.

PRAYER

Plaintiff, Charitable DAF Fund, L.P., respectfully requests that this Court grant judgment in DAF's favor over and against Defendant Alvarez & Marsal CRF Management, LLC as set forth herein, including but not limited to, for an accounting of DAF's interest in the Crusader Fund II and the related fees and expenses charged by A&M, for disgorgement of all of A&M's fees, profits, and/or other funds received by A&M with respect to DAF's interest in that fund during the relevant period when A&M unlawfully withheld DAF's funds, for all actual damages DAF has suffered, for exemplary damages, for disgorgement, prejudgment and post-judgment interest at the highest rate permitted by law, for DAF's costs of court, and that DAF be awarded all

other and further relief, at law and in equity, general and special, to which DAF may be justly entitled.

Dated: November 6, 2023

Respectfully submitted,

/s/ Roger L. McCleary

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ATTORNEYS FOR PLAINTIFF CHARITABLE DAF FUND, L.P.

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2023, a true and correct copy of this instrument was filed and served on all known counsel of record in accordance with the Texas Rules of Civil Procedure via the Court's E-File system.

/s/ Roger L. McCleary
ROGER L. MCCLEARY

3128760.3

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

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Filing Code Description: Amended Petition
Filing Description: FIRST
Status as of 11/7/2023 8:19 AM CST

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Associated Case Party: CHARITABLE DAF FUND LP

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Associated Case Party: Charitable DAF Fund, L.P.

Name	BarNumber	Email	TimestampSubmitted	Status
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Exhibit 3

CASE NO. DC-22-10107

CHARITABLE DAF FUND, L.P.,	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
VS.	§	DALLAS COUNTY, TEXAS
	§	
ALVAREZ & MARSAL CRF MANAGEMENT, LLC,	§	
	§	
Defendant.	§	116th JUDICIAL DISTRICT

PLAINTIFF'S SECOND AMENDED PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, Charitable DAF Fund, L.P. ("**DAF**" or "**Plaintiff**"), and files this Second Amended Petition against Defendant Alvarez & Marsal CRF Management, LLC ("**A&M**" or "**Defendant**"), and for causes of action would respectfully show:

I. DISCOVERY PLAN

1. Plaintiff asserts that discovery should be conducted under Level 3 pursuant to Texas Rules of Civil Procedure 190.1 and 190.4.

II. PARTIES

2. DAF is a limited partnership organized in the Cayman Islands. DAF conducts charitable activities in the State of Texas.

3. A&M is a foreign limited liability company organized and existing under the laws of the State of Delaware. A&M engages in business in Texas but has not

designated or maintained a resident agent for service of process in Texas. A&M has generally appeared and answered in this lawsuit.

III. JURISDICTION AND VENUE

4. This Court has jurisdiction over this action as DAF currently seeks monetary relief over $1,000,000. The damages sought by DAF are within the jurisdictional limits of the Court.

5. Venue is proper under Texas Civil Practice and Remedies Code §15.002(a)(1) because all or a substantial part of the events or omissions giving rise to this claim occurred in Dallas County, Texas.

6. This Court has personal jurisdiction over A&M because: (i) A&M is and has been doing business in Texas pursuant to § 17.042 of the Texas Civil Practices and Remedies Code, (ii) A&M has purposefully availed itself of the benefits and protections offered by the State of Texas by conducting business in this State, (iii) A&M committed wrongful acts within this State, (iv) A&M's conduct in and contacts with this State give rise to or relate to the causes of action alleged herein, and (v) A&M has submitted to this Court's jurisdiction by appearing and answering in this lawsuit.

IV. FACTUAL BACKGROUND

7. DAF's exclusive mission involves charity. Since 2012, DAF's supporting organizations committed over $42 million to nonprofit organizations and funded approximately $32 million of total commitments. These charitable causes include

education, veterans, first responders, health and medical research, economic and community development initiatives, and youth and family programs in the State of Texas. This lawsuit is necessary because of A&M's improper withholding of assets lawfully owned by and due to DAF and A&M's associated interference with DAF's charitable mission.

8. On or about June 30, 2016, DAF purchased shares in the Highland Crusader Fund II, Ltd. ("**Crusader Fund II**")[1] from the Promethee T Fund (formerly known as Promethee Tremont Fund) ("**Promethee**") for in excess of $1.0 million ("**DAF's Direct Interest**"). In connection with DAF's acquisition of this interest, DAF became a party to (or beneficiary of) Crusader Fund II's Subscription Documents, Offering Memorandum, Memorandum of Association, By-Laws, and various other agreements governing the relationship between Crusader Fund II and its investors.

9. DAF is the lawful owner of all right, title, and interest in and to DAF's Direct Interest and to DAF's Full Direct Interest, as described below. The Crusader Fund II is a segregated, identifiable fund held separate from other funds managed by A&M. A&M has no legitimate claim to DAF's Full Direct Interest.

10. A&M is the investment manager of the Crusader Fund II and has been so at all times relevant to the claims asserted in this lawsuit. As the investment manager,

[1] Crusader Fund II is part of an investment scheme with an "Onshore Fund," an "Offshore Fund" (Crusader Fund II), and a "Master Fund," which is collectively referred to as the "**Crusader Funds**."

A&M receives payment from the Crusader Fund II for A&M's management services. Upon information and belief, A&M's compensation is based on the value of Crusader Fund II; accordingly, A&M earns more compensation if Crusader Fund II has more available funds.

A. Withheld Distributions

11. On or about July 12, 2021, A&M informed DAF that DAF's Direct Interest "will not exist as of June 30 NAV."[2] A&M then refused to make distributions to DAF and treated DAF's Direct Interest as having been extinguished.

12. DAF previously made a written demand to A&M, through A&M's legal counsel, for payment to DAF of the full value of DAF's Direct Interest, plus all related distributions and other withholdings owed to DAF in regard to DAF's Direct Interest ("**DAF's Full Direct Interest**"). A&M initially refused to comply with this demand and did so wrongfully without legal justification. In doing so, A&M deprived DAF of DAF's access to and right to possess and use DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest. In short, A&M deprived DAF of DAF's property without any legal basis or justification.

13. A&M's actions deprived DAF of the use of its funds, namely the ability to earn profits on such funds to promote charitable causes, for the time period when A&M

[2] NAV stands for Net Asset Value.

improperly exercised control over and withheld distributions—and, upon information and belief, while A&M continued to charge additional fees based on an inflated value of the Crusader Fund II due to A&M's failure to make timely distributions to DAF.

14. Upon information and belief, A&M is a registered investment advisor subject to the Investment Advisors Act of 1940. Notwithstanding its role as a registered investment advisor, A&M improperly withheld DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, and A&M refused to distribute equivalent funds to DAF.

15. A&M entered into an informal confidential and special relationship with DAF. A&M controls and manages funds in which DAF has a direct interest. DAF placed trust and confidence in A&M to control, manage, and distribute DAF's Full Direct Interest. DAF's damages arise out of A&M's refusal to recognize DAF's right to control DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, and A&M's decision, instead, to unlawfully withhold these funds even though they should have been distributed to DAF.

16. On or about February 17, 2023, after this lawsuit was filed, A&M belatedly transferred $951,060.82 to DAF, effectively acknowledging its prior breaches of its duties as manager of the Crusader Fund II. On or about March 29, 2023, A&M again transferred $139,101.94 to DAF in further acknowledgement of DAF's Direct Interest and again confirming A&M's prior breaches of duties.

B. Sale of Claims

17. Upon information and belief, A&M also preferred the interests of one or more other Crusader Fund II interest holders. When doing so, A&M created, and violated, separate and independent fiduciary duties which should have ensured, but did not, that all Crusader Fund investors were treated fairly, regardless of class.

18. A&M's claimed basis for withholding DAF's Direct Interest was an award issued in a prior arbitration involving Crusader Fund II, styled *Redeemer Committee of the Highland Crusader Fund v. Highland Capital Management, L.P.* This arbitration was a dispute between certain investors in the Crusader Funds, known as the "**Redeemer Committee**," and the Fund's previous investment manager, Highland Capital Management, L.P. ("**HCM**"), which was replaced as investment manager by A&M during the pendency of the arbitration.

19. Ultimately the arbitration panel issued a partial final award, followed by a final award, against HCM in favor of the Redeemer Committee on behalf of the Crusader Funds. Neither DAF nor A&M were parties to the arbitration, and no party ever attempted to confirm the arbitration award against DAF in any civil court. DAF is also not referenced in either the partial or the final awards issued by the arbitration panel.

20. Several months after the final arbitration award was issued, HCM filed bankruptcy and the Redeemer Committee and the Crusader Funds filed overlapping claims in the amount of $190,824,557 against HCM's estate (Claim Nos. 72 and 81) based

on the arbitration award (the "**Claims**"). The Crusader Funds' claim was filed by A&M and also included a claim for $23,483,446 in additional damages for management fees, resulting in a total claim of over $214 million.

21. A&M and the Redeemer Committee then entered into a settlement with HCM which reduced the Claims to the allowed amounts of $136.7 million—in favor of the Redeemer Committee—and $50,000—in favor of the Crusader Funds. A motion to approve the Claims was filed in the bankruptcy court by HCM [Dkt. 1089] ("**Settlement Motion**"), which confirms that A&M allowed the Redeemer Committee to control negotiations concerning funds to which the Crusader Funds asserted entitlement.[3]

22. In doing so, the Redeemer Committee became one of the largest creditors in HCM's bankruptcy estate and held a position on the Unsecured Creditors' Committee, while A&M effectively sat on the sideline abdicating its responsibilities. In effect, A&M abdicated—to the Redeemer Committee—its duties to manage Crusader Fund II's assets, thereby failing to ensure fair treatment of all interest holders and maximization of recovery.

23. In or around April 2021, the approved Claims were sold to a special purpose entity, Jessup Holdings, LLC ("**Jessup**"), which is owned and controlled by a hedge fund, Stonehill Capital Management, LLC ("**Stonehill**"). On July 6, 2021, A&M

[3] Settlement Motion, ¶ 27 (emphasis added).

issued a letter ("**July 6 Letter**") notifying the investors of the Crusader Funds that A&M had brokered this sale, and further disclosing that A&M and the Redeemer Committee sold both Claims for approximately 50% of the allowed amount of the Redeemer Committee's claim alone, or approximately one third of the Crusader Funds' total original claim.

24. HCM has since paid out almost $320 million—$255 million of which had been distributed by the end of Q3 2022.[4] Had A&M done nothing and simply held the Claims for one year after HCM's plan was confirmed the Crusader Funds' investors would have received an additional $10 million, and if A&M had held the Claims through Q2 2024, the Crusader Funds' investors would have received an additional $30 million over what was paid for the Claims. Investors not on the Redeemer Committee, such as DAF, were never consulted about the sale to Jessup nor the timing of the sale.

25. A&M's July 6 Letter concludes by informing investors that a distribution of $78 million in funds received from the sale of the Claims to Jessup would occur by July 31, 2021, and would be "based on the [NAV] as of June 30, 2021"—the same NAV date that A&M later informed DAF would reflect the cancellation of DAF's interests. It appears the sale was timed deliberately to either (a) avoid any distributions to DAF, or (b) appease the Redeemer Committee's apparent need for liquidity rather than holding onto the Claims to maximize the realization on those assets.

[4] HCM Dkts. 3582, 4131.

26. One or more of A&M's foregoing acts or omissions proximately caused or, alternatively, contributed to cause DAF to be damaged in an amount far exceeding the jurisdictional limit of this Court.

V. CAUSES OF ACTION

Count One – Breach of Fiduciary Duties

27. DAF incorporates all foregoing factual averments by reference as if set fully set forth herein.

28. A&M has exercised and continues to exercise dominion and control over DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest. A&M holds a position of special trust and confidence with DAF regarding DAF's Full Direct Interest. A&M owes DAF common law fiduciary duties arising out of A&M's position of trust and confidence. Upon information and belief, as Investment Manager, the governing documents, including the Offering Memorandum and the advisory management agreements, required A&M to act fairly, equitably, and in accordance with reasonable commercial standards. Upon information and belief, these duties further obligated A&M to not unlawfully and improperly withhold investor's interests, including DAF's Direct Interest.

29. The fiduciary duties A&M owed, and continues to owe, to DAF include, but are not limited to, the duty of loyalty—to always act in the best interests of the investor, the duty to act with utmost good faith, the duty to refrain from self-dealing, the

duty of fair and honest dealing, the duty to act with integrity of the strictest kind, and the duty of candor and full disclosure. Central to the fiduciary duties A&M owed and continues to owe DAF are the duties to not deprive DAF of DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, and to not wrongfully reduce the values of those interests.

30. A&M's failure and refusal to pay or return DAF's Full Direct Interest, even after DAF made specific written demand, is intentional misconduct that breached one or more of the fiduciary duties A&M owed and continues to owe DAF and has caused damage to DAF.

31. By abdicating its responsibility to manage the recovery and sale of the Redeemer Committee's and Crusader Funds' bankruptcy Claims, A&M further breached its fiduciary duties to the investors of Crusader Fund II, including DAF. Furthermore, by preferring certain equity holders (*i.e.*, various members of the Redeemer Committee), A&M breached its fiduciary duties to Crusader Fund II's other shareholders like DAF, including the duty of loyalty. A&M assumed independent fiduciary duties to DAF by preferring the interests of other interest holders to those of DAF. When A&M solicited offers to purchase the Claims and entered into exclusive negotiations with buyers, A&M was required to ensure that the sale of the Claims was in the best interests of all investors, not just for various members of the Redeemer Committee, yet it appears A&M either (a) orchestrated and timed the sale of the Claims to freeze-out DAF and retain proceeds

owed to DAF for A&M's own benefit or the benefit of other investors (such as the Redeemer Committee), or (b) allowed the Redeemer Committee to dominate the management of the Claims in derogation of A&M's fiduciary duties as investment manager, to DAF's detriment, so that the Redeemer Committee could quickly liquidate its interest, rather than managing the Claims to maximize the return on those assets.

32. Because A&M knowingly committed a clear and serious breach of its fiduciary duties, DAF is entitled to disgorge fees, profits, and/or funds received by A&M in connection with its purported management of Crusader Fund II and the Claims.

33. DAF also is entitled to an accounting of its interest in the Crusader Fund II to verify the accuracy of the distributions made to DAF by A&M after this suit was originally filed. This audit is also necessary to confirm all other benefits to which the DAF is entitled but which have been withheld by A&M.

34. A&M is liable to DAF for actual damages, disgorgement, exemplary damages, an accounting, and all other relief to which DAF is justly and legally entitled as the result of A&M's breach of fiduciary duties owed to DAF.

Count Two – Conversion

35. DAF incorporates by reference the foregoing factual and legal averments as if fully set forth herein.

36. DAF owns and has a right to immediate possession of DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest. A&M

had no legitimate claim to DAF's Full Direct Interest or to the Crusader Fund II regarding DAF's Full Direct Interest.

37. The Crusader Fund II funds were delivered to A&M for safekeeping and management. The Crusader Fund II funds were intended to be segregated from other funds managed by A&M.

38. Upon information and belief, A&M held the Crusader Fund II funds in substantially the same form as received.

39. DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, were separate and identifiable funds held by A&M for the benefit of DAF. DAF made demand upon A&M to immediately relinquish possession of DAF's Full Direct Interest to DAF. A&M ignored DAF's demand and A&M wrongfully exercised dominion and control over DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest.

40. DAF was deprived of its lawful right to ownership and control of DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, by A&M's unauthorized withholding of the same without a legally correct basis to do so.

41. As a proximate and/or direct result of A&M's conversion of DAF's Full Direct Interest or, in the alternative, the capital account value of DAF's Direct Interest, DAF has suffered significant damages for which damages DAF now sues.

42. A&M is liable to DAF for actual damages, punitive damages, and all other relief to which DAF is justly and legally entitled as the result of A&M's conversion.

Count Three – Tortious Interference

43. DAF respectfully incorporates by reference the foregoing factual and legal averments as if fully set forth herein.

44. DAF's investment in, and relationship with, Crusader Fund II is the subject of various contracts, including, without limitation, the Crusader Fund II's Subscription Documents, Offering Memorandum, Memorandum of Association, and By-Laws.

45. As investment manager of Crusader Fund II, A&M was and is in possession of these agreements and, during all material times, A&M was aware of the terms of these agreements.

46. Despite knowing that A&M had no right to unilaterally cancel DAF's Direct Interest under any of the relevant transactional documents, A&M did so without justification or excuse.

47. A&M's cancellation of DAF's Direct Interest is a direct interference with A&M's rights and expectancies under the relevant transactional documents, which has proximately caused or, alternatively, contributed to cause DAF damages.

48. Upon information and belief, A&M timed the sale of the Claims to further interfere with DAF's Direct Interest by attempting to ensure that DAF would not receive

its pro rata proceeds from the sale, enabling A&M to instead retain those proceeds for A&M's own benefit or the benefit of other investors (such as the Redeemer Committee).

49. Because A&M had no business justification for cancelling DAF's Direct Interest and A&M timed the sale of the Claims either (a) around the cancellation of DAF's Direct Interest or (b) when the Redeemer Committee wanted to liquidate rather than when it would be prudent to monetize the Claims for all investors—moves that were calculated solely to harm DAF—the only conclusion is that A&M acted with malicious intent in interfering in the relationship between DAF and Crusader Fund II.

50. A&M is liable to DAF for actual damages, punitive damages, and all other relief to which DAF is justly and legally entitled as the result of A&M's tortious interference.

VI. DAMAGES

51. DAF incorporates the foregoing factual averments, and the factual and legal averments in Counts One through Three above, as if fully set forth herein and further alleges the following in the alternative.

52. DAF requests judgment against A&M for all of DAF's actual damages, including, without limitation, direct damages, special damages, consequential damages, lost savings, lost profits, out-of-pocket damages, future damages, and incidental damages, to which DAF is entitled, in addition to punitive or exemplary damages, prejudgment and post-judgment interest at the highest legal rate, and costs of Court.

53. DAF further requests judgment against A&M for disgorgement of all of A&M's fees, profits, and/or other funds received in connection with its purported management of the Crusader Fund II with respect to DAF's interest in that fund, and an accounting of DAF's interest in the Crusader Fund II and of the related fees and expenses charged by A&M.

VII. CONDITIONS PRECEDENT

54. All conditions precedent, if any, to the claims asserted herein have been performed, excused, waived, satisfied, or have otherwise occurred.

VIII. JURY DEMAND

55. DAF has demanded a trial by jury and tendered the jury fee pursuant to Rule 216 of the Texas Rules of Civil Procedure.

IX. RULE 193.7 NOTICE

56. Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, DAF intends to use any and all documents produced in A&M's discovery responses as evidence at the time of any hearing or trial in this matter.

PRAYER

Plaintiff, Charitable DAF Fund, L.P., respectfully requests that this Court grant judgment in DAF's favor over and against Defendant Alvarez & Marsal CRF Management, LLC as set forth herein, including but not limited to, for an accounting of DAF's interest in the Crusader Fund II and the related fees and expenses charged by

A&M, for disgorgement of all of A&M's fees, profits, and/or other funds received by A&M with respect to DAF's interest in that fund, for all actual damages DAF has suffered, for exemplary damages, prejudgment and post-judgment interest at the highest rate permitted by law, for DAF's costs of court, and that DAF be awarded all other and further relief, at law and in equity, general and special, to which DAF may be justly entitled.

Dated: August 28, 2024

Respectfully submitted,

PARSONS MCENTIRE MCCLEARY PLLC

/s/ Sawnie A. McEntire

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ATTORNEYS FOR PLAINTIFF CHARITABLE DAF FUND, L.P.

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2024, a true and correct copy of this instrument was filed and served on all known counsel of record in accordance with the Texas Rules of Civil Procedure via the Court's E-File system.

/s/ Sawnie A. McEntire
SAWNIE A. MCENTIRE

3166176.1

Exhibit 4

FILED
2/20/2023 8:45 AM
FELICIA PITRE
DISTRICT CLERK
DALLAS CO., TEXAS
Madison McCarrier DEPUTY

CAUSE NO. DC-22-10107

CHARITABLE DAF FUND, L.P.,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	DALLAS COUNTY, TEXAS
vs.	§	
	§	
ALVAREZ & MARSAL, CRF MANAGEMENT, LLC.	§	116TH JUDICIAL DISTRICT
	§	

Defendant.

DEFENDANT ALVAREZ & MARSAL'S ANSWER TO PETITION

Defendant Alvarez & Marsal CRF Management, LLC ("A&M") respectfully files this original answer ("Answer") in response to Plaintiff Charitable DAF Fund, L.P.'s ("Plaintiff" or "DAF") Original Petition filed on August 15, 2022 ("Petition"), to respectfully show the Court the following:

I.
GENERAL DENIAL

1. Pursuant to Texas Rule of Civil Procedure 92, Defendant generally denies all allegations, demands, causes of action, and claims for relief set forth in the Petition, and demands proof thereof as required by law.

II.
A&M'S AFFIRMATIVE DEFENSES

2. A&M sets forth below its affirmative defenses. By setting forth these affirmative defenses, A&M does not assume the burden of proving any fact, issue, or element of a cause of action where such burden properly belongs to Plaintiff. Furthermore, all such defenses are pleaded in the alternative and do not constitute an admission of liability or an admission that Plaintiff is entitled to any relief whatsoever.

3. Plaintiff's Petition and each purported cause of action alleged therein fail to state any claims against A&M upon which relief can be granted.

4. Plaintiff's claims against A&M were filed in an improper forum and/or are subject to arbitration.

5. Plaintiff's claims against A&M are barred, in whole or in part, by the Partial Final Award, dated March 6, 2019, and the Final Award, dated May 9, 2019, issued by an arbitration panel under the rules of the American Arbitration Association.

6. Plaintiff's claims against A&M are barred, in whole or in part, by the doctrines of res judicata and collateral estoppel.

7. Plaintiff's claims against A&M are barred, in whole or in part, because of agreement, acquiescence, ratification, or consent.

8. Plaintiff's claims against A&M are barred, in whole or in part, by, or for failure to comply with, the express terms and conditions of the Amended and Restated Bye-Laws of Highland Crusader Fund II, Ltd., the Joint Plan of Distribution of the Crusader Funds, the Scheme of Arrangement relating to Highland Crusader Fund II, Ltd., the Investment Management Agreement between Highland Crusader Fund, L.P., Highland Crusader Fund, Ltd., Highland Crusader Fund II, Ltd., Highland Crusader Offshore Partners, L.P., House Hanover, LLC, Alvarez & Marsal CRF Management, LLC, Alvarez & Marsal Asset Management Services, LLC, and the Redeemer Committee of the Crusader Funds, and any other document or agreement that governs Plaintiff's ownership of an interest in the Crusader Funds.

9. Plaintiff's claims against A&M are barred, in whole or in part, because of accord and satisfaction under the terms of the Amended and Restated Bye-Laws of Highland Crusader Fund II, Ltd., the Joint Plan of Distribution of the Crusader Funds, the Scheme of Arrangement

relating to Highland Crusader Fund II, Ltd., and any other document or agreement that governs Plaintiff's ownership of an interest in the Crusader Funds

10. Plaintiff's claims against A&M are barred, in whole or in part, because A&M's alleged obligations, if any, have been fulfilled and discharged.

11. Plaintiff's claims against A&M are barred, in whole or in part, because of estoppel.

12. Plaintiff's claims against A&M are barred, in whole or in part, by the doctrine of waiver.

13. Plaintiff's claims against A&M are barred, in whole or in part, based on the doctrine of unclean hands.

14. Plaintiff's claims against A&M are barred, in whole or in part, on the ground that any alleged damages were not proximately or legally caused by any action or omission by A&M.

15. Plaintiff's claims against A&M are barred, in whole or in part, because it has failed to exercise reasonable efforts to mitigate, minimize, or avoid any of the harm alleged.

16. A&M currently lacks sufficient knowledge or information that may serve as a basis for additional affirmative defenses or claims. Therefore, in addition to the affirmative defenses identified above, A&M reserves the right to later assert additional affirmative defenses or claims.

II.
PRAYER

WHEREFORE, Defendant prays for entry of judgment against Plaintiff and in favor of Defendant as follows:

17. That Defendant is not liable under any of the Petition's claims, Plaintiff sustained no damages, and Plaintiff takes nothing;

18. That Plaintiff is not entitled to damages, interest, attorneys' fees, or costs;

19. That Defendant be awarded judgment in its favor against Plaintiff;

20. That Defendant be awarded its attorney's fees and costs; and

21. For such other and further relief as the Court deems just and proper.

DATED: February 20, 2023 Respectfully submitted,

/s/ John T. Cox III

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Andrew Bean
Texas Bar No. 24097352
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Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of February, 2023, a true and correct copy of the foregoing document was served on all counsel of record in accordance with the Texas Rules of Civil Procedure.

/s/ *John T. Cox III*
John T. Cox III

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Wendy Cassidy on behalf of John Cox
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Status as of 2/20/2023 9:09 AM CST

Associated Case Party: CHARITABLE DAF FUND LP

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Roqui Brooks		rbrooks@pmmlaw.com	2/20/2023 8:45:31 AM	SENT

Associated Case Party: Charitable DAF Fund, L.P.

Name	BarNumber	Email	TimestampSubmitted	Status
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Marshall R.King		MKing@gibsondunn.com	2/20/2023 8:45:31 AM	SENT

Exhibit 5

CASE NO. DC-22-10107

CHARITABLE DAF FUND, L.P.,	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
v.	§	DALLAS COUNTY, TEXAS
	§	
ALVAREZ & MARSAL, CRF MANAGEMENT, LLC	§	
	§	
Defendant.	§	116th JUDICIAL DISTRICT

PLAINTIFF CHARITABLE DAF FUND, L.P.'S SECOND SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION TO DEFENDANT ALVAREZ & MARSAL, CRF MANAGEMENT, LLC

TO: Defendant Alvarez & Marsal, CRF Management, LLC, by and through its attorneys of record, John T. Cox III and Andrew Bean, GIBSON, DUNN & CRUTCHER LLP, 2001 Ross Avenue, Suite 2100, Dallas, TX 75201-2923

Plaintiff, Charitable DAF Fund, L.P. ("DAF"), serves this Second Set of Interrogatories and Requests for Production (collectively "Requests") on Defendant, Alvarez & Marsal, CRF Management, LLC ("A&M") as authorized by Rules 196 and 197 of the Texas Rules of Civil Procedure. A&M is requested to respond fully and in writing, along with producing all responsive, non-privileged documents, within thirty (30) days of service.

INSTRUCTIONS

1. Each Request shall be construed and answered separately and shall not be combined for the purpose of supplying a common response thereto. Each answer shall set forth verbatim the Request to which it responds. The answer to a Request shall not be supplied by referring to the answer to another Request unless the Request referred to supplies a complete and accurate answer to the Request being answered. The specificity of any Request shall not be construed or understood as limiting the generality or breadth of any other Request.

2. These Requests require you to produce Documents and Communications and/or to provide information in your physical possession, custody, or control, as well as in the possession, custody, or control of any agents, employees, officers, members, managing members, directors, shareholders, partners, general partners, legal representatives, predecessors, successors, and assigns. All requested Documents, Communications, or information not subject to a valid objection that is known by, possessed by, or available to you that appears in your records must be provided.

3. In addition to original and final versions of Documents and Communications, each Request includes all drafts, alterations, modifications, changes, and amendments of such Documents and Communications, as well as copies non-identical to the original in any respect, including any copies bearing non-identical markings or notations of any kind.

4. If any requested Document, Communication, or information was, but no longer is, in A&M's possession, state whether a copy thereof is in the possession, custody, or control of some other person, agency, entity, partnership, or corporation, and why such Document, Communication, or information is no longer available, and the circumstances under which the loss occurred.

5. Each requested Document and Communication shall be produced in its entirety with an affixed bates stamp. If an identical copy appears in more than one person's files, each of the copies shall be produced or the extracted metadata shall reflect the source, owner, and/or custodian for all persons with identical copies. If a Document or Communication responsive to any Request cannot be produced in full, it shall be produced to the extent possible with an explanation stating why the production of the remainder is not possible.

6. In the event you do not answer any Request, in whole or in part, on the basis of an assertion of attorney-client privilege, the work-product doctrine, or any other claim of privilege or immunity, answer each Request to the extent consistent with the

privilege or immunity asserted and provide information sufficient to permit the Court to make a determination of whether a proper basis exists for the assertion of privilege or immunity. For all documents withheld on the basis of privilege, state the basis for your claim with specificity and, for each such document, identify:

a. whether the document contains a request for legal advice and, if so, identify the person who requested the legal advice;

b. whether the document contains advice as to the meaning or application of particular laws or rules in response to such request;

c. any further information to explain and support the claim of privilege and to permit the adjudication of the propriety of that claim;

d. the nature of the privilege (including work product) that is being claimed and, if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and the type of document, *e.g*. letter or memorandum; the general subject of the document; and such other information sufficient to identify the document, including, where appropriate, the date, author, addressee, and other recipient(s) of the document.

7. If there are no Documents or Communications responsive to a particular Request, please provide a written response so stating.

8. DAF specifically reserves the right to serve additional Requests.

9. These Requests are continuing in nature as to require supplemental responses in accordance with the Texas Rules of Civil Procedure if and when additional Documents, Communications, or information responsive to any of the Requests herein is/are obtained, discovered, or located between the time of responding to these Requests and the final disposition of this action.

RULES OF CONSTRUCTION

Along with the rules of construction and instructions provided under applicable discovery rules and law, these Rules of Construction apply to the following Requests:

1. Unless specifically stated otherwise in a particular Request, the relevant time period is October 16, 2019, to the present.

2. The terms "any" and "all" should be understood in either the most or the least inclusive sense as necessary to bring within the scope of the Request all responses that might otherwise be construed to be outside its scope. "Any" includes the word "all," and "all" includes the term "any."

3. The terms "any," "all," and "each" shall each be construed as encompassing any and all.

4. The use of the singular form of any word shall be construed to include the plural and vice versa.

5. All phrases following the terms "including" are intended to illustrate the kinds of information responsive to each Interrogatory, and shall be construed as "including, but not limited to." Such examples are not intended to be exhaustive of the information sought and shall not in any way be read to limit the scope of an Interrogatory.

6. References to an entity are intended to include past and present officers, directors, employees, agents, affiliates, subsidiaries, owners, partners, general partners, shareholders, representatives, attorneys, predecessors, successors, assigns, related entities, parent companies, and/or any other person(s) acting on behalf of such entity.

DEFINITIONS

For the purposes of these Requests, the following terms shall have the following definitions and meanings, unless expressly provided otherwise:

1. "A&M," "you," and "your," shall mean Alvarez & Marsal, CRF Management, LLC, and its managing members and other members, officers, agents, employees, representatives, attorneys, partners, predecessors, successors, assigns, and anyone else acting on A&M's behalf, now or at any time relevant to the response.

2. "Big Boy Clause" shall mean any agreement, or provision in any agreement, that purports to waive claims based on one party's superior knowledge and the non-disclosure of that superior knowledge to the other transacting party.

3. "Claims" shall mean collectively the "Redeemer Committee Claim," as defined herein, and the "Crusader Funds Claim," as defined herein.

4. "Communication(s)" and "communicate" shall mean any manner in which the mental processes of one individual are relayed to another, including, without limitation, any verbal utterance, correspondence, email, text message, statement, transmission of information by computer or other device, letters, telegrams, telexes, cables, telephone conversations, and records or notations made in connection therewith, notes, memoranda, sound recordings, electronic data storage devices, and any other reported, recorded or graphic matter or document relating to any exchange of information.

5. "Concerning" shall mean reflecting, regarding, relating to, referring to, describing, evidencing, supporting, forming any basis for, or constituting.

6. "Crusader Fund" shall mean the Highland Crusader Fund II, Ltd., which is subject to this Lawsuit, and in which DAF purchased participating shares in or around June of 2016.

7. "Crusader Funds Claims" shall mean the Crusader Funds' allowed general unsecured claim of $50,000 against Highland Capital Management L.P., as referred to in Exhibit 1 hereto.

8. "Document" or "Documents" shall mean anything that may be considered to be a document or tangible thing within the meaning of the Texas Rules of Civil Procedure, including (without limitation) Electronically Stored Information and the originals and all copies of any correspondence, memoranda, handwritten or other notes, letters, files, records, papers, drafts and prior versions, diaries, calendars, telephone or

other message slips, invoices, files, statements, books, ledgers, journals, work sheets, inventories, accounts, calculations, computations, studies, reports, indices, summaries, facsimiles, telegrams, telecopied matter, publications, pamphlets, brochures, periodicals, sound recordings, surveys, statistical compilations, work papers, photographs, videos, videotapes, drawings, charts, graphs, models, contracts, illustrations, tabulations, records (including tape recordings and transcriptions thereof) of meetings, conferences and telephone or other conversations or communications, financial statements, photostats, e-mails, microfilm, microfiche, data sheets, data processing cards, computer tapes or printouts, disks, word processing or computer diskettes, computer software, source and object codes, computer programs and other writings, or recorded, transcribed, punched, taped and other written, printed, recorded, digital, or graphic matters and/or electronic data of any kind however produced or reproduced and maintained, prepared, received, or transmitted, including any reproductions or copies of documents which are not identical duplicates of the original and any reproduction or copies of documents of which the originals are not in your possession, custody or control.

9. "Electronically Stored Information" or "ESI" shall mean and include all documents, notes, photographs, images, digital, analog or other information stored in an electronic medium. Please produce all Documents/ESI in .TIF format (OCR text, single page). Please also provide a Summation Pro Load File (.dii) and/or all related metadata with respect to all such Documents/ESI.

10. "Grosvenor" shall mean Grosvenor Capital Management, L.P.

11. "HCM" shall mean Highland Capital Management L.P.

12. "Identify" or "Identity(ies)" (person(s)) when referring to person shall, shall mean to provide the person's full first and last name; last known address, telephone number, and e-mail address; and last known place of employment.

13. "Identify" or "Identity(ies)" (document(s)) when referring to a document, shall mean to provide the document's name; the date of the document's creation; the form of the document (e.g., letter, e-mail message, etc.); a description of the substance of the document; and the identity of the person who currently possesses the document (and, if the document no longer exists, an explanation for why it no longer exists and the date on which it ceased to exist).

14. "Lawsuit" shall mean and refer to the above-captioned lawsuit styled: *Charitable DAF Fund, L.P. v. Alvarez & Marsal, CRF Management, LLC*, Cause No. DC-22-10107; 116th Judicial District Court of Dallas County, Texas.

15. "Jessup" shall mean Jessup Holdings LLC.

16. "Material Terms" shall mean the purchase price, any "Bigboy" clauses, value disclaimers, closing deadlines and any conditions precedent or conditions subsequent.

17. "Person" shall mean any natural person and/or any business, legal, or governmental entity or association.

18. "Plaintiff" and "Defendant," as well as a party's full or abbreviated name or a pronoun referring to a party, shall mean the party or parties, and where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

19. "Redeemer Committee Claim" shall mean the Redeemer Committee's allowed general unsecured claim of $137,696,610 against HCM, as referred to in Exhibit 1 hereto.

20. "Sale of the Claims" shall mean the sale of the Claims that occurred on or about April 30, 2021, as described in Exhibit 1 hereto.

21. "Seery" shall mean James P. Seery.

22. "Stonehill" shall mean Stonehill Capital Management, LLC.

SECOND SET OF INTERROGATORIES

INTERROGATORY NO. 16: Describe A&M's role in preparing any written solicitation and participation in the negotiation of offers to purchase the Claims.

ANSWER:

INTERROGATORY NO. 17: Identify the asking price of the Redeemer Committee and the Crusader Fund relating to the Sale of the Claims.

ANSWER:

INTERROGATORY NO. 18: Identify all persons and/or entities that submitted an offer or offers to purchase the Claims.

ANSWER:

INTERROGATORY NO. 19: Identify the price set forth in each offer to purchase the Claims.

ANSWER:

INTERROGATORY NO. 20: Other than price, identify all other material terms of each offer to purchase either of the Claims.

ANSWER:

INTERROGATORY NO. 21: Describe whether the Redeemer Committee and/or the Crusader Fund has any right to participate in ultimate recoveries on the Claims and, if so, the terms of any such participation arrangement.

ANSWER:

INTERROGATORY NO. 22: Identify all persons and/or entities that communicated with A&M concerning DAF's Direct Interest, DAF's Full Direct Interest, DAF's capital account value, and/or DAF's shares in the Crusader Fund.

ANSWER:

INTERROGATORY NO. 23: Identify and describe in detail the role of Seery, Grosvenor, and/or anyone on the Redeemer Committee in the solicitation or negotiation of any of the offers leading up to the Sale of the Claims.

ANSWER:

INTERROGATORY NO. 24: Identify the material terms of the Sale of the Claims to Jessup.

ANSWER:

SECOND SET OF REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 43: All Documents and Communications concerning the solicitation and negotiation of offers to purchase the Claims.

RESPONSE:

REQUEST FOR PRODUCTION NO. 44: All Documents and Communications concerning A&M's involvement in the solicitation and negotiation of offers to purchase the Claims.

RESPONSE:

REQUEST FOR PRODUCTION NO. 45: Any and all bids, offers, solicitation packages, term sheets, or similar documents, relating to the Sale of the Claims.

RESPONSE:

REQUEST FOR PRODUCTION NO. 46: All Documents and Communications concerning or reflecting the value of each of the Claims prior to or after the Sale of the Claims, or in connection with the solicitation or negotiation of offers as described in Exhibit 1.

RESPONSE:

REQUEST FOR PRODUCTION NO. 47: Any and all agreements granting the Redeemer Committee, or any member of the Redeemer Committee, and/or the Crusader Fund the right to participate in the ultimate recoveries on the Claims, and all Communications relating to any such grant.

RESPONSE:

REQUEST FOR PRODUCTION NO. 48: All Documents and Communications concerning or reflecting Seery's role in the solicitation or negotiation of any of the offers made in connection with the Sale of the Claims.

RESPONSE:

REQUEST FOR PRODUCTION NO. 49: All Documents and Communications concerning or reflecting Grosvenor's and/or anyone on the Redeemer Committee's role in the solicitation or negotiation of any of the offers made in connection with the Sale of the Claims.

RESPONSE:

REQUEST FOR PRODUCTION NO. 50: All Documents reflecting any Communications involving and/or including Seery, on the one hand, and A&M, on the other hand, regarding the Sale of Claims or the Claims

RESPONSE:

REQUEST FOR PRODUCTION NO. 51: All Documents reflecting any Communications involving and/or including Grosvenor, on the one hand, and A&M, on the other hand, regarding the Sale of Claims or the Claims

RESPONSE:

REQUEST FOR PRODUCTION NO. 52: All Documents reflecting any Communications involving and/or including Stonehill, on the one hand, and A&M, on the other hand, regarding the Sale of Claims or the Claims.

RESPONSE:

REQUEST FOR PRODUCTION NO. 53: All Documents reflecting any Communications involving and/or including Jessup, on the one hand, and A&M, on the other hand, regarding the Sale of Claims.

RESPONSE:

REQUEST FOR PRODUCTION NO. 54: All Documents reflecting any Communications between and/or among one or more of A&M, Seery, Grosvenor, Stonehill, and/or Jessup regarding any Big Boy Clause proposed or agreed to in connection with the Sale of the Claims or the Claims

RESPONSE:

REQUEST FOR PRODUCTION NO. 55: All Documents reflecting any Communications between and/or among one or more of A&M, Seery, Grosvenor, Stonehill, and/or Jessup regarding any risks of recovery on the Claims.

RESPONSE:

REQUEST FOR PRODUCTION NO. 56: All Documents reflecting any Communications between and/or among one or more of A&M, Seery, Grosvenor, Stonehill, and/or Jessup regarding any deferred payment(s) for the Claims, including but not limited to, any agreement to pay any additional money based on the ultimate/percentage of recovery on the Claims from HCM's bankruptcy estate.

RESPONSE:

REQUEST FOR PRODUCTION NO. 57: All Documents and Communications concerning or reflecting all persons and/or entities that communicated with A&M concerning DAF's Direct Interest, DAF's Full Direct Interest, DAF's capital account value, and/or DAF's shares in the Crusader Fund.

RESPONSE:

REQUEST FOR PRODUCTION NO. 58: All Documents and Communications concerning or reflecting Grosvenor's interest in the Crusader Fund.

RESPONSE:

REQUEST FOR PRODUCTION NO. 59: All Documents and Communications concerning or reflecting Grosvenor's interest, if any, in Stonehill.

RESPONSE:

REQUEST FOR PRODUCTION NO. 60: All Documents and Communications concerning or reflecting Grosvenor's interest, if any, in Jessup.

RESPONSE:

Dated: July 29, 2024

Respectfully submitted,

/s/ *Sawnie A. McEntire*

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ATTORNEYS FOR PLAINTIFF CHARITABLE DAF FUND, L.P.

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2024, a true and correct copy of this instrument was filed and served on all known counsel of record in accordance with the Texas Rules of Civil Procedure.

/s/ *Sawnie A. McEntire*
Sawnie A. McEntire

3163998.1

EXHIBIT 1

Alvarez & Marsal CRF Management, LLC 2029 Century Park East Suite 2060 Los Angeles, CA 90067

July 6, 2021

Re: Update & Notice of Distribution

Dear Highland Crusader Funds Stakeholder,

As you know, in October 2020, the Bankruptcy Court approved a settlement of the Redeemer Committee's and the Crusader Funds' claims against Highland Capital Management L.P. ("HCM"), as a result of which the Redeemer Committee was allowed a general unsecured claim of $137,696,610 against HCM and the Crusader Funds were allowed a general unsecured claim of $50,000 against HCM (collectively, the "Claims"). In addition, as part of the settlement, various interests in the Crusader Funds held by HCM and certain of its affiliates are to be extinguished (the "Extinguished Interests"), and the Redeemer Committee and the Crusader Funds received a general release from HCM and a waiver by HCM of any claim to distributions or fees that it might otherwise receive from the Crusader Funds (the "Released Claims" and, collectively with the Extinguished Interests, the "Retained Rights").

A timely appeal of the settlement was taken by UBS (the "UBS Appeal) in the United States District Court for the Northern District of Texas, Dallas Division. However, the Bankruptcy Court subsequently approved a settlement between HCM and UBS, resulting in dismissal of the UBS Appeal with prejudice on June 14, 2021.

On April 30, 2021, the Crusader Funds and the Redeemer Committee consummated the sale of the Claims against HCM and the majority of the remaining investments held by the Crusader Funds to Jessup Holdings LLC ("Jessup") for $78 million in cash, which was paid in full to the Crusader Funds at closing. The sale specifically excluded the Crusader Funds' investment in Cornerstone Healthcare Group Holding Inc. and excluded certain specified provisions of the settlement agreement with HCM (the "Settlement Agreement"), including, but not limited to, the Retained Rights. The sale of the Claims and investments was made with no holdbacks or escrows.

The sale to Jessup resulted from a solicitation of offers to purchase the Claims commenced by Alvarez & Marsal CRF Management LLC ("A&M CRF"), as Investment Manager of the Crusader Funds, in consultation with the Redeemer Committee. Ultimately, the Crusader Funds and the Redeemer Committee entered exclusive negotiations with Jessup, culminating in the sale to Jessup.

A&M CRF, pursuant to the Plan and Scheme and with the approval of House Hanover, the Redeemer Committee and the Board of the Master Fund, now intends to distribute the proceeds from the Jessup transaction ($78 million), net of any applicable tax withholdings and with no reserves for the Extinguished Claims or the Released Claims. In addition, the distribution will include approximately $9.4 million in proceeds that have been redistributed due to the cancellation

and extinguishment of the interests and shares in the Crusader Funds held by HCM, Charitable DAF and Eames in connection with the Settlement Agreement, resulting in a total gross distribution of $87.4 million. Distributions will be based on net asset value as of June 30, 2021.

Please note that A&M CRF intends to make the distributions by wire transfer no later than July 31, 2021. Please confirm your wire instructions on or before **July 20, 2021**. If there are any revisions to your wire information, please use the attached template to provide SEI and A&M CRF your updated information on investor letterhead. This information should be sent on or before **July 20, 2021** to Alvarez & Marsal CRF and SEI at CRFInvestor@alvarezandmarsal.com and AIFS-IS_Crusader@seic.com, respectively.

The wire payments will be made to the investor bank account on file with an effective and record date of July 1, 2021. Should you have any questions, please contact SEI or A&M CRF at the e-mail addresses listed above.

Sincerely,

Alvarez & Marsal CRF Management, LLC

By: 

Steven Varner
Managing Director

On investor letterhead, please use the template below to provide Alvarez & Marsal CRF Management, LLC and SEI your updated wire information.

Information Needed	Wire Information Input
Investor name (as it reads on monthly statements) Fund(s) Invested Contact Information (Phone No. and Email) Updated Wire Information • Beneficiary Bank • Bank Address • Beneficiary (Account) Name • ABA/Routing # • Account # • SWIFT Code International Wires • Correspondent Bank • ABA/Routing # • SWIFT Code	

Signed By: _____ Date: _____

Exhibit 6

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

In re: Highland Capital Management, L.P.[1] *Debtor.*	Chapter 11 Case No. 19-34054 (SGJ)
Charitable DAF Fund, L.P., *Plaintiff,* v. Alvarez & Marsal CRF Management, LLC *Defendant.*	Adversary No. 24-03073-sgj DECLARATION OF CHRISTIAN LUTHI

I, CHARLES CHRISTIAN ROLF LUTHI, of Richmond House, 12 Par-la-Ville Road, Bermuda, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am a Director and Head of the Litigation and Restructuring Practice in the Bermuda law firm of Conyers Dill & Pearman Limited ("Conyers Dill & Pearman").

2. I have been instructed by Gibson, Dunn & Crutcher LLP in the above-captioned proceedings, to express my opinion in relation to certain issues under Bermuda law.

3. I understand that this Declaration will be submitted in connection with the Defendants' Motion to Dismiss in the above-captioned proceedings.

4. I confirm that I consider that I have the requisite qualifications and expertise to express my opinions on the issues I have been asked to consider under Bermuda law. I was awarded an undergraduate Degree (BA) in Philosophy from Trinity College, Hartford,

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

Connecticut, in 1988. I was awarded a Degree in Jurisprudence from Oriel College, Oxford University, Oxford, in 1991. I was called to the Bar of England and Wales in 1993 and to the Bermuda Bar in 1993.

5. My practice encompasses all aspects of civil and commercial litigation, in particular company law, insolvency and schemes of arrangement, insurance, telecommunications, and general common law and frequently conduct litigation in the Supreme Court and Court of Appeal of Bermuda.

6. Before turning to the specific factual circumstances of the above captioned proceedings, I shall set out certain general principles of Bermuda law.

Introduction to Affidavit[2]

7. I have been asked to opine on various issues arising out of a claim issued in the Plaintiff's Second Amended Petition originally filed in the District Court of Dallas County, Texas and now pending in the United States Bankruptcy Court for the Northern District of Texas ("Petition") by Charitable DAF Fund LP ("DAF") against Alvarez & Marsal CRF Management, LLP ("A&M").

8. A&M is and was at all material times the investment manager of Highland Crusader Fund II, Ltd. ("Crusader Fund II"). Crusader Fund II is an exempted limited Company incorporated in Bermuda under the Companies Act 1981 (the "Act"). As the investment manager, in exchange for payment A & M performed investment management services (Petition, paragraph 10).

9. DAF purchased an interest in the Crusader Fund II for over $1 million in June 2016 from Promethee T Fund and became a "*a party to the various agreements governing the relationship between Crusader Fund II and its investors. DAF's interest is referred to as "DAF's Direct Interest*". (Petition, paragraph 8) I note the Petition does not articulate what the legal nature of the "Direct Interest" is save to state that DAF "*became a party to (or beneficiary of) Crusader Fund II's Subscription Documents, Offering Memorandum,*

[2] The background information set forth herein is taken from the allegations in the Petition and documents referenced therein which, I understand, the Court must accept as true for the purposes of the Motion to Dismiss. I have no personal knowledge of the allegations in the Petition and repeat such allegations only for the purpose of providing the relevant background for my opinions below.

*Memorandum of Association, By-Laws (*sic*), and various other agreements governing the relationship between Crusader Fund II and its investors.*" I am advised by those instructing me that Promethee's interest in the Crusader Fund II was that of shareholder and I have assumed for the purposes of this opinion that the Plaintiff became a shareholder of the Crusader Fund II upon acquisition of the DAF Direct Interest.

An arbitration award was issued against Highland Capital Management, L.P. (HCM) in favour of the Redeemer Committee on behalf of the Crusader Funds. HCM then filed for bankruptcy (Petition, paragraph 19). After HCM filed for bankruptcy, the Redeemer Committee and the Crusader Funds filed overlapping claims totalling over $214 million against HCM's estate based on the arbitration award (Petition, paragraph 20). A&M and the Redeemer Committee entered into a settlement with HCM which reduced the claims to $136.7 million for the Redeemer Committee and $50,000 for the Crusader Funds. In April 2021, the claims were sold to Jessup Holdings, LLC, a special purpose entity owned by Stonehill Capital Management, LLC (Petition, Paragraph 23). A&M notified investors on July 6, 2021 that following the solicitation of offers to purchase the claims, the Crusader Funds and the Redeemer Committee entered exclusive negotiations resulting in the sale of both claims for approximately 50% of the allowed amount of the Redeemer Committee's claim alone, or about one-third of the Crusader Funds' total original claim. The plaintiff alleges that if A&M had not sold the claims, investors in the Crusader Funds would have received significantly greater sums for their claim (Petition, paragraphs 23 – 25).

10. The plaintiff alleges that A&M breached its fiduciary duties by:

    a. Abdicating responsibility for managing the claims to the Redeemer Committee;

    b. Preferring the interests of the Redeemer Committee over other investors;

    c. Failing to ensure the sale was in the best interests of all investors;

    d. Potentially timing the sale to freeze out DAF or benefit other investors at DAF's expense.

11. The Plaintiff alleges that A&M mismanaged the sale of the claims, resulting in significantly less money being available for the Crusader Funds and its investors than could have been obtained through proper management and timing of the sale.

12. I am instructed to advise on issues of Bermuda law which arise in connection with the Plaintiff's claims. DAF alleges that A&M breached fiduciary duties that it owed to DAF. It does not purport to bring a derivative claim on behalf of the Crusader Fund II.

13. Therefore, the following questions arise under Bermuda law:

    a. Is DAF the proper plaintiff for wrongs done to Crusader Fund II under the "proper plaintiff principle"?

    b. Assuming that the Crusader Fund II is the proper plaintiff, does DAF have standing to bring derivative claims on behalf of Crusader Fund II, including the claim for breach of fiduciary duty?

Bermuda law

Sources of Bermuda Law

14. Bermuda is a British Overseas Territory. As such, it is a self-governing but dependent territory of the United Kingdom. In common with other British Overseas Territories and former colonies, English law was introduced to Bermuda at the date of its settlement in 1612. The system of law in Bermuda is therefore founded on the English legal system, although there is a distinct body of Bermudian statute law and Bermudian case law that has developed over the past 400 years.

15. In particular, section 15 of the Supreme Court Act 1905 provides that the systems of law administered in Bermuda are (a) the common law of England (b) the doctrines of equity of England, and (c) the Acts of the Parliament of England of general application which were in force in England at the date of Bermuda's settlement on 11th July 1612, except where those laws have been altered by (1) United Kingdom legislation, since 1612, expressly made applicable to Bermuda, (2) local Bermuda legislation, and (3) expansion or restriction of Bermuda common law since the year 1612. Law and equity are administered concurrently, and in any conflict the rules of equity generally prevail.

The Bermuda Court System

16. The Supreme Court of Bermuda is the first instance court in Bermuda with unlimited jurisdiction, and it determines all civil and commercial disputes with a value in excess of

BD$25,000. The Supreme Court of Bermuda also determines any disputes relating to the affairs of companies incorporated in Bermuda, under the Companies Act 1981.

17. The Court of Appeal for Bermuda is the first-tier appellate court in Bermuda, made up of three judges who sit in quarterly sessions, and it entertains appeals from the Supreme Court of Bermuda.

18. Appeals against decisions of the Court of Appeal for Bermuda are entertained by the Judicial Committee of the Privy Council, which, although based in the United Kingdom, is Bermuda's highest appellate court. The Privy Council is ordinarily made up of a five judge tribunal sitting in London. Its composition consists of members of the Supreme Court of the United Kingdom (formerly the House of Lords, and the highest appellate court for England and Wales, Scotland, and Northern Ireland), as well as other senior judges from the Commonwealth jurisdictions.

The Common Law Principle of Precedent is Applicable in Bermuda

19. Bermuda law, following English law in this regard, is based upon the common law principle of precedent.

20. Under the doctrine of precedent, certain judicial decisions are 'binding' on other judges, and their reasoning or '*ratio decidendi*' must be followed and applied, unless they are properly capable of being distinguished. In particular, a judge of the Supreme Court of Bermuda is bound to follow and apply any relevant decision of the Court of Appeal for Bermuda, and any relevant decision of the Privy Council. The Court of Appeal, in turn, is bound by any relevant decision of the Privy Council. Previous relevant decisions of the Privy Council are binding on the Privy Council itself, except in exceptional circumstances. The Privy Council can depart from a previous decision where it is right to do so, when, for example, the previous decision is thought to be wrong, and impeding the proper development of the law or to have led to results which were unjust or contrary to public policy.

21. Furthermore, under the doctrine of precedent, certain judicial decisions, or parts thereof (such as '*ex parte*' rulings or '*obiter dicta*'), may be 'persuasive', and, depending on the facts of the case, the seniority and experience of the tribunal, and the quality of their

reasoning, should ordinarily be followed and applied, unless they are plainly wrong or are properly capable of being distinguished. In particular, decisions of the Supreme Court of Bermuda are persuasive and should generally be followed by other judges of the Supreme Court of Bermuda.

22. Furthermore, Bermudian courts often treat English case law as being persuasive, for three principal reasons.

23. First, many Bermuda statutes are based upon current or former United Kingdom legislation. As a result, decisions of the Superior Courts of England and Wales in respect of provisions of United Kingdom statute law which are identical to or similar to Bermuda law are considered in Bermuda to be highly persuasive authority.

24. Second, the decisions of the United Kingdom Supreme Court (formerly the House of Lords) on matters of common law and statutory interpretation are extremely persuasive in Bermuda since the Supreme Court (formerly the House of Lords), sitting as the highest appellate Court for the United Kingdom, and the Privy Council, sitting as the highest appellate Court for Bermuda, share common membership. As was explained by Lord Diplock in the Privy Council decision in *De Lasala v De Lasala* [1980] A.C. 546 at 558:

> "... *A decision of the House of Lords on a matter which in Hong Kong is governed by the common law by virtue of application of English Law Ordinance is not ipso facto binding on a Hong Kong Court although its persuasive authority must be very great, since the judicial committee of the Privy Council, whose decisions on appeals from Hong Kong <u>are</u> binding on all Hong Kong Courts, shares with the appellate committee of the House of Lords a common membership. This board is unlikely to diverge from a decision which its members have reached in their alternative capacity, unless the decision is in a field of law in which the circumstances of the colony or its inhabitants make it inappropriate that the common law in that field should have developed on the same lines in Hong Kong as in England.*
>
> *Different considerations, in their Lordships view, apply to decisions of the House of Lords on the interpretation of recent legislation that is common to Hong Kong and England. Here there is no question of divergent development of the law. The*

legislature in Hong Kong has chosen to develop that branch of the law on the same lines as it has been developed in England, and, for that purpose, to adopt the same legislation as is in force in England and falls to be interpreted according to English canons of construction. What their Lordships have already said about the common membership of the judicial committee of the Privy Council and the appellate committee of the House of Lords applies a fortiori to decisions of the House of Lords on the interpretation of recent English statutes that have been adopted as the law of Hong Kong. Since the House of Lords as such is not a constituent part of the judicial system of Hong Kong, it may be that in juristic theory, it would be more correct to say that the authority of its decisions on any question of law, even the interpretation of recent common legislation, can be persuasive only; but looked at realistically, its decision on such question will have the same practical effect as if they were strictly binding and courts in Hong Kong would be well advised to treat them as being so".

25. Indeed, the Court of Appeal for Bermuda has so recognised, and has accepted that, generally speaking, Bermuda Courts will accept decisions of the Supreme Court (formerly the House of Lords) as effectively binding in common law matters, unless there are circumstances in which the social and economic conditions of Bermuda justify a departure from English precedent.

26. Third, where issues of common law in Bermuda have not been expressly considered by the Bermuda courts, the Bermuda courts often find assistance in the consideration of such issues in reasoned judgments or rulings by judges of the Superior Courts of England and Wales, whether in the High Court, the Court of Appeal, or the Supreme Court (formerly the House of Lords). Furthermore, depending on the facts and the circumstances (including the legislative background, the jurisdictional and legal similarities, and the perceived quality of the tribunal and its reasoning), the Bermuda courts often find assistance in the consideration of issues in reasoned judgments by judges of the superior courts of other common law and offshore jurisdictions, such as the British Virgin Islands, the Cayman Islands, Australia, New Zealand, Hong Kong, Singapore, and Canada. In practice, Privy Council decisions, on appeal from other common law jurisdictions, are

treated as highly persuasive if the relevant common law or legislation is similar to the law of Bermuda.

Derivative Claims - The rule in *Foss v Harbottle* or the 'proper Plaintiff' principle

27. As a matter of Bermuda common law (following English common law), only a company itself can sue for loss caused to the company, or to redress a wrong done to the company. The legal rights of a company belong to the company as a separate person and not to its shareholders. As a result, shareholders do not have standing to enforce the rights of the company by legal action. This is known as the rule in *Foss v Harbottle*[3], or the 'proper plaintiff' principle[4]. The rule follows from the fundamental and basic principle that a company is a legal person, separate and distinct from its shareholders[5].

28. In *Edwards v Halliwell* [1950] 2 All ER 1064, the English Court of Appeal noted a second, related principle, which Jenkins LJ expressed as follows, at 1066:

> "*where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio. No wrong has been done to the company or association and there is nothing in respect of which anyone can sue*".

29. As the English Court of Appeal further noted in *Prudential Assurance Co. Ltd. v Newman Industries Ltd (No. 2)* [1982] Ch 204 at 210:

[3] The facts in *Foss v Harbottle* (1843) 2 Hare 461 were that the minority shareholders alleged the company had a claim in damages against some of the directors by reason of the fraudulent acts of those directors but at a general meeting the majority resolved that no action should be taken against them. Two of the minority shareholders took legal proceedings against the directors and others to compel them to make good the losses to the company. The court dismissed the action on the grounds that, as the acts of the directors were capable of confirmation by the majority of the shareholders, the court would not interfere. The court left the majority of shareholders to decide what was for the benefit of the company.

[4] The rule in *Foss v Harbottle* has been accepted as being applicable in Bermuda, for example in *Stena Finance BV and Temple Holdings Ltd v Sea Containers Ltd and others* [1989] Bda LR 71, and also in *Leamington Reinsurance v Lisa* [2006] Bda LR 82 at paragraph 39.

[5] See, for example, *Salomon v Salomon* [1897] AC 22; *Clark v Energia Global Ltd* [2002] Bda LR 39.

"The classic definition of the rule in Foss v Harbottle is stated in the judgment of Jenkins LJ. in Edwards v Halliwell [1950] 2 All E.R. 1064 as follows:

(1) The proper plaintiff in an action in respect of a wrong alleged to be done to a corporation is, prima facie, the corporation.

(2) Where the alleged wrong is a transaction which might be made binding on the corporation and on all its members by a simple majority of the members, no individual member of the corporation is allowed to maintain an action in respect of that matter because, if the majority confirms the transaction, cadit quaestio; or, if the majority challenges the transaction, there is no valid reason why the company should not sue.

(3) There is no room for the operation of the rule if the alleged wrong is ultra vires the corporation, because the majority of members cannot confirm the transaction.

(4) There is also no room for the operation of the rule if the transaction complained of could be validly done or sanctioned only by a special resolution or the like, because a simple majority cannot confirm a transaction which requires the concurrence of a greater majority.

(5) There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue".

30. The House of Lords (predecessor to what is now the Supreme Court of the United Kingdom) has confirmed the principle that the company is the proper plaintiff to enforce its rights, in *Johnson v Gore Wood & Co* [2002] 2 AC 1.

Derivative actions as an exception to the rule in *Foss v Harbottle*

31. As set out below, in certain circumstances and exceptionally a shareholder in a company is able to bring a claim on behalf of and for the benefit of the company, in respect of a wrong done to the company. The claim is called a derivative claim, as the shareholders standing *derives* from the right of the company to bring a claim. It is therefore necessary for any person wishing to bring a derivative claim to be a shareholder of the company[6].

32. Although there are not many examples of derivative claims actually being initiated and pursued in Bermuda, the concept of a derivative claim, in limited circumstances, (i.e., as an exception to the rule in *Foss v Harbottle*) has been judicially recognized in Bermuda. It has also been judicially recognized that Bermuda common law follows English common law in this area. For example: (i) in S*tena Finance BV v Sea Containers Ltd* [1989] Bda LR 71, Astwood CJ dismissed an application to strike out a derivative claim, while recognizing that Bermuda common law followed the common law of England and Wales; and (ii) in *Clark v Energia Global Ltd* [2002] Bda LR 39, Meerabux J recognized that Bermuda common law followed the common law of England and Wales, while noting that a shareholder complaint did not satisfy the requirements of a derivative claim.

33. As the passage cited above from *Prudential Assurance Co. Ltd. v Newman Industries Ltd (No. 2)* [1982] Ch. 204 indicates, the exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 461[7] are limited. For the purposes of the Petition under consideration in this case, the only exception to the rule that is of relevance appears to be the '*fraud on the minority*' exception[8]. The English cases and the Bermuda cases make clear that a shareholder in a

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[6] A beneficial interest in the shares is insufficient, see *Maas v McIntosh* (1928) 28 SR (NSW) 441. I assume for purposes of this opinion that the DAF Direct Interest is a shareholding.

[7] See also *Edwards v Halliwell* [1950] 2 All ER 1064 and *Wallersteiner v Moir (No 2)* [1975] QB 373.

[8] There is no suggestion in the Complaint that the alleged wrongs are *ultra vires* the company, or that the alleged wrongs could only be carried out by approval of a special majority of shareholders which was not obtained, which are two of the other qualifications or exceptions to the rule in *Foss v Harbottle* referred to in *Edwards v Halliwell* [1950] 2 All E.R. 1064 and *Prudential Assurance Co. Ltd. v Newman Industries Ltd (No. 2)* [1982] Ch 204 at 210 (as cited above). In summary, the *ultra vires* qualification or exception is limited to those exceptional circumstances where the director's or the company's alleged acts are outside the corporate capacity of the company, as provided for by the objects of the company set out in the company's Memorandum of Association and by the statutory powers given to a Bermuda company under the Act. See *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) LR 7 HL 653, *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, at 297 to 303, and *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's LR 543, at 569. In the exceptional circumstances of an *ultra vires* act, the company's and the

Bermuda company may bring a derivative claim in the exceptional circumstance where he can establish both (a) '*fraud on the minority*' and (b) '*wrongdoer control*' which prevents the company itself from bringing an action in its own name ("the '*fraud on the minority*' exception"). Under the '*fraud on the minority*' exception, the derivative claimant must also demonstrate that (i) his conduct has not been so tainted as to bar a claim to equitable relief, (ii) there has been no unacceptable delay in bringing the claim, (iii) the action is not brought for an ulterior motive and (iv) there is no other adequate remedy available to the complainant. The position was summarized by Peter Gibson LJ in the English Court of Appeal decision in *Barrett v Duckett* [1995] 1 BCLC 243, at 249-250:

> "*The general principles governing actions in respect of wrongs done to a company or irregularities in the conduct of its affairs are not in dispute:*
>
> *1. The proper plaintiff is prima facie the company.*
>
> *2. Where the wrong or irregularity might be made binding on the company by a simple majority of its members, no individual shareholder is allowed to maintain an action in respect of that matter.*
>
> *3. There are however recognised exceptions, one of which is where the wrongdoer has control which is or would be exercised to prevent a proper action being brought against the wrongdoer: in such a case the shareholder may bring a derivative action (his rights being derived from the company) on behalf of the company.*
>
> *4. When a challenge is made to the right claimed by a shareholder to bring a derivative action on behalf of the company, it is the duty of the court to decide as a preliminary issue the question whether or not the plaintiff should be allowed to sue in that capacity.*
>
> *5. In taking that decision it is not enough for the court to say that there is no plain and obvious case for striking out; it is for the shareholder to establish to the satisfaction of the court that he should be allowed to sue on behalf of the company.*

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director's alleged acts may be the subject of a direct claim by an aggrieved shareholder, seeking to restrain the company and the directors from carrying out the *ultra vires* acts in question. See *Smith v Croft (No 2)* [1988] Ch 114 at 167 and 177.

6. The shareholder will be allowed to sue on behalf of the company if he is bringing the action bona fide for the benefit of the company for wrongs to the company for which no other remedy is available. Conversely if the action is brought for an ulterior purpose or if another adequate remedy is available, the court will not allow the derivative action to proceed."

34. In *Nurcombe v Nurcombe* [1985] 1 WLR 370 at 376, Lawton LJ held that *"the court is entitled to look at the conduct of a plaintiff in a minority shareholder's action in order to satisfy itself that he is a proper person to bring the action on behalf of the company and that the company itself will benefit. A particular plaintiff may not be a proper person because his conduct is tainted in some way which under the rules of equity may bar relief. He may not have come with "clean hands" or he may have been guilty of delay*".

'Fraud on the minority'

35. Fraud on the minority includes not simply fraud at common law (i.e. the tort of deceit), but it also includes fraud in the wider equitable sense of an abuse or misuse of power: see *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 WLR 2 at page 12. However, unless the wrongdoing is actual fraud, it is a requirement that the wrongdoer must have improperly benefited personally as a result of his fraudulent conduct, such as where he has misappropriated company property for his own benefit (*Clark v Energia Global Ltd* [2002] Bda LR 39).

36. Mere negligence is not sufficient to bring a case within the '*fraud on the minority*' exception unless the negligence is coupled with a personal benefit to the wrongdoer (*Pavlides v Jenson* [1956] Ch 565). The essence of this exception is wrongful conduct on the part of a director resulting in an improper benefit to the director and corresponding loss to the company. Typically this has involved misappropriation by a director or majority shareholder of the property or corporate opportunities belonging to the company. These twin requirements are illustrated by the following extracts from the authorities:

    a. In *Clarke v Energia Global International, Limited* [2002] Bda LR.39, Meerabux, J. said: "*fraud on the minority means that there has been some element of misappropriation of company property*"

b. In *Turquand v Marshall [*1869] LR 4 Ch. Appeal, 376, the court refused to make the directors liable for funds advanced to a fellow director on the ground that they had been improperly advanced. In doing so Lord Hatherley, L.C., set that 386:

"*Then as to the loan to Higgins. The statement of this in the bill was only as part of the general misconduct of the directors, and the loan was only mentioned as one of the losses incurred. There was no specific allegation of any impropriety in lending the money to him, nor was any specific relief prayed in this respect. It was within the powers of the board to lend to a brother director and, however foolish the loan might have been, so long as it was within the powers of the directors, the court could not interfere and make them liable. They were entrusted with full powers of lending the money, and it was part of the business of the concern to trust people with money, and their trusting to an undue extent was not a matter with which they could be fixed, unless there was anything more alleged, as, for instance, that it was done fraudulently and improperly and not merely by a default of judgment. Whatever may have been the amount lent to anybody, however ridiculous and absurd their conduct might seem, it was the misfortune of the company that they choose such unwise directors; as long as they kept within the powers of the board, the court could not interfere with the discretion exercised by them. If a bill had been filed to stop them lending in this way, the court, on the principle of the case of Foss v Harbottle could not have interfered upon that ground.*"

c. In *Mason v Harris* [1879] 11 Ch.D. 97, Jessel M.R. set at page 107:

"*As a general rule the company must sue in respect of a claim of this nature, but general rules have their exceptions, and one exception to the rule requiring the company to be the plaintiff is, that where fraud is committed by persons who can command a majority of votes, the minority can sue. The reason is plain, as unless such an exception were allowed it would be in the power of the majority to defraud the minority with impunity. If the majority were to make a fraudulent sale and put the money into their pockets, would it be reasonable to say that the majority could confirm the sale*".

'Wrongdoer control'

37. The second element which must be established before a minority shareholder can come within the '*fraud on the minority*' exception is wrongdoer control which prevents the company from bringing an action in its own name: *Pavlides v Jenson* [1956] Ch 565. Unless it would obviously be futile, the minority shareholder must first make some attempt to persuade the company to sue[9]: it is not sufficient simply to allege that the wrongdoers are in control.

38. It is important, when considering the issue of 'wrongdoer control', to bear in mind the difference between the control exercised by the directors of a company, and the control exercised by the majority of the shareholders of a company in general meeting. In order to demonstrate 'wrongdoer control', the derivative claimant or minority shareholder needs to establish that the alleged wrongdoers exercise control of the company, not simply in their capacity as directors, but also in their capacity as shareholders in general meeting. If a shareholders' decision not to sue is not adversely affected by the votes of those sought to be sued, then the decision not to sue is effective and no derivative action is possible[10]. This is consistent with the rule that where the alleged wrong is a matter which might be made binding on the company or ratified by a simple majority of shareholders, no individual member of the company is allowed to maintain an action in respect of that matter: *Prudential Assurance Co. Ltd. v Newman Industries Ltd (No. 2)* [1982] Ch 204, at 210[11].

Determination of certain issues at a preliminary stage on the basis of a 'prima facie' case

39. It is incumbent on the minority shareholder (or limited partner, as the case may be) to show that the "*proper plaintiff*" rule is displaced and that the case falls within the relevant exception. As set out above a person seeking to sue derivatively must first obtain the leave of the court to continue the action. Substantively, a derivative action is only permitted

[9] *Birch v Sullivan* [1957] 1 WLR 1247.
[10] *Smith v Croft (No 2)* [1988] Ch 114 at page 139.
[11] See also *Burland v Earle* [1902] AC 83, per Lord Davey at 93-94.

where it can *prima facie* be shown that there exists a viable cause of action or equitable claim vested in the company which, if made good, would establish a fraud on the minority; as well as control of the company by the alleged wrongdoers such as to enable them to stifle any proposed action against themselves[12].

40. The practice at common law in Bermuda is for the claimant to issue proceedings "*on behalf of himself and the other shareholders other than the defendants*", naming the company on whose behalf the proceedings are brought as one of the defendants. A challenge to the claimant's locus will take place at the leave stage. It is in such a context that the court has to consider whether the self-appointed derivative claimant should be permitted to proceed with the action by way of exception to the rule in *Foss v Harbottle*.

41. The Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 at 219 addressed the need for a standard to determine whether a sufficient case has been shown by the claimant:

> "*In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in Foss v Harbottle. On the latter issue it may well be right for the judge trying the preliminary issue to grant a sufficient adjournment to enable a meeting of shareholders to be convened by the board, so that he can reach a conclusion in the light of the conduct of, and proceedings at, that meeting.*"

[12] See the judgments of Lord Millett NPJ and Mr Justice Ribeiro PJ in *Waddington Ltd v Chan Chun Hoo Thomas* [2008] 11 HKCFAR 370, [2008] HKEC 1498, at paragraphs 10 to 21, and paragraphs 47 to 54. Although this is a decision of the Hong Kong Court of Final Appeal, and it is not technically binding on the Supreme Court of Bermuda, the judgments of Lord Millett NPJ and Mr. Justice Ribeiro PJ are likely to be treated by the Supreme Court of Bermuda as highly persuasive in their review and summary of the procedural requirements at common law.

DAF is not the proper plaintiff in respect of losses suffered by Crusader Fund II

42. DAF purchased shares in Crusader Fund II. DAF alleges that A&M, as investment manager for Crusader Fund II, mismanaged Crusader Fund II's claims against HCM, settled those claims for an inadequate amount, and sold the claims for an inadequate amount. The losses claimed for, namely damages for breach of fiduciary duty, are Crusader Fund II's losses. DAF alleges, for instance, that had A&M not sold the Crusader Funds' bankruptcy claim, "the Crusader Funds' investors would have received an additional $30 million over what was paid for the Claims" (Petition par. 24). DAF also alleges that "A&M was required to ensure that the sale of the Claims was in the best interest of all investors" (Petition par. 31).

43. This is precisely the type of claim that Bermuda authority dictates may not be brought by a shareholder. It is a claim for the diminution of value in a company's shares or a reduction of distributions which he receives by virtue of his shareholding which is the result of a loss suffered by the Company in consequence of a wrong done to it by the Defendant (see *Prudential Assurance v Newman* cited above and also *Sjvvilleja v Marex Financial Ltd* [2020] UKSC 31, where the English Supreme Court)

44. It is not open to a shareholder to bring claims which would otherwise belong to a Company, unless the shareholder has standing to bring a derivative claim.

Does DAF Have Standing to Bring a Derivative Claim?

45. In order to bring a derivative claim under Bermuda law on behalf of Crusader Fund II, DAF must bring itself within one of the exceptions to the Rule in *Foss v Harbottle*. The only exception that is conceivably applicable in these circumstances is the 'fraud on the minority' exception.

46. The 'fraud on the minority' exception has a dual test that must be satisfied:

    a. First, DAF must show that there has been actual fraud by the wrongdoer. Actual fraud by A&M has not been pleaded.

b. Alternatively, if the allegation is one of fraud in the wider sense, including equitable fraud, it must also be shown that the wrongdoer improperly benefited personally as a result of his wrongdoing.

c. At paragraph 28 of the Complaint, DAF alleges that A&M owed fiduciary duties to the investors in the Crusader Fund II and breached those fiduciary duties. It further pleads that A&M "preferred certain equity holders (i.e., members of the Redeemer Committee). However other than a bald allegation at paragraph 31 unsupported by particulars[13] it has not pleaded that A&M personally benefited from the alleged wrongdoing, a necessary ingredient for claiming fraud on the minority in the wider sense.

d. As such, on DAF's pleaded case, it is unable to satisfy the first limb, namely that there has been a fraud on the minority.

e. Second, DAF must show that A&M is 'in control' of the entity on behalf of which DAF purports to bring the action. DAF has pleaded that A&M exercises "dominion and control over DAF's direct interest" and therefore holds a position of "special trust and confidence" with DAF regarding DAF's direct interest. However, the root of the alleged dominion and control is unclear and not pleaded. I am instructed that under the Bye-laws of Fund II the ultimate management and control of Fund II resides with the board of Fund II (Bye-law 50). In order to bring itself within the exception to the rule in *Foss v Harbottle*, DAF is required to account for the fact that the Crusader Fund II has not seen fit to bring an action on its own behalf. This is because a Bermuda Court, like English Courts, will recognize that it is for the Board and the majority of the shareholders may legitimately refuse to pursue litigation (see *Sevillja v Marex Financial Ltd* cited above). In such a case, the minority cannot pursue a personal action unless he can bring himself within one of the exceptions to the Rule in *Foss v Harbottle*. No facts have been pleaded in this

[13] The Petition at paragraph 31 states that A&M "either (a) orchestrated and timed the sale of the Claims to freeze out DAF and retain proceeds owed to DAF for A&M's own benefit or the benefit of other investors such as the Redeemer Committee or (b) allowed the Redeemer Committee to dominate the management of the Claims in derogation of A&M's fiduciary duties as investment manager…"

regard. DAF has not pleaded that it has made any demand on the Crusader Fund II to bring proceedings against A&M.

47. It is therefore my opinion that DAF would not have had standing to bring a derivative claim on behalf of Crusader Fund II on its pleaded case.

The approach Bermuda Law takes to the exercise of management decisions. Is there a "Business Judgment Rule?

48. In order to succeed in challenging a management decision it is necessary to demonstrate a lack of good faith on the part of management with respect to the decision.

49. Under Bermuda law there is no rule that is styled as "the Business Judgment Rule" as understood under the laws of certain states in the United States. However, the courts of Bermuda, again following applicable binding or highly persuasive precedent in the English and Commonwealth Courts, will not interfere with bona fide management decisions made by the directors (or those in control of the management) of Bermuda Companies.

50. Officers[14] of Bermuda Companies have a duty to:

    a. act honestly and in good faith with a view to the best interests of the company; and

    b. exercise the care skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that a reasonably prudent person would exercise in comparable circumstances. (Section 97(1)(a) and (b) of the Companies Act 1981).

51. Bermuda, following English precedent, recognizes that it is for the directors themselves to determine (acting in good faith how best to promote the success of a Company for the benefit of its members as a whole (e.g *Re Smith & Fawcett Limited* [1942] Ch 304, 306

[14] The term "officer" is defined to include directors -Section 2(1) of the Companies Act. The Bye-laws of the Crusader Fund II permit the directors to delegate their duties powers and discretions to investment managers (Bye-law 54.1) and confer on those managers powers of attorney. The Board have delegated certain duties and powers to A & M under the Investment Management Agreement. That relationship would be governed by the terms and governing law of the Investment Management Agreement. The board's duties of investment management must be exercised in good faith and for the purposes of this section I assume that A&M have a similar duty under New York law.

per Lord Green MR)). This proposition has been unaffected by the codification of the duties under the Companies Act[15].

52. In *Iesini v Westrip Holdings* [2011] 1 BCLC 498 at [85] Lewison J stated that "*The weighing of these considerations is essentially a commercial decision which the court is ill equipped to take, except in a clear case*"

53. The court will not substitute its view for a bona fide exercise of management power by the officers of a company. The Privy Council made this clear in *Howard Smith Ltd. v Ampol Ltd.* [1974] AC 821 at 832 E/F per Lord Wilberforce. He stated,

"It would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision, on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at."

54. That proposition remains good law and was cited in *ClientEarth* where Trower J explained, "*It is well established that the test for breach of s.172 is a subjective one (e.g., Regentcrest Plc v Cohen [2001] 2 BCLC 80 at [120] per Jonathan Parker J) and requires proof of conduct other than in good faith. As Jonathan Parker J explained, there will be cases in which an absence of good faith can be inferred from the irrational nature of the conduct in issue, but it remains the case that the state of mind of the director concerned is what matters. For these purposes, good faith, not irrationality, is the cornerstone and an honest but unreasonable and mistaken belief that a particular course of action is in the company's best interests is not sufficient to amount to a breach of s.172.*"

55. It is therefore necessary for a claimant to plead facts which support allegations that the officers have acted in other than in good faith. Actions that are unreasonable or taken in mistaken belief that the course of action is in the best interests of the company which subsequently turn out not to be will not justify the interference of the court.

[15] Per Trower J in *ClientEarth* paragraph 18

56. In the Petition, with respect to the handling of the bankruptcy claims against HCM, the allegations of breach of fiduciary duty are said to be that A&M:

    a. Abdicated its responsibility to manage the recovery and sale of the Redeemer Committee's and Crusader Funds' bankruptcy claims (Complaint, paragraph 31).

    b. Preferred the interests of other interest holders to those of DAF and orchestrated and timed the sale of the Claims to freeze out DAF and retain proceeds owed to DAF for A&M's own benefit or the benefit of other investors and or allowed the Redeemer Committee to dominate the management of the Claims in derogation of A&Ms fiduciary duties as investment manager to DAF's detriment so that the Redeemer Committee could quickly liquidate its interest rather than managing the Claims to maximize the return on assets (Complaint, paragraph 31)

57. It is not clear how A&M is said to be acting otherwise than in good faith on the pleaded case.

    a. Assuming A&M "abdicated" or rather, permitted or delegated a responsibility to the Redeemer Committee to manage and recover the sale of the Crusader Funds' bankruptcy claims, the Complaint does not explain why such "abdication" if it took place was improper, or outside its powers or otherwise than in good faith. There is no clear explanation of the role and powers of the Redeemer Committee and how it interacted with A&M in the management of the Funds, let alone any pleading which explains how it is said that the Redeemer Committee or A&M are acting other than in good faith, with respect to such interaction. Absent pleading such lack of good faith no case of breach of its fiduciary duty under Bermuda law could be sustained.

    b. With respect of the allegations relating to preferential treatment, if directors were exercising their powers for the purpose of "freezing out" DAF or to retain proceeds owed to DAF for A&M's own benefit or the benefit of other investors, such actions could be a breach of fiduciary duty and an improper exercise of powers. However, there are no facts pleaded which would lead a court to infer that other creditors or A&M in fact benefitted or received more, only the bald allegation that they did and

that interests of others were preferred. It may be that the sale of claims reduced the amounts which were payable to investors in Crusader Fund II, but it is not pleaded that such a sale was outside A&M's powers. Nor is it pleaded how A&M is said to have "benefited" and if, in fact it was within their powers, why they acted improperly otherwise than in good faith. This is so particularly where on its face, there may be very good commercial reasons for effecting a sale in the manner and in the time frame that that it was.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 13th day of November, 2024.

Charles Christian Rolf Luthi

Exhibit 7

FILED UNDER SEAL