

Fill in this information to identify the case:

Debtor 1 Highland Capital Management, L.P.

Debtor 2 \_\_\_\_\_  
(Spouse, if filing)

United States Bankruptcy Court for the: Northern District of Texas, Dallas Division

Case number 19-34054

## Official Form 410

## Proof of Claim

12/15

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. Do not send original documents; they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

## Part 1: Identify the Claim

1. Who is the current creditor?	<u>Acis Capital Management L.P. and Acis Capital Management GP, LLC</u> Name of the current creditor (the person or entity to be paid for this claim)	
	Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent?  Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	<b>Where should notices to the creditor be sent?</b>  <u>Acis Capital Management, L.P. and Acis Capital Management GP, LLC</u> <u>c/o Winstead PC Attn: Annmarie Chiarello</u> Name  <u>500 Winstead Building, 2728 N. Harwood Street</u> Number Street  <u>Dallas TX 75201</u> City State ZIP Code  Contact phone <u>(214) 745-5410</u> Contact email <u>achiarello@winstead.com</u>  Uniform claim identifier for electronic payments in chapter 13 (if you use one): _____	<b>Where should payments to the creditor be sent? (if different)</b>  <u>Acis Capital Management, L.P. and Acis Capital Management GP, LLC</u> Name  <u>3110 Webb Ave., Suite 203</u> Number Street  <u>Dallas TX 75205</u> City State ZIP Code  Contact phone <u>(214) 556-3405</u> Contact email <u>josh@shorewoodmgmt.com</u>
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



**Part 2: Give Information About the Claim as of the Date the Case Was Filed**

6. Do you have any number you use to identify the debtor? ☒ No  
☐ Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: \_\_\_\_\_

7. How much is the claim? At least \$75,000,000.00  
 (see attached addendum) Does this amount include interest or other charges?  
☐ No  
☒ Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim? Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.  
 Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).  
 Limit disclosing information that is entitled to privacy, such as health care information.  
Various litigation claims (See attached addendum)

9. Is all or part of the claim secured? ☐ No  
☒ Yes. The claim is secured by a lien on property.

**Nature of property:**

☐ Real estate. If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.

☐ Motor vehicle

☒ Other. Describe: See attached addendum

**Basis for perfection:** See attached addendum  
 Attach redacted copies of document, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

**Value of Property:** See attached addendum

**Amount of the claim that is secured:** See attached addendum

**Amount of the claim that is unsecured:** See attached addendum

**Amount necessary to cure any default as of the date of the petition:** See attached addendum

**Annual Interest Rate** (when case was filed) See attached addendum

☐ Fixed  
☐ Variable

10. Is this claim based on a lease? ☒ No  
☐ Yes. Amount necessary to cure any default as of the date of the petition. \$ \_\_\_\_\_

11. Is this claim subject to a right of setoff? ☐ No  
☒ Yes. Identify the property: See attached addendum

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

☒ No

☐ Yes. Check all that apply:

Amount entitled to priority

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

\$ \_\_\_\_\_

☐ Up to \$2,775\* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ \_\_\_\_\_

☐ Wages, salaries, or commissions (up to \$12,475\*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ \_\_\_\_\_

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ \_\_\_\_\_

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ \_\_\_\_\_

☐ Other. Specify subsection of 11 U.S.C. § 507(a)(2) that applies.

\$ \_\_\_\_\_

\* Amounts are subject to adjustment on 4/01/19 and every 3 years after that for cases begun on or after the date of adjustment.

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☒ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have a reasonable belief that the information is true and correct.

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

Executed on date 12/31/2019

MM / DD / YYYY

Signature [Signature]

Print the name of the person who is completing and signing this claim:

Name Joshua N. Terry  
First name Middle name Last name

Title President of Acis Capital Management GP, LLC, General Partner of Acis Capital Management L.P.

Company Acis Capital Management GP, LLC, General Partner of Acis Capital Management L.P.  
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address 3110 Webb Ave., Suite 203

Dallas

City

TX

State

75205

ZIP Code

Contact phone (214) 556-3405

Email josh@shorewoodmgmt.com

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

**IN RE:**

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

**DEBTOR.**

§  
§  
§  
§  
§  
§  
§

**CASE NO. 19-34054**

**Chapter 11**

**ADDENDUM TO PROOF OF CLAIM FILED BY  
ACIS CAPITAL MANAGEMNT, L.P. AND  
ACIS CAPITAL MANAGEMENT GP, LLC**

**Claimant:**

Acis Capital Management, L.P ("Acis LP") and Acis Capital Management GP, LLC ("Acis GP," together with Acis LP, "Acis") file this addendum in support of their proof of claim against Highland Capital Management, L.P (the "Debtor").

**Basis, Description of Claim, and Amount of Claim:**

On October 16, 2019 (the "Petition Date"), the Debtor commenced the above-styled and numbered bankruptcy case under Chapter 11 of 11 U.S.C §§ 101 *et seq.* (the "Bankruptcy Code")

Acis's claim against the Debtor, as of the Petition Date, consists of at least **\$75,000,000.00** as further described by the Complaint (as hereinafter defined) (the "Claim"). Post-petition interest, attorneys' fees, costs, and other expenses continue to accrue on the Claim against the Debtor to the extent allowable under applicable law. The Claim includes pre-judgment interest on certain claims asserted in the Complaint, interest on certain claims asserted in the Complaint, attorneys' fees, and punitive damages, as further described by the Complaint.

The Claim is based on the claims and causes of action asserted in the *Second Amended Complaint (Including Claim Objections and Objections to Administrative Expense Claims)* filed by Acis in Adversary No. 18-03078 pending in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (including all attachments referenced therein, the "Complaint"). A true and correct copy of the Complaint is attached hereto as **Exhibit "A."**<sup>1</sup>

**Other Rights:**

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<sup>1</sup> **Exhibit "A"** does not include the attachments to the Complaint as the attachments are voluminous. The attachments to the Complaint are incorporated by reference and can be found at Docket Nos. 157-159 in Adversary No. 18-03078 pending in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division or by contacting the undersigned counsel.

Acis reserves all rights with respect to recoupment and setoff, including, but not limited to, Acis's rights under Section 553 of the Bankruptcy Code. Acis's claim against the Debtor is accordingly secured to the extent permitted under Sections 506 and 553 of the Bankruptcy Code.

In addition to the foregoing claims, Acis reserves the right in the future to amend, if necessary, and assert any and all claims that Acis may have against the Debtor under both federal and state law, including, without limitation, any legal or equitable remedies to which Acis may be entitled. Acis additionally claims the benefit of (a) all renewals, extensions, ratifications, supplements, amendments, corrections, and other prior or subsequent documentation evidencing or relating to the claims of Acis; (b) all applicable rights under the Bankruptcy Code; and (c) any other filed or recorded documents. The filing of this Proof of Claim is not to be construed as an election of remedies.

**Notices:** All notices to Acis in connection with this Proof of Claim shall be sent to:

Annmarie Chiarello  
**WINSTEAD PC**  
500 Winstead Building  
2728 N. Harwood Street  
Dallas, Texas 75201  
(214) 745-5400 (Telephone)  
achiarello@winstead.com

**Payments:** Please submit any payments and distributions to Acis with respect to this Proof of Claim to:

Acis Capital Management, L.P. and Acis Capital Management GP, LLC  
Attention: Joshua N. Terry  
3110 Webb Avenue, Suite 203  
Dallas, Texas 75205

**Amendments:** Acis reserves the right to amend and/or supplement this Proof of Claim, the Addendum to the Proof of Claim, and any other attachments to its Proof of Claim.

**DATED: December 31, 2019.**

Counsel:

Rakhee V. Patel  
Annmarie Chiarello  
**WINSTEAD PC**  
500 Winstead Building  
2728 N. Harwood Street  
Dallas, Texas 75201  
(214) 745-5400 (Telephone)  
rpatel@winstead.com  
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Brian P. Shaw  
**ROGGE DUNN GROUP, PC**  
500 N. Akard Street  
Suite 1900  
Dallas, Texas 75201  
Telephone: (214) 239-2707  
Facsimile: (214) 220-3833  
shaw@roggedunnngroup.com

**COUNSEL FOR ACIS CAPITAL  
MANAGEMENT, L.P. AND ACIS  
CAPITAL MANAGEMENT GP, LLC**

Brian P. Shaw – State Bar No. 24053473  
**ROGGE DUNN GROUP, PC**  
 500 N. Akard St., Suite 1900  
 Dallas, Texas 75201  
 Telephone: (214) 888-5000  
 Facsimile: (214) 220-3833  
[shaw@roggedunngroup.com](mailto:shaw@roggedunngroup.com)

## COUNSEL FOR REORGANIZED DEBTORS

**In re:**

**ACIS CAPITAL MANAGEMENT, L.P.,  
ACIS CAPITAL MANAGEMENT GP,  
LLC,**

## Debtors.



**Case No. 18-30264-SGJ-11**

**Case No. 18-30265-SGJ-11**

**(Jointly Administered Under Case  
No. 18-30264-SGJ-11)**

## Chapter 11

**ACIS CAPITAL MANAGEMENT, L.P.,  
ACIS CAPITAL MANAGEMENT GP,  
LLC, Reorganized Debtors,**

**Plaintiffs,**

**VS.**

**HIGHLAND CAPITAL MANAGEMENT,  
L.P., HIGHLAND CLO FUNDING, LTD.  
F/K/A ACIS LOAN FUNDING, LTD.,  
HIGHLAND HCF ADVISOR, LTD.,  
HIGHLAND CLO MANAGEMENT, LTD.,  
and HIGHLAND CLO HOLDINGS, LTD,**

## Defendants.



Adversary No. 18-03078

**(To be consolidated with Adversary  
Nos. 18-03212 & 19-03103)**

**SECOND AMENDED COMPLAINT (INCLUDING CLAIM  
OBJECTIONS AND OBJECTIONS TO ADMINISTRATIVE EXPENSE CLAIM)**

Acis Capital Management, L.P. ("Acis LP") and Acis Capital Management GP, LLC ("Acis GP" together with Acis LP, the "Reorganized Debtors" or "Acis")<sup>1</sup> the reorganized debtors in the above-styled and jointly administered bankruptcy cases (the "Bankruptcy Cases"), and Plaintiffs in the in the above-styled adversary proceeding (the "Adversary Proceeding"), file this *Second Amended Complaint (Including Claim Objections and Objections to Administrative Expense Claim)* (this "Second Amended Complaint"), objections to the proofs of claims filed by Highland Capital Management, L.P. ("Highland Capital"), and objections to the administrative expense claim filed by Highland Capital, and respectfully state as follows:<sup>2</sup>

**ANSWER AND AFFIRMATIVE DEFENSES**

1. Pursuant to Federal Rule of Civil Procedure 41(a), incorporated by Federal Rule of Bankruptcy Procedure 7041, all claims asserted in the *Original Complaint and Request for Preliminary Injunction of Highland CLO Funding, Ltd. and Highland Capital Management Against Chapter 11 Trustee of Acis Capital Management, L.P. and Acis Capital Management GP, LLC* [Docket No. 1] (the "Original Complaint") by Highland Capital and Highland CLO Funding, Ltd. ("Highland Funding") have been dismissed without prejudice. *See* Adv. No. 18-03078, Docket No. 79. Accordingly, such dismissal of Highland Capital's and Highland Funding's claims obviates the Trustee's, now Acis's, answer and affirmative defenses thereto;

<sup>1</sup> On February 15, 2019, the date upon which the Plan (defined below) became effective, Acis was substituted for Robin Phelan, the Chapter 11 Trustee, in the above-referenced consolidated adversary cases. *See* Case No. 18-30264, Docket Nos. 829, 830, & 863. Prior to the date upon which the Plan (defined below) became effective, Acis may be referred to as the "Debtors."

<sup>2</sup> As more fully described below in the Procedural Background, this Second Amended Complaint consolidates: (i) claims, counterclaims, third-party claims, and objections to Highland Capital's proofs of claim brought by the Chapter 11 Trustee, now Acis, in this Adversary No. 18-03078; (ii) claims brought by the Chapter 11 Trustee, now Acis, in Adversary No. 18-03212, which has been consolidated under this Adversary Proceeding; and (iii) objections of the Chapter 11 Trustee, now Acis, against Highland Capital's request for an administrative expense claim, which was converted to Adversary No. 19-03103 and was ordered consolidated under this Adversary Proceeding.



however, Acis reserves all rights with respect to answering or asserting affirmative defenses to any future-filed claims by any parties in this Adversary Proceeding.

2. Additionally, pursuant to Federal Rule of Civil Procedure 41(a)(2), such dismissal of Highland Capital's and Highland Funding's claims is without prejudice to any counterclaims asserted by the Trustee, now Acis, in the *Defendant's Answer, Affirmative Defenses, Counterclaims, and Third Party Claims* [Adv. No. 18-03078, Docket No. 23] (the "Original Answer"), as may be amended, and such counterclaims remain pending for independent adjudication.

### **CLAIMS AND COUNTERCLAIMS**

3. Acis hereby asserts the following claims for affirmative recovery against Highland Capital, Highland Funding, Highland HCF Advisor, Ltd. ("Highland Advisor"), Highland CLO Management Ltd. ("Highland Management"), and Highland CLO Holdings, Ltd. ("Highland Holdings"). Additionally, Acis asserts the following claims and counterclaims against Highland Capital and such claims and counterclaims shall also constitute recoupment or offset to any claim Highland Capital has against Acis.

#### **I. JURISDICTION, VENUE, AND STATUTORY PREDICATE**

4. This Court has subject matter jurisdiction over the Bankruptcy Cases and this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. Venue of the Adversary Proceeding in this district is proper under 28 U.S.C. § 1409.

5. This matter arises under the laws of the United States of America and state common law. The statutory predicates for the relief sought herein are pursuant to sections 362, 502, 503, 541, 542, 544, 547, 548, 550, and 558 of 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code"), Texas Business & Commerce Code § 24.001 *et seq.* ("TUFTA"), and Federal Rules of Bankruptcy Procedure 3007(b) and 7001.

6. This Adversary Proceeding constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Acis hereby consents to the Court's entry of a final judgment resolving this Adversary Proceeding. This Adversary Proceeding includes an objection to Highland Capital's proofs of claim pursuant to Federal Rule of Bankruptcy Procedure 3007(b), and the claims and counterclaims asserted herein shall constitute recoupment and/or offset to such proofs of claim, to the extent such claims are otherwise allowed. This Adversary Proceeding also includes an objection to Highland Capital's administrative expense claim, and the claims and counterclaims asserted herein shall constitute recoupment and/or offset to such administrative expense claim, to the extent such claims are otherwise allowed.

## II. PARTIES

7. Acis LP is limited partnership and Acis GP is a limited liability company, both of which were organized under the laws of the State of Delaware, and both of which may be served with pleadings and process in this Adversary Proceeding through the undersigned counsel.

8. Highland Capital is a limited partnership organized under the laws of the State of Delaware, with its principal place of business located at 300 Crescent Court, Suite 700, Dallas, Texas 75201.

9. Highland Funding is an exempted company organized with limited liability under the laws of Guernsey, with its registered office located at First Floor, Dorey Court, Admiral Park, St Peter Port, Guernsey GY1 6HJ, Channel Islands.

10. Highland Advisor is a company organized under the laws of the Cayman Islands, with its registered office located at Maples Corporate Services Limited, P.O. Box 309 Ugland House, South Church Street, George Town, Grand Cayman KY1-1004. Highland Advisor's principal place of business is 300 Crescent Court, Suite 700 Dallas, Texas 75201. *See **Exhibit T*** at 86. Highland Advisor may be served through its President, James Dondero, at 300 Crescent

Court, Suite 700 Dallas, Texas 75201. *See id.* at 89. Highland Advisor may be served through its Secretary, Scott Ellington, at 300 Crescent Court, Suite 700 Dallas, Texas 75201. *See id.* Highland Advisor may be served through its Chief Compliance Officer, Thomas Surgent at 300 Crescent Court, Suite 700 Dallas, Texas 75201. *See id.* Highland Advisor may be served through its Executive Vice President, Mark Okada at 300 Crescent Court, Suite 700 Dallas, Texas 75201. *See id.* Highland Advisor may be served through its Treasurer, Frank Waterhouse at 300 Crescent Court, Suite 700 Dallas, Texas 75201. *See id.* Highland Advisor may be served through its Assistant Secretary, Lee "Trey" Parker at 300 Crescent Court, Suite 700 Dallas, Texas 75201. *See id.* Highland Advisor may also be served through its director Summit Management, Limited c/o John Cullinane P.O. Box 32311, Suite #4-210 Governors Square 23 Lime Tree Bay Avenue Grand Cayman KY1-1209 Cayman Islands. Highland Advisor may also be served through its director John Cullinane at 24 Windjammer Quay, George Town Grand Cayman. Highland Advisor may also be served through its director at Suite #4-210 Governors Square 23 Lime Tree Bay Avenue Grand Cayman KY1-1209 Cayman Islands. Acis reserves the right to serve Highland Advisor by any method that is reasonably calculated to give notice including, but not limited to applicable treaties and conventions between the United States and the Cayman Islands, a British overseas territory.

11. Highland Management is a company organized under the laws of the Cayman Islands, with its registered office located at P.O. Box 309 Ugland House, South Church Street, George Town, Grand Cayman KY1-1004. Upon information and belief, Highland Management principal place of business is 300 Crescent Court, Suite 700 Dallas, Texas 75201. Highland Management may also be served through its director Summit Management, Limited c/o John Cullinane P.O. Box 32311, Suite #4-210 Governors Square 23 Lime Tree Bay Avenue Grand Cayman KY1-1209 Cayman Islands. Acis reserves the right to serve Highland Management by

any method that is reasonably calculated to give notice including, but not limited to applicable treaties and conventions between the United States and the Cayman Islands, a British overseas territory.

12. Highland Holdings is a company organized under the laws of the Cayman Islands, with its registered office located at P.O. Box 309 Ugland House, South Church Street, George Town, Grand Cayman KY1-1004. Highland Holding's principal place of business is 300 Crescent Court, Suite 700 Dallas, Texas 75201. *See id.* at 103. Highland Holding's general or managing agent is James Dondero. *See id.* Highland Advisor may be served through its general or managing agent, James Dondero, at 300 Crescent Court, Suite 700 Dallas, Texas 75201. *See id.* Acis reserves the right to serve Highland Holdings by any method that is reasonably calculated to give notice including, but not limited to applicable treaties and conventions between the United States and the Cayman Islands, a British overseas territory.

### III. JURISDICTIONAL BACKGROUND<sup>3</sup>

#### A. Highland Advisor Jurisdictional Background

13. Upon information and belief, on October 26, 2017, Jean Paul Sevilla ("Sevilla"), a Highland employee and associate general counsel, requested Maples and Calder create Highland Advisor. On information and belief, on October 27, 2017, Mr. Sevilla requested that Highland Advisor be established such that Highland is the 100% owner of the "high" share class of Highland Advisor.

14. Highland Advisor's principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201, Highland Capital's office and headquarters. *See Exhibit T* at 88. Highland Advisor is ultimately, directly or indirectly, owned or controlled by James Dondero

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<sup>3</sup> Any capitalized term not otherwise defined in this Jurisdictional Background shall have the meaning ascribed to it later in this Second Amended Complaint.

("Dondero") and Mark Okada ("Okada"), who ultimately, directly or indirectly, own or control Highland Capital. *See id.* at 89 and Opinion at 8.

15. Upon information and belief, the principals of Highland Capital, Dondero and Okada, serve as the president and executive vice president, respectively, of Highland Advisor. *See* Opinion at 8 and **Exhibit T** at 89. Other Highland Capital employees serve as officers of Highland Advisor including Scott Ellington, Lee "Trey" Parker, Thomas Surgent, and Frank Waterhouse. *See* **Exhibit T** at 89.

16. Dondero signed the November 15, 2017 Portfolio Management Agreement by and between Highland Advisor and Highland Funding (the "November 2017 PMA") on behalf of Highland Advisor. A true and correct copy of the November 2017 PMA is attached hereto as **Exhibit P**.

17. Attached hereto as **Exhibit Q** is the December 13, 2018 (A.M.) hearing transcript from *In re Acis Capital Management, L.P., et al.* At the December 13, 2018 hearing, Hunter Covitz, a Highland Capital employee, testified: "As I understand HCF Advisor is a relying advisor of Highland." *See* **Exhibit Q** at 78, ll. 15-16. Hunter Covitz further testified, "[b]ut HCF Advisor is Highland. . . . That's the distinction between Highland HCF Advisor could be well capitalized, the substance of Highland Capital, its office space, employees, balance sheet, back office, legal, what [have] you, would all be incorporated with HCF Advisor, where Acis with no employees is not looked at that way." *Id.* at 61, ll. 5 & 11-15. Finally, Hunter Covitz testified, "there's really no differentiation between HCF Advisor and Highland." *Id.* at 62, ll. 21-23.

18. Attached hereto as **Exhibit R** are meeting minutes of Acis Loan Funding, Ltd. and Highland Funding, which contain a Highland Funding Bates label and were produced in connection with the Bankruptcy Cases or related adversary case. These meeting minutes reflect that various Highland Capital employees, including Sevilla, Hunter Covtiz, Tim Cournoyer,

David Wilmore, Issace Leventon, and Thomas Surgent appeared at Highland Funding's board meeting on behalf of Highland Advisor. The parties that conduct the day-to-day operations of Highland Advisor are Highland Capital employees that office in Dallas, Texas.

19. Attached hereto as **Exhibit S** is Highland Capital's 2017 Form ADV, which states that Highland Advisor is another business name of Highland Capital.

20. Attached hereto as **Exhibit T** is Highland Capital's 2019 Form ADV, which states that Highland Advisor's principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201—Highland Capital's office and headquarters. Highland Capital's 2019 Form ADV also states that Highland Capital is a shareholder of Highland Advisor and that Highland Advisor is another business name of Highland Capital.

21. The Confirmation Opinion states that "Dondero, in addition to being the chief executive of Highland and the Debtor-Acis, also became the president of the newly formed Highland [Advisor]." Confirmation Opinion at 8. Additionally, the Confirmation Opinion states that "Highland [Advisor] (i.e., the Cayman Island entity that was recently formed to essentially replace the Debtor-Acis under the Equity/ALF PMA)." Confirmation Opinion at 19. Additionally, the Confirmation Opinion states that Highland Advisor is an affiliate of Highland Capital. Confirmation Opinion at 21.

## **B. Highland Management Jurisdictional Background**

22. Upon information and belief, on or about October 27, 2017 (7 days after the Arbitration Award), Highland Management was created at the direction of Sevilla, a Highland lawyer and employee, using the same structure as Highland Advisor. Upon information and belief, Highland Management's mailing address is 300 Crescent Court, Suite 700, Dallas, Texas 75201, Highland's Dallas office and headquarters.

23. Upon information and belief, Highland Management is ultimately, directly or indirectly, owned or controlled by Dondero and Okada, who ultimately, directly or indirectly, own or control Highland Capital.

24. Additionally, in connection with the hearing on the involuntary petitions, Dondero testified at great length regarding the Note Transfer to Highland Management on behalf of Highland Management.<sup>4</sup> Dondero testified upon direct examination by Acis's (at the time, a putative debtor) counsel about the Note Transfer, stating:

Q: Now, if there came a time with litigation costs and other expenses where Acis was unable to pay its expenses when they became due, what was your intent in signing this as to whether or not HCLM [Highland Management] would honor this and make the payment?

A: We would -- we would honor it and -- and pay as appropriate.

See Exhibit U (March 23, 2018 Hr'g Tr., *In re Acis Capital Management, L.P., et al.* 146:7-12) (emphasis added). When Dondero says "we," Acis contends that he is speaking on behalf of Highland Capital and Highland Management. Additionally, Dondero testified that the Note Transfer was an "economic wash" for him as "it doesn't matter which pocket it goes into." *Id.* at 152:20-24.

25. The Opinion states that, "Highland Management was registered in the Cayman Islands on October 27, 2017, roughly a week before the Note Transfer... **it appears Highland Management was an entity that was created specifically to hold the Note and eventually take possession of the CLO PMAs in an international forum that would be difficult for Mr. Terry to reach.**" Opinion at 20-21, n. 37 (emphasis added).

<sup>4</sup> Dondero testified at the trial on the involuntary petitions only after Mr. Terry sought to compel Dondero's deposition and after this Court ordered Dondero to appear at the trial on the involuntary petitions.



26. Upon information and belief, Dondero is the managing or general agent of Highland Management.

27. The Confirmation Opinion states that Highland Management is "an entity registered in the Cayman Islands on October 27, 2017—seven days after Mr. Terry's Arbitration Award)." Confirmation Opinion at 19. The Confirmation Opinion further states that "it appears Highland Management was an entity that was created specifically to hold the Note and eventually take possession of the CLO PMAs in an international forum that would be difficult for Mr. Terry to reach." Opinion at 20-21, n.37. Finally, the Confirmation Opinion states that "Highland Management (the Highland-created entity that entered into a portfolio management agreement with a new Acis-CLO that was established in 2017)." Confirmation Opinion at 24.

#### C. **Highland Holdings Jurisdictional Background**

28. The Confirmation Opinion states that Highland Holdings is "(yet another entity incorporated in the Cayman Island on October 27, 2017)." Confirmation Opinion at 19.

29. Attached hereto as **Exhibit T** is Highland Capital's 2019 Form ADV, which states that Highland Holding's principal place of business is 300 Crescent Court, Suite 700, Dallas, Texas 75201, Highland Capital's office and headquarters. **Exhibit T** at 103. Highland Capital's 2019 Form ADV also states that Highland Holdings is another business name of Highland Capital. Highland Capital's 2019 Form ADV further states Highland Capital, Dondero, and other Highland affiliates are "control persons" of Highland Holdings.

### IV. **PROCEDURAL BACKGROUND**

30. On January 30, 2018 (the "Petition Date"), Joshua N. Terry ("Terry"), as petitioning creditor, filed involuntary petitions under section 303 of the Bankruptcy Code against both Acis LP and Acis GP, thereby initiating the Bankruptcy Cases. *See* Case No. 18-30264, Docket No. 1 & Case No. 18-30265, Docket No. 1.



31. On April 13, 2018, this Court entered its *Findings of Fact and Conclusions of Law in Support of Orders for Relief Issued After Trial on Involuntary Bankruptcy Petition* [Case No. 18-30264, Docket No. 118 & Case No. 18-30265, Docket No. 113] (the "Opinion") and *Order for Relief in an Involuntary Case* in each of the Bankruptcy Cases [Case No. 18-30264, Docket No. 119 & Case No. 18-30265, Docket No. 114] (the "Orders for Relief"). The Opinion is hereby incorporated by reference as if fully set forth herein.

32. On May 14, 2018, Robin Phelan (the "Trustee") was appointed chapter 11 trustee of the Debtors' bankruptcy estates in the Bankruptcy Cases. *See* Case No. 18-30264, Docket No. 213.

33. On May 30, 2018, Highland Capital and Highland Funding filed their Original Complaint, initiating this Adversary Proceeding, in which Highland Capital and Highland Funding asserted various claims for breach of contract, declaratory relief, and injunctive relief against the Trustee. *See* Adv. No. 18-03078, Docket No. 1.

34. On June 21, 2018, the Trustee filed his *Verified Original Complaint and Application for Temporary Restraining Order and Preliminary Injunction* [Adv. No. 18-03212, Docket No. 1] ("Complaint and Application for TRO"), initiating Adversary No. 18-03212, in which the Trustee sought, *inter alia*, injunctive relief to prevent Highland Capital, Highland Funding, and their affiliates from taking any action to effectuate an optional redemption (which would result in liquidation of the Acis CLOs (defined below)), as well as relief pursuant to 11 U.S.C. § 362(k) for willful violations of the automatic stay for actions taken by Highland Capital and its affiliates, including Highland Funding, in attempting to effectuate an optional

redemption.<sup>5</sup> Highland Capital and Highland Funding subsequently filed their answers to the Trustee's Complaint and Application for TRO. *See* Adv. No. 18-03212, Docket Nos. 32 & 33.

35. On July 2, 2018, the Trustee filed his Original Answer in this Adversary Proceeding, in which the Trustee asserted certain counterclaims and third-party claims against Highland Capital, Highland Funding, Highland Advisor, and Highland Management (collectively and along with Highland Holdings, the "Highlands") in connection with the Highlands' scheme, described more fully below, to fraudulently transfer Acis LP's assets to the Highlands and otherwise appropriate the business of Acis LP. *See* Adv. No. 18-03078, Docket No. 23.

36. On July 23, 2018, Highland Capital filed *Highland Capital Management, L.P.'s Motion to Dismiss Counterclaims or, Alternatively, for a More Definite Statement* [Adv. No. 18-03078, Docket No. 42] ("Highland's Motion to Dismiss"), in which Highland Capital sought, *inter alia*, to dismiss the Trustee's counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(6).

37. Also on July 23, 2018, Highland Funding filed *Highland CLO Funding Ltd.'s Motion to Dismiss* [Adv. No. 18-03078, Docket No. 43] ("Highland Funding's Motion to Dismiss") and *Highland CLO Funding Ltd.'s Brief in Support of its Motion to Dismiss* [Adv. No. 18-03078, Docket No. 44], in which Highland Funding sought, *inter alia*, to dismiss the Trustee's counterclaims pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6).

38. On August 1, 2018, Highland Capital filed Proof of Claim No. 27 in the claims register for Case No. 18-30264 (the "Highland Acis LP Claim"), in the amount of \$4,672,140.38, with the basis of the claim listed as "Sub-Advisory Services and Shared Services."

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<sup>5</sup> Certain portions of the Complaint and Application for TRO were subsequently dismissed, ultimately leaving only: Count 1 for *Temporary Restraining Order and Preliminary Injunction* (which injunctive relief expired with confirmation of the Plan (defined below)); and Count 2 for *Willful Violation of the Automatic Stay* against Highland Capital and Highland Funding. *See* Adv. No. 18-03212, Docket Nos. 49 & 56.

39. Also on August 1, 2018, Highland Capital filed Proof of Claim No. 13 in the claims register for Case No. 18-30265 (the "Highland Acis GP Claim," together with the Highland Acis LP Claim, the "Highland Capital Claims"), in the amount of \$4,672,140.38, with the basis of the claim listed as "Sub-Advisory Services and Shared Services." The Highland Acis GP Claim is identical to the Highland Acis LP Claim.

40. On August 10, 2018, Highland Capital and Highland Funding filed *Highland Capital Management, L.P. and Highland CLO Funding Ltd.'s Motion for Leave to Amend Adversary Complaint and Brief in Support* [Docket No. 51] (the "Motion to Amend"), in which Highland Capital and Highland Funding sought to amend their Original Complaint to remove all claims against the Trustee, except for one claim by Highland Funding for a declaratory judgment that the Trustee cannot "sell or transfer Highland Funding's property without Highland Funding's consent."

41. On October 9, 2018, the Court heard Highland Capital's Motion to Dismiss, Highland Funding's Motion to Dismiss, and the Motion to Amend. Considering that the Trustee expressed his intent to amend his Original Answer, the parties agreed that all arguments made by Highland Capital and Highland Funding to dismiss the Trustee's counterclaims pursuant to Rule 12(b)(6) were moot. With respect to Highland Funding's argument to dismiss for lack of personal jurisdiction under Rule 12(b)(2), the Court ruled that Highland Funding has minimum contacts with the United States, and that the Court, has personal jurisdiction over Highland Funding in this Adversary Proceeding, and exercising personal jurisdiction over Highland Funding would not violate any traditional notions of fair play and substantial justice. Further, the Court ruled that, even if sufficient minimum contacts did not exist, Highland Funding has waived personal jurisdiction in this Adversary Proceeding.

42. With respect to the Motion to Amend, due to the change in circumstances in the Bankruptcy Cases, Highland Capital and Highland Funding agreed to voluntarily dismiss all claims asserted in the Original Complaint, without prejudice.

43. On November 13, 2018, the Trustee filed his *Defendant's Amended Answer, Counterclaims (Including Claim Objections) and Third-Party Claims* [Adv. No. 18-03078, Docket No. 84] (the "Amended Counterclaims") in this Adversary Proceeding, in which the Trustee asserted numerous counterclaims and third-party claims against Highland Capital and various of its affiliates in connection with, *inter alia*, their scheme to fraudulently transfer Acis LP's assets to the Highlands and otherwise appropriate the business of Acis LP. Additionally, with the Amended Counterclaims, the Trustee included his objections to the Highland Claims pursuant to section 502(b)(1), (b)(4), and (d) of the Bankruptcy Code (the "Objections to Claim"), and further asserted that, to the extent allowed, the Highland Claims should be equitably subordinated pursuant to section 510(c) of the Bankruptcy Code.

44. On December 11, 2018, Highland Capital filed *Highland Capital Management, L.P.'s Application for Administrative Expense Claim Pursuant to 11 U.S.C. § 503(b)* [Case No. 18-30264, Docket No. 772] (the "Application") for approval of an administrative expense claim pursuant to section 503(b)(1) of the Bankruptcy Code, in the amount of \$3,554,224.29 (the "Administrative Claim"), for purportedly providing postpetition services to the Debtors in connection with the Sub Agreements (defined below) and the Universal/BVK Agreement (defined below), which Highland Capital contends were actual, necessary costs and expenses of preserving the estate.

45. On January 10, 2019, the Trustee timely filed his *Objection to Highland Capital Management, L.P.'s Application for Administrative Expense Claim Pursuant to 11 U.S.C. § 503(b)* [Case No. 18-30264, Docket No. 772].

46. On January 31, 2019, this Court entered its *Findings of Fact, Conclusions of Law, and Order Granting Final Approval of Disclosure Statement and Confirming the Third Amended Joint Plan for Acis Capital Management, L.P. and Acis Capital Management GP, LLC, as Modified* (the "Confirmation Order") [Case No. 18-30264, Docket Nos. 829 & 830], which approves the *Third Amended Joint Plan for Acis Capital Management, L.P. and Acis Capital Management GP, LLC* (the "Plan") and is supplemented by the *Court's Bench Ruling and Memorandum of Law in Support of: (A) Final Approval of Disclosure Statement; and (B) Confirmation of Chapter 11 Trustee's Third Amended Joint Plan* (the "Confirmation Opinion") [Case No. 18-30264, Docket No. 827]. The Confirmation Opinion is hereby incorporated by reference as if fully set forth herein.

47. On February 15, 2019 (the "Effective Date"), the Trustee filed the *Notice of February 15, 2019 Effective Date for the Third Amended Joint Plan for Acis Capital Management, LP and Acis Capital Management GP, LLC* [Case No. 18-30264, Docket No. 863]. On the Effective Date, Acis (as the Reorganized Debtors) became substituted for the Trustee in the above-referenced consolidated adversary cases pursuant to the Plan, which provides:

Upon the Effective Date, the Reorganized Debtor (a) shall automatically be substituted in place of the Chapter 11 Trustee as the party representing the Estate in respect of any pending lawsuit, motion or other pleading pending before the Bankruptcy Court or any other tribunal, and (b) is authorized to file a notice on the docket of each adversary proceeding or the Chapter 11 Cases regarding such substitution. The Reorganized Debtor shall have exclusive standing and authority to prosecute, settle or compromise Estate Claims for the benefit of the Estate in the manner set forth in this Plan.

Plan § 7.03.

48. On March 11, 2019, the Court entered its *Order Consolidating Adversary Case Nos. 18-03078 & 18-03212* [Adv. No. 18-03078, Docket No. 127; Adv. No. 18-03212, Docket No. 63], under which the Court ordered that Adversary Nos. 18-03078 and 18-03212 are

consolidated under Federal Rule of Civil Procedure 42(a), incorporated by Federal Rule of Bankruptcy Procedure 7042. The Court further directed the Clerk to caption the case *as Robin Phelan, Chapter 11 Trustee v. Highland Capital Management, L.P., et al.*, resulting in the designation of the Trustee, now Acis, as the Plaintiff(s) and Highland Capital and its affiliates as Defendants in this Adversary Proceeding.

49. On May 1, 2019, the Court entered its *Order Addressing DE #825 and Directing that: (A) Highland Capital Management, L.P.'s Administrative Expense Request [DE #722] Be Converted from a Contested Matter to Adversary Proceeding; and (B) Counts 27-31 Be Transferred in Adversary Proceeding No. 18-03078 into a New Adversary Proceeding* [Case No. 18-30264, Docket No. 919], whereby the Court converted Highland Capital's Application into a new adversary proceeding, and thereby initiating Adversary No. 19-03103.

50. On June 10, 2019, the Court held a status conference and directed: (i) that Adversary No. 19-03103 should be consolidated under this Adversary No. 18-03078; and (ii) that Acis will file an amended complaint, consolidating all claims, counterclaims, third-party claims against Highland Capital and its affiliates, as well as any objections to the Highland Capital Claims and Administrative Claim, by June 20, 2019.

## V. FACTUAL BACKGROUND

### A. The Debtors' Business

51. Dondero, Okada, and Terry formed Acis LP in 2011 as a registered investment advisor to raise money from third-party investors to invest in certain collateralized loan obligation funds (the "CLOs").<sup>6</sup> The CLOs are governed by certain indentures (the

<sup>6</sup> The Acis CLOs include: (i) Acis CLO 2013-1 Ltd. ("CLO-1"), (ii) Acis CLO 2014-3 Ltd. ("CLO-3"), (iii) Acis CLO 2014-4 Ltd. ("CLO-4"), (iv) Acis CLO 2014-5 Ltd. ("CLO-5"), and (v) Acis CLO 2015-6 Ltd. ("CLO-6").



"Indentures").<sup>7</sup> Acis LP is the portfolio manager for the CLOs and generates revenue primarily through the management of the CLOs via certain portfolio management agreements ("PMAs").<sup>8</sup> See Opinion ¶¶ 22-28. While Dondero made and approved the higher-level financial strategies and decisions of Acis, Terry was responsible for the day-to-day management of Acis.

52. Acis LP's business as portfolio manager for the CLOs has been incredibly successful. Between 2011 and 2017, Acis LP distributed profits of \$11,037,445.00 to Dondero, \$4,598,935.00 to Terry, and \$2,759,361.00 to Okada, its partners. Further, on August 31, 2017, right before Highland Capital began its campaign to denude Acis LP and take over its business, Acis LP also boasted millions of dollars in investment assets and total shareholder equity of roughly \$3.4 million. Without question, Acis LP's business as portfolio manager for the CLOs and others has been very valuable and lucrative.

53. As is common with the numerous Highland Capital affiliates, Acis LP contracted out certain of its administrative functions and portfolio management responsibilities to Highland Capital pursuant to that certain *Sub-Advisory Agreement*, originally dated January 1, 2011 (as amended, the "Sub-Advisory Agreement") and that certain *Shared Services Agreement*, originally dated January 1, 2011 (as amended, the "Shared Services Agreement," and together

<sup>7</sup> The Indentures include: (i) that certain Indenture, dated as of March 18, 2013, issued by CLO-1, as issuer, Acis CLO 2013-1 LLC, as co-issuer, and U.S. Bank, as trustee (the "CLO-1 Indenture"); (ii) that certain Indenture, dated as of February 25, 2014, issued by CLO-3, as issuer, Acis CLO 2014-3 LLC, as co-issuer, and U.S. Bank, as trustee (the "CLO-3 Indenture"); (iii) that certain Indenture, dated as of June 5, 2014, issued by CLO-4, as issuer, Acis CLO 2014-4 LLC, as co-issuer, and U.S. Bank, as trustee (the "CLO-4 Indenture"); (iv) that certain Indenture, dated as of November 18, 2014, issued by CLO-5, as issuer, Acis CLO 2014-5 LLC, as co-issuer, and U.S. Bank, as trustee (the "CLO-5 Indenture"); and (v) that certain Indenture, dated as of April 16, 2015, issued by CLO-6, as issuer, Acis CLO 2015-6 LLC, as co-issuer and U.S. Bank, as trustee (the "CLO-6 Indenture").

<sup>8</sup> The PMAs include: (i) that certain Portfolio Management Agreement by and between Acis LP and CLO-1, dated March 18, 2013 (the "CLO-1 PMA"); (ii) that certain Portfolio Management Agreement by and between Acis LP and CLO-3, dated February 25, 2014 (the "CLO-3 PMA"); (iii) that certain Portfolio Management Agreement by and between Acis LP and CLO-4, dated June 5, 2014 (the "CLO-4 PMA"); (iv) that certain Portfolio Management Agreement by and between Acis LP and CLO-5, dated November 18, 2014 (the "CLO-5 PMA"); and (v) that certain Portfolio Management Agreement by and between Acis LP and CLO-6, dated April 16, 2015 (the "CLO-6 PMA").

with the "Sub Agreements"). The Sub-Advisory Agreement and Shared Services Agreement have each been amended multiple times.

54. As the Court explained in its Opinion:

Acis LP and Acis GP/LLC have never had any employees. Rather, all employees that work for any of the Highland family of companies (including Mr. Terry) have, almost without exception, been employees of Highland itself. Highland has approximately 150 employees in the United States. Highland provides employees to entities in the organizational structure, such as Acis LP and Acis GP/LLC, through both the mechanism of: (a) a Shared Services Agreement (herein so called), which provides "back office" personnel—such as human resources, accounting, legal and information technology to the Highland family of companies; and (b) a Sub-Advisory Agreement (herein so called), which provides "front office" personnel to entities—such as the managers of investments like Mr. Terry. The evidence indicated that this is typical in the CLO industry to have such agreements.

Opinion at 14 (footnotes omitted).

55. Prior to entry of the Orders for Relief, Dondero directed, either himself or through Highland Capital employees, all actions taken by Acis. *See* Opinion ¶ 30.

Mr. Dondero [the Chief Executive of Highland] testified that he has decision making authority for the Alleged Debtors but usually delegates that authority to Highland's in-house lawyers, Scott Ellington (General Counsel, Chief Legal Officer, and Partner of Highland) and Isaac Leventon (Assistant General Counsel of Highland) . . . Mr. Leventon is designated to be the representative for the Alleged Debtors (and testified as a Rule 30(b)(6) witness during pre-trial discovery)—he explained that this representative-authority derives from the Shared Services Agreement. Mr. Leventon testified that he takes his instructions generally through his direct supervisor, Mr. Ellington.

*Id.*

56. Highland Funding, formerly known as Acis Loan Funding, Ltd. ("ALF"),<sup>9</sup> holds the subordinated notes issued by the CLOs and receives the "very last cash flow from the CLOs." Opinion at pp. 12-13. "It, in certain ways, controls the CLO vehicle . . . [and] was essentially the equity owner in the CLO special purpose entities." *Id.* Until the ALF PMA Transfer in the Fall of

<sup>9</sup> On October 30, 2017, Acis Loan Funding, Ltd. changed its name to Highland CLO Funding, Ltd. The defined term "ALF" used herein denotes Highland CLO Funding, Ltd. f/k/a Acis Loan Funding, Ltd. before October 30, 2017.



2017 (described below), Acis LP had complete control of Highland Funding and its valuable subordinated note rights to further enhance its successful portfolio management business.

**B. Section 3.10(a) of the Limited Partnership Agreement**

57. In order to form Acis LP, Acis GP, the general partner, and limited partners The Dugaboy Investment Trust<sup>10</sup> (the "Trust"), Okada, and Terry entered into that certain *Amended and Restated Agreement of Limited Partnership of Acis Capital Management, L.P.* (the "LPA"), dated to be effective as of January 21, 2011.<sup>11</sup> The LPA is attached hereto as **Exhibit A**. The LPA is governed by Delaware Law. LPA § 6.11. At all relevant times herein, the officers of Acis GP are Dondero, as President, and Frank Waterhouse ("Waterhouse")<sup>12</sup>, as Treasurer. Further, at least between October 14, 2015, and December 19, 2017, Dondero was the sole member of Acis GP. *See* Case No. 18-30265, Docket No. 152.

58. Pursuant to the Sub Agreements, Highland Capital received compensation for providing services to Acis LP, but amounts of compensation were subject to certain terms of the LPA. Section 3.10 of the LPA directs compensation and reimbursement of the General Partner and contains subpart (a), which limits compensation and reimbursement of expenses payable to the General Partner and any Affiliate of the General Partner without proper consent:

Compensation. The General Partner and any Affiliate of the General Partner shall receive no compensation from the Partnership for services rendered pursuant to this Agreement or any other agreements unless approved by a Majority Interest; provided, however, that the aggregate annual expenses of the Partnership, inclusive of such compensation, *may not exceed 20% of Revenues without the consent of all of the members of the Founding Partner Group.*

LPA § 3.10(a) (emphasis added).

<sup>10</sup> Dondero was the trustee and owned 100% of the Trust, and he was President of Acis GP.

<sup>11</sup> The partnership interests of Acis LP were as follows: Acis GP owned .1%; the Trust owned 59.9%; Okada owned 15%; and Terry owned 25%.

<sup>12</sup> Waterhouse is a partner in Highland Capital and serves as Highland Capital's Chief Financial Officer.

59. An Affiliate under the LPA is defined as:

[A]ny [entity] that directly or indirectly controls, is controlled by, or is under common control with the [entity] in question. As used in this definition, the term "*control*" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of [an entity], whether through ownership of voting Securities, by contract, or otherwise.

*Id.* § 2.01.

60. Highland Capital was at all times relevant to this Second Amended Complaint, an Affiliate of Acis GP and Acis LP. Further, Highland Capital was at all times relevant to this Second Amended Complaint, an insider of Acis GP and Acis LP.

### **C. State Court Litigation and Arbitration**

61. In June 2016, Highland Capital advised Terry that he had been terminated.

62. In September 2016, Highland Capital sued Terry in the 162nd Judicial District Court of Dallas County, Texas (the "State Court") under a variety of legal theories and causes of action, including breach of fiduciary duty/self-dealing, disparagement, and breach of contract. Terry asserted his own claims against Highland Capital, as well as claims against the Debtors, Dondero, and others, and demanded arbitration. Opinion ¶ 8.

63. On September 28, 2016, the State Court stayed the litigation and ordered the parties to arbitrate. *Id.* The parties then participated in a ten-day arbitration proceeding before JAMS, styled as *Terry v. Highland*, JAMS Arbitration No. 1310022713.

### **D. The Arbitration Award**

64. On October 20, 2017, Terry obtained an arbitration award (the "Arbitration Award") jointly and severally against the Debtors in the amount of \$7,949,749.15, plus post-award interest at the legal rate. The Arbitration Award was based on theories of breach of contract and breach of fiduciary duties. The Arbitration Award is attached hereto as **Exhibit B**.

65. Under the Arbitration Award, the arbitration panel found that Terry's termination by Dondero/Highland Capital was without cause and that, among other things, Acis breached the LPA and breached fiduciary duties owed to Terry as Acis's limited partner. Importantly, the arbitration panel found that Highland Capital had been paid more than 20% of Revenues (as such term is understood under the LPA), without Terry's consent, in violation of Section 3.10(a) of the LPA:

It is undisputed that ACIS habitually paid more than 20% of Revenues to Highland for providing ACIS with overhead and administration. Respondents' evidence and arguments that Terry waived or consented to ACIS's payment of excess expenses is not persuasive. At most, Terry accepted his ACIS distributions without regard to the expenses paid to Highland. This is not consent contemplated by the ACIS LPA.

.....  
The evidence establishes that Terry did not consent to ACIS payments of expenses in excess of 20% of Revenue and Terry has not waived his right to claim damages directly resulting from ACIS's and ACIS GP's breach of contract and breach of fiduciary duty. Clearly, ACIS and ACIS GP ignored Terry's contractual rights and ACIS GP as a general partner has a fiduciary duty not to benefit itself or another at the expense of its limited partner, as they ignore and breach the terms of the partnership agreement and diminish Terry's distributions.

Arbitration Award at pp. 15-16.

66. Additionally, in the analysis of Terry's damages, the arbitration panel stated:

The evidence establishes that ACIS and ACIS GP paid excess expenses to Highland during the years of 2013, 2014, 2015 and January through May 2016. These expenses paid exceeded the 20% of Revenues cap stated in Section 3.10(a) of the ACIS LPA. The payment of these excess expenses reduced Terry's ACIS partnership distributions during this period. Had excess expenses not been paid and only the contractually capped expenses had been paid, Terry would have received additional ACIS profits distributions of \$1,755,481.00 for his 25% partnership interest in ACIS.

Arbitration Award at 20.

67. Finally, in its findings and conclusions, the arbitration panel stated: "ACIS [LP] and ACIS GP paid Highland Capital expenses in excess of the contractual limit imposed by Section 3.10(a) of the ACIS LPA." Arbitration Award at 22, ¶ 7.

68. On December 18, 2017, the 44th Judicial District Court of Dallas County, Texas, entered a final judgment confirming the Arbitration Award. Opinion ¶ 10. The judgment was abstracted in the Official Public Records of Dallas County, Texas, as Instrument No. 201800008611, and writs of garnishment were issued and served pursuant to the judgment.

69. Pursuant to the Arbitration Award, Highland Capital wrongly received at least \$7,021,924.00 (collectively, the "Expense Overpayments") in excess of the clear cap under Section 3.10(a) of the LPA.<sup>13</sup> On information and belief, Highland Capital wrongfully received other overpayments of expenses for many years in excess of the express limitations contained in the LPA. The Expense Overpayments for which the Plaintiffs seek relief herein include all overpayments by Acis LP to Highland Capital in violation of the expense cap pursuant to the LPA whether or not addressed in the Arbitration Award. The Plaintiffs seek a declaratory judgment that such Expense Overpayments to Highland Capital and any agreements supporting such overpayments were *ultra vires* and, thus, void or voidable. The Plaintiffs also seek to recover from Highland Capital all such Expense Overpayments, which rightfully belong to Acis LP, as set forth below.

#### **E. Modifications to the Sub-Advisory Agreement and Shared Services Agreement**

70. The Sub-Advisory Agreement has been amended from time to time. The first iteration the Sub-Advisory Agreement by and between Acis LP and Highland Capital dated January 1, 2011 (the "Original Sub-Advisory Agreement") provided that Acis LP was to pay Highland Capital certain amounts for assisting Acis LP with the advisory services required by the PMAs. Under the Original Sub-Advisory Agreement, Acis LP paid Highland Capital 5 bps

<sup>13</sup> If \$1,755,481.00 represents 25% of the amount overpaid to Highland Capital, then the total amount paid to Highland Capital in excess of the 20% cap would be at least \$7,021,924.00.

of the management fees received by Acis LP pursuant to the various PMAs for the sub-advisory services provided to Acis LP by Highland Capital.

71. On July 29, 2016, the Sub-Advisory Agreement was modified to increase the sub-advisory fee from 5 basis points to 20 basis points (the "Second Amended Sub-Advisory Agreement"). The effective date of the Second Amended Sub-Advisory Agreement was also back-dated to January 1, 2016. The fourfold increase in the sub-advisory fees via the Second Amended Sub-Advisory Agreement siphons off the funds of Acis LP and effectively gifts the additional amounts to Highland Capital. Highland Capital was already contractually obligated to provide the sub-advisory services for the lower 5 basis points fee and no legitimate justification for this fourfold increase was ever presented. Notably, Terry was unjustifiably terminated from Acis in June 2016, roughly one month before Acis and Highland Capital amended the Sub-Advisory Agreement to increase the fee paid fourfold. Further, Dondero consented to the increased sub-advisory fee on behalf of *both* Acis LP and Highland Capital. Dondero signed the Second Amended Sub-Advisory Agreement as president of Highland Capital's general partner, Strand Advisors, Inc., and as president of Acis GP, the general partner of Acis LP.<sup>14</sup>

72. The Shared Services Agreement has also been amended from time to time. The first iteration of the shared services agreement, the Shared Services Agreement by and between Acis LP and Highland Capital, dated January 1, 2011 (the "Original Shared Services Agreement"), provided that Acis LP was to pay Highland Capital certain amounts for providing Acis LP with the back-office services such as book keeping, compliance, human resources and marketing. Under the Original Shared Services Agreement, Acis LP reimbursed Highland Capital for amounts directly attributable to Acis LP for these services. The Shared Services

<sup>14</sup> Dondero also signed the Third Amended and Restated Sub-Advisory Agreement, entered into on March 17, 2017, on behalf of both parties (Acis LP and Highland Capital) to the agreement; this amendment retained the 20 bps fee put in place by the Second Amended Sub-Advisory Agreement.

Agreement was later amended to provide compensation to Highland Capital of 15 to 20 basis points, depending on the nature of the fund for which services were provided. Thus, shortly after Terry was terminated by Acis in June 2016, Acis was paying Highland Capital a total of 35 to 40 basis points for the sub-advisory and shared services it provided.

73. Due to the retroactive nature of the amendments to the Sub-Advisory Agreement and Shared Services Agreement, Highland, at all times relevant to this proceeding, held an antecedent debt related to Acis.

74. Finally, as the Court has already found and as described in more detail below, Highland Capital, Dondero, and various of their affiliates and insiders (including Highland Funding, Highland Advisor and Highland Holdings) entered into numerous other transactions through the Fall of 2017 in an attempt to take control of Acis's assets and effectively take over Acis's business. The combination of all of these actions evidence a clear pattern of behavior by Highland Capital, Dondero, and various of their affiliates and insiders (including Highland Funding, Highland Advisor, Highland Management, and Highland Holdings)<sup>15</sup> to hinder, delay or defraud Terry as a creditor and appropriate the going-concern business of Acis LP for the Highlands. Opinion, Section 1.C. (pp. 16-23).

**F. Highland Capital's Mismanagement of the CLOs and the Trustee's Engagement of Brigade Capital Management, L.P.**

75. During the pendency of these Bankruptcy Cases, while acting as sub-advisor, Highland Capital grossly mismanaged the CLOs. Following the Trustee's appointment in these Bankruptcy Cases, in disregard of its duties under the Sub-Advisory Agreement, Highland

<sup>15</sup> The Debtors were also under Highland Capital and Dondero's control at this time and were active participants in all of Highland Capital and Dondero's schemes to denude the Debtors and make them "judgment proof" as the Debtors' own counsel, Jamie Welton, later boasted. In fact, Highland Funding has admitted that the Debtors were "no more than shell entities" in pleadings recently filed with the Court. Highland Funding's *Motion to Dissolve Preliminary Injunction and Lift the Automatic Stay* at page 21, Docket # 639 in Case No. 18-30264.

Capital failed to purchase a single loan for the CLOs. Yet, at the same time, in an apparent tactical move to accumulate cash in the CLOs (prior to an attempted liquidation), Highland Capital ordered that the Trustee sell numerous loans. Indeed, during this time, Highland Capital's own analysis showed that 19.7% to 32.4% of available loans were eligible for consideration for purchase in the CLOs. Although the Trustee expressed his concerns to Highland Capital about the accumulation of cash in the CLOs and Highland Capital's failure to recommend purchases of eligible collateral in the CLOs, Highland Capital failed to make any change or correction in its sub-advisor role, in abrogation of its duties.

76. In July 2018, considering Highland Capital's mismanagement of the CLOs and the exorbitant amounts attempted to be charged to Acis for its services under the Sub Agreements, the Trustee solicited potential third parties to provide shared services and sub-advisory services to the Debtors. After contacting over 40 parties, the Trustee received bids from nine parties to perform the services provided by Highland Capital under the Sub Agreements. Through this process, the Trustee was able to locate Brigade Capital Management, LP ("Brigade") and Cortland Capital Markets Services LLC ("Cortland") to provide such services to the Debtors at a rate far less than that charged by Highland Capital. As set forth more fully in the *Emergency Motion to Approve Replacement Sub-Advisory and Shared Services Providers, Brigade Capital Management, LP and Cortland Capital Markets Services LLC* [Case No. 18-30264, Docket No. 448] (the "Brigade Motion"), Brigade agreed to sub-advise the CLOs for 15 basis points. As further described by the Brigade Motion, Cortland agreed to provide middle and back office CLO outsourcing (previously provided by Highland Capital under the



Shared Services Agreement) for \$30,000 per month, \$250-\$350 per trade, and a one-time fee of \$75,000. Cortland's fee equates to roughly 3 basis points per month.<sup>16</sup>

77. On August 1, 2018, the Court granted the Brigade Motion, and Brigade and Cortland began performing the services previously provided by Highland Capital under the Sub Agreements. *See* Case No. 18-30264, Docket No. 464. Notably, on the record at the hearing on July 6, 2018, Highland offered to provide the same services it was providing Acis for 17.5 basis points less than it previously charged, a tacit acknowledgement that Highland had grossly overcharged Acis. *See* Case No. 18-30264, Docket No. 369 at 243-44.

78. From approximately August 2, 2018 through December 11, 2018, Brigade directed the purchase of approximately \$300 million in conforming loans for the CLOs. *See* Case No. 18-30264, Docket No. 790 at 100-01 & 134.

#### **G. The Highlands' Fraudulent Scheme to Take Over Acis's Business and Dismantle Acis's Assets.**

79. After Terry received the Arbitration Award on October 20, 2017, the Highlands immediately began work to systematically transfer the assets of Acis LP to other Highlands. This was done to denude Acis LP of value and make the Debtors "judgment proof." This was also done to ensure that Acis LP's very valuable business as portfolio manager was taken over by other Highlands and remained under Highland Capital and Dondero's control.

80. Prior to the filing of the Bankruptcy Cases, the Highlands' scheme was accomplished through, *inter alia*, the ALF PMA Transfer, the ALF Share Transfer, the Note Transfer, and the transfer of the 2017-7 Equity and the 2017-7 Agreements (as each is defined

<sup>16</sup> Thus, the Trustee was paying roughly 18 basis points, instead of the 35 to 40 basis points charged by Highland Capital starting shortly after Terry was terminated by Acis in June 2016, for the work previously performed by Highland Capital under the Sub Agreements. The definitive agreement between the Reorganized Debtors and Brigade removes Cortland and the Reorganized Debtors pay roughly 15 basis points to Brigade for essentially the same services previously provided by Highland Capital.



below), which all occurred in the three months between October 23 and December 19, 2017. Each of these transfers followed the same pattern: Highland Capital caused Acis LP to fraudulently convey valuable economic rights away from Acis LP to offshore (often newly created) Highland Capital affiliates that were not subject to Terry's Arbitration Award and judgment, thus, safely remaining under the control of Highland Capital and Dondero. Further, the only alleged consideration for these transfers, to the extent there was any, was the satisfaction of purported debts owed to other Highlands or their representatives.

81. Reference to Acis LP's balance sheets right before and right after the Highlands began their campaign of fraud against Terry and Acis demonstrate just how effective their scheme was. On August 31, 2017—roughly 45 days before the Arbitration Award—Acis LP boasted \$15,441,551 in total assets (including nearly \$4 million in valuable portfolio management investments and the \$9.5 million note) as well as \$3,372,851 in total equity value.<sup>17</sup> After the Arbitration Award and the judgment enforcing it, Acis presented the affidavit of David Klos, Highland Capital's Controller, to the State Court in furtherance of Highland Capital's efforts to get a pathetically small bond for Terry's judgment. The Klos affidavit and attached balance sheet demonstrate that as of February 1, 2018 (the day after the Involuntary Petitions were filed) Acis LP had only \$2,855,050 in total assets, no investment assets or notes, and a paltry \$35,709 in total equity value.<sup>18</sup> Thus, the amount of value destruction and asset concealment caused by the Highlands' brazen fraud in just the few months immediately after the Arbitration Award is staggering.

82. Even the filing of the Bankruptcy Cases did not deter the Highlands from attempting to complete their goal of denuding Acis. During the Bankruptcy Cases, in disregard

<sup>17</sup> The Balance Sheet as of August 31, 2017, is attached as Exhibit C.

<sup>18</sup> The Declaration of David Klos concerning Defendants' net worth, is attached as Exhibit D.

of the automatic stay, on multiple occasions, the Highlands directed the Trustee to effectuate optional redemptions, which would result in the liquidation of the CLOs and render Acis incapable of reorganizing and paying its creditors.

**1. *The ALF PMA Transfer and the ALF Share Transfer***

83. Prior to October 27, 2017, Acis LP—not ALF (or Highland Funding as it is currently named)—had authority to direct and effectuate an optional redemption and otherwise pervasively control ALF's assets. Acis LP had this authority pursuant to that certain Portfolio Services Agreement by and between Acis LP and ALF, dated August 10, 2015 (the "First ALF PMA") and that certain Portfolio Management Agreement by and between Acis LP and ALF, dated December 22, 2016 (the "Second ALF PMA"). A true and correct copy of the First ALF PMA is attached hereto as **Exhibit E**. A true and correct copy of the Second ALF PMA is attached hereto as **Exhibit F**.

84. The Second ALF PMA granted Acis LP, as the portfolio manager of ALF, extensive rights and discretion to control and manage ALF's assets, including its interests in the Acis CLOs. Section 5 of the Second ALF PMA set out Acis LP's authority, which included authority for and in the name of ALF to:

(a) invest, directly or indirectly . . . in all types of securities and other financial instruments of United States and non-U.S. entities . . . including without limitation . . . notes representing tranches of debt ('CLO Notes') issued by a special purpose vehicle which issues notes backed by a pool of collateral consisting primarily of loans (which may be represented by a debt or equity security) (a 'CLO') . . . (each of such items, 'Financial Instruments'), (c) provide credit and market research and analysis in connection with the investments and ongoing management of [ALF] and direct the formulation of investment policies and strategies for [ALF] . . . ; (g) possess, transfer, mortgage, pledge or otherwise deal in, and exercise all rights, powers, privileges and other incidents of ownership or possession with respect to Financial Instruments and other property and funds held or owned by [ALF] . . . ; (n) cause [ALF] to engage in . . . agency, agency cross, related party principal transactions with affiliates of [Acis LP] . . . ; and (q) vote Financial Instruments, participate in arrangements with creditors, the

institution and settlement or compromise of suits and administrative proceedings and other like or similar matters.

Second ALF PMA § 5(a)-(q) (emphasis added).<sup>19</sup>

85. While ALF did not have authority to terminate the Second ALF PMA, Acis LP could terminate the Second ALF PMA without cause upon at least ninety (90) days' notice. *See* Second ALF PMA § 13(a)-(c). The Second ALF PMA provided that Acis LP could be removed as portfolio manager only "for cause." *See* ALF PMA § 14(a)-(e).

86. On October 27, 2017, just seven days after Terry's Arbitration Award, Acis LP ostensibly terminated its own portfolio management rights under the Second ALF PMA and transferred its authority and its valuable portfolio management rights—for no value—to Highland Advisor, an affiliate of Highland Capital.<sup>20</sup>

87. This transfer of Acis LP's portfolio management rights to Highland Advisor was accomplished by way of a new Portfolio Management Agreement entered into by ALF and Highland Advisor on October 27, 2017 (the "October 2017 PMA"), which empowered Highland Advisor with the same broad authority to direct the management of ALF as was previously held by Acis LP under the ALF PMA (the "ALF PMA Transfer"). *See* October 2017 PMA §§ 1 & 5(a)-(q). A true and correct copy of the October 2017 PMA is attached hereto as **Exhibit G**.

88. As the Court explained:

On October 27, 2017 (seven days after the Arbitration Award), ALF—having purchased back the ownership interest that Acis LP had in it, just three days earlier—decided that it would no longer use Acis LP as its portfolio manager and

<sup>19</sup> The Highlands contend that the reference to "control" in Section 6 of the Second ALF PMA negates the broad language of Section 5 of the Second ALF PMA. The Plaintiffs disagree.

<sup>20</sup> Although purportedly a Cayman Islands entity, Highland Funding's 2017 Annual Report and Audited Financials lists Highland Advisor's address as Highland Capital's address in Dallas, Texas. This same document also discloses that Highland Capital is the sub-advisor for Highland Advisor, and thus is the party actually in control of Highland Funding's assets. Finally, this same document shows that all of Highland Funding's subordinated notes issued by the CLOs (the primary assets managed by Highland Advisor) are physically held at and are pledged to NexBank, a Dallas bank that is an affiliate of Highland Capital.

entered into a new portfolio management agreement to supersede and replace the ALF Portfolio Management Agreement. Specifically, on October 27, 2017, ALF entered into a new Portfolio Management Agreement with a Cayman Island entity called Highland HCF Advisor, Ltd., replacing Acis LP in its role with ALF. This agreement appears to have been further solidified in a second portfolio management agreement dated November 15, 2017.

Opinion at 19 (footnotes omitted).

89. Under the prior ALF PMA, Acis LP's consent to the termination of the ALF PMA was required in order to effectuate the ALF PMA Transfer. So, Dondero, on behalf of Acis LP, simply signed the October 2017 PMA, consenting and agreeing to its removal and replacement, and transferring all authority and management rights as portfolio manager of ALF to Highland Advisor under the October 2017 PMA. Acis received no consideration for this transfer.

90. Without this ALF PMA Transfer, which transferred Acis LP's valuable rights under the ALF PMA to Highland Advisor, Highland Funding could not have attempted to liquidate the CLOs, by directing optional redemptions, and further deplete Acis's assets.<sup>21</sup>

91. On October 24, 2017, a mere four days after the Arbitration Award was entered, Waterhouse, on behalf of Acis LP, and Grant Scott, for CLO Holdco Ltd., entered into that certain special resolution whereby Highland Funding, then known as ALF, acquired back Acis's equity interest in ALF (the "ALF Share Transfer"). A true and correct copy of the special resolution is attached hereto as **Exhibit H**. Pursuant the ALF Share Transfer, ALF paid Acis LP \$991,180.13 for all of its shares of ALF.

92. Thus, by virtue of the ALF PMA Transfer and the ALF Share Transfer, by October 31, 2017, Acis LP had given up all of its shares of ALF and all of its control of ALF.

<sup>21</sup> After the ALF PMA Transfer, Highland Funding and Highland Advisor have issued at least three different optional redemption notices, in an attempt to terminate the PMAs and cut off the Debtors' primary source of cash. All three notices have been withdrawn and/or enjoined by this Court.

93. On November 15, 2017 – only days after the ALF Share Transfer and ALF PMA Transfer were completed – Highland Funding,<sup>22</sup> Highland Advisor and CLO Holdco, Ltd. (another Highland Capital affiliate) entered into a subscription agreement whereby Highland Funding completed a private placement of its equity (including, upon information and belief, the equity acquired in the ALF Share Transfer) to third-party investors. The Plaintiffs believe both the ALF PMA Transfer and the ALF Share Transfer were concocted by Highland Capital and Highland Funding to complete this private placement, which was of great value to Highland Funding (then known as Acis Loan Funding, Ltd.) and Highland Capital, but after the transfers, of no value to Acis.<sup>23</sup> Without the ALF PMA Transfer and the ALF Share Transfer, control of Highland Funding's assets, and the Highland Funding stock held by Acis, would be vested in an entity (Acis LP) that was subject to a looming judgment based on Terry's recently acquired Arbitration Award. That would compromise the Highlands' control of Highland Funding.

## 2. *The Note Transfer*

94. On November 3, 2017, Acis LP, Highland Capital, and Highland Management (a newly created, offshore Highland Capital affiliate) entered into that certain Agreement for Assignment and Transfer of Promissory Note (the "Note Assignment and Transfer Agreement"). A true and correct copy of the Note Assignment and Transfer Agreement is attached hereto as **Exhibit I**. The Note Assignment and Transfer Agreement, among other things, transferred the

<sup>22</sup> ALF had changed its name to Highland Funding at this point.

<sup>23</sup> Highland Funding's (then Acis Loan Funding Ltd.) board of director minutes from October 6, 2017, disclose that the private placement investment would bring \$150 million in new investment in Highland Funding and that they were "confident that they could develop further interest and ... bring the total capital to up to around \$325 million." The Arbitration Award was issued against Acis LP exactly two weeks later, throwing a huge monkey wrench in Highland Funding's plans to raise hundreds of millions of dollars for Highland Capital and its cronies. Testimony in the bankruptcy case as well as the subscription agreement demonstrate that numerous Highland Capital executives, as well as Highland Capital itself, received Highland Funding stock in connection with this private placement. Thus, they were highly motivated to close this transaction and also deprive the Acis LP of any value in this transaction.

\$9.5 million promissory note executed by Highland Capital and payable to Acis LP (the "Note") from Acis LP to Highland Management (the "Note Transfer"). As noted in the Opinion:

The Assignment and Transfer Agreement memorializing this transaction is signed by Mr. Dondero for Acis LP and Mr. Dondero for Highland and some undecipherable name for Highland CLO Management Ltd.

The document recites that (i) Highland is no longer willing to continue providing support services to Acis LP, (ii) Acis LP, therefore, can no longer fulfill its duties as a collateral manager, and (iii) Highland CLO Management Ltd. agrees to step into the collateral manager role if Acis LP will assign to it the Acis LP Note Receivable from Highland. One more thing: since Acis LP was expected to potentially incur future legal and accounting/administrative fees, and might not have the ability to pay them when due, Highland CLO Management Ltd. agreed to reimburse Acis LP (or pays its vendors directly) up to \$2 million of future legal expenses and up to \$1 million of future accounting/administrative expenses.

Opinion at 20.

95. Acis LP received no or insufficient consideration for the Note Transfer.

96. The Note Transfer was also of great benefit to Highland Capital because it transferred Highland Capital's liability under the Note away from Acis LP (and its legal woes with Terry) and allowed Highland Capital's liability under the Note, and any payments made thereunder, to stay well within the control of the Highlands. Just as importantly to Highland Capital and Dondero, and in furtherance to their ongoing feud with Terry, the Note Transfer took away the Note as an asset from which Terry could collect his judgment and allowed Highland Capital to argue (as repeatedly argued in the Bankruptcy Cases) that Terry got his judgment against the "wrong" entities and that Highland Capital has no liability related to Terry's claim.

97. Additionally, the Note Assignment and Transfer Agreement also purports to initiate the transfer of the PMAs between Acis and the CLOs to Highland Management.<sup>24</sup> Again,

<sup>24</sup> Highland Management was registered in the Cayman Islands on October 27, 2017, roughly a week before the Note Transfer (and on the exact day of the ALF PMA Transfer). Thus, Highland Management had no portfolio or collateral management experience whatsoever when it entered the Assignment and Transfer Agreement. To the contrary, it appears Highland Management was an entity that was created specifically to hold the Note and eventually take possession of the PMAs in an international forum that would be difficult for Terry to reach, similar



Acis LP was to receive no consideration for transferring its most significant assets, the PMAs. As the Court is aware, Acis LP did not in fact transfer the PMAs pursuant to the Note Assignment and Transfer Agreement, but it was clearly the plan as outlined in that agreement and further evidence of Highland Capital's intent to steal Acis LP's valuable going-concern business.

### 3. *The Acis CLO 2017-7 Transfers*

98. On December 19, 2017, Acis LP and Highland Holdings (another newly created, offshore Highland Capital affiliate)<sup>25</sup> entered into that certain Agreement for Assignment and Transfer (the "2017-7 Assignment and Transfer Agreement"). A true and correct copy of the 2017-7 Assignment and Transfer Agreement is attached hereto as **Exhibit J**. The 2017-7 Assignment and Transfer Agreement focused on Acis CLO Management, LLC ("Acis CLO Management"), which is an entity that had been formed to enter into a portfolio management agreement with Acis CLO 2017-7, Ltd. ("CLO 2017-7"). CLO 2017-7 is the last CLO the Highlands formed. Acis CLO Management was indirectly owned by Acis LP, and Acis LP and Acis CLO Management had entered into a Master Sub-Advisory Agreement and a Staff and Services Agreement (the "2017-7 Agreements") that allowed Acis LP to manage the CLO 2017-7 portfolio and collect management fees for CLO 2017-7.

99. The 2017-7 Assignment and Transfer Agreement, among other things, transferred to Highland Holdings all of Acis LP's interest in the 2017-7 Agreements. The 2017-7 Assignment and Transfer Agreement also transferred to Highland Holdings all of Acis LP's

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to the transferees for the ALF PMA Transfer (Highland Advisor, a Cayman Island entity) the ALF Share Transfer (Highland Funding, a Guernsey entity) and the 2017-1 Assignment and Transfer Agreement (Highland Holdings, a Cayman Island entity). Thus, not only did Highland Capital and Dondero scheme to transfer Acis LP's assets away from it, but they also slyly chose entities in offshore jurisdictions that would be hard for a judgment creditor to reach.

<sup>25</sup> Like Highland Management, Highland Holdings was registered in the Cayman Islands on October 27, 2017.

equity interests in various entities that constituted Acis LP's indirect equity interests in Acis CLO Management (the "2017-7 Equity"). Thus, similar to the ALF PMA Transfer and the ALF Share Transfer that occurred roughly two months before, Acis LP was divested of both its ownership in Acis CLO Management and its control of Acis CLO Management (and related management fee stream) in one fell swoop on December 19, 2017, which is the day after Terry received his judgment based on the Arbitration Award. Also, importantly, the 2017-7 Assignment and Transfer Agreement rendered Acis non-compliant with relevant U.S. and European risk retention requirements.

100. Significantly, also on December 19, 2017, Highland Capital entered into an agreement with Highland Holdings that allowed Highland Capital to sub-advise and manage CLO 2017-7 and get paid the management fees that otherwise would have flowed to Acis LP. So, like the numerous transfers before it, Highland Capital effectuated the transfer of the 2017-7 Agreements and 2017-7 Equity to cut out Acis LP, while Highland Capital stayed in complete control of CLO 2017-7 and its stream of management fees.

101. As the Court noted in the Opinion:

On December 19, 2017—just one day after the Arbitration Award was confirmed with the entry of the Final Judgment—the vehicle that can most easily be described as the Acis LP "risk retention structure" (necessitated by federal Dodd Frank law) was transferred away from Acis LP and into the ownership of Highland CLO Holdings, Ltd. (yet another Cayman Island entity, incorporated on October 27, 2017).

In addition to transferring Acis LP's interest in the Acis LP risk retention structure on December 19, 2017, Acis LP also transferred its contractual right to receive management fees for Acis CLO 2017-7, Ltd. (which had just closed April 10, 2017), which Mr. Terry credibly testified had a combined value of \$5 million, to Highland CLO Holdings, Ltd., another Cayman entity, purportedly in exchange for forgiveness of a \$2.8 million receivable that was owed to Highland under the most recent iteration of the Shared Services Agreement and Sub-Advisory Agreement for CLO-7. In conjunction with this transfer, Highland CLO Holdings, Ltd. then entered into new Shared Services and Sub-Advisory Agreements with Highland.



Opinion at 20-21.

102. The purported consideration for the 2017-7 Equity transferred in the 2017-7 Assignment and Transfer Agreement was the forgiveness of a \$2,804,870 payable allegedly owed by Acis LP to Highland Capital and transferred to Highland Funding sometime before the agreement was entered. According to Acis LP's financial statements, this payable to Highland Capital entirely comprises amounts due under the Sub-Advisory Agreement and Shared Services Agreement. Thus, the "consideration" provided in exchange for the 2017-7 Assignment and Transfer Agreement would suffer from the same defects as outlined throughout this Second Amended Complaint related to the Sub Agreements; i.e., Acis only "owed" Highland Capital these amounts because Highland Capital grossly overcharged Acis. Finally, like the Note Transfer, the 2017-7 Equity transfer allowed Highland Capital to effectively collect all of the \$2.8 million owed by Acis LP (assuming it is even a valid debt) through the use of an offshore intermediary.

103. Further, the 2017-7 Assignment and Transfer Agreement itself discloses that no consideration was provided for the transfer of the 2017-7 Agreements. Rather, the justification for the transfer of the 2017-7 Agreements is Highland Capital's self-serving refusal to continue to do business with Acis LP after the Arbitration Award and related judgment.

#### **4. *Thwarted Attempts to Transfer the Universal/BVK Agreement and Force an Optional Redemption***

104. Highland Capital and the other Highlands did not stop with the transfers in the Fall of 2017. Immediately after the Involuntary Petitions were filed on January 30, 2018, Highland Capital conspired with Acis LP's own bankruptcy counsel in an effort to appropriate Acis LP's valuable sub-advisor rights under the Agreement for the Outsourcing of Asset Management (the "Universal/BVK Agreement") between Acis LP and Universal-Investment-

Luxembourg S.A. ("Universal"), which provided sub-advisory services for a German fund called BayVK R2 Lux S.A., SICAV-FIS ("BVK").<sup>26</sup> Like the many transfers before it, Highland Capital's plan (as clearly outlined in an email from Isaac Leventon to Mike Warner) was "to transfer the BVK investment management agreement from Acis LP to another Highland-affiliated manager."<sup>27</sup> Immediately after Highland Capital sought (and presumably received) advice from Acis's own counsel, Highland Capital reached out to Universal and BVK to solicit their participation in Highland Capital's scheme. In fact, BVK acknowledged in its very first email with Highland Capital after Acis LP's bankruptcy filing that Highland Capital's plan was to replace Acis LP.

105. Over the several weeks leading up to this Court's ruling on the Orders for Relief, Highland Capital and Universal/BVK did, in fact, frequently discuss replacing Acis LP, conducted extensive due diligence in order to replace Acis LP and even negotiated and prepared a new asset management agreement between Highland Capital and Universal that was to take effect once Acis LP and its bankruptcy were out of the way. But even after the Orders for Relief were entered and the Debtors were under the control of a trustee, the communications did not stop. Among other things, Highland Capital volunteered to pay Universal and BVK's legal costs incurred in terminating Acis LP and making Highland Capital the new sub-advisor for Universal and BVK, Highland Capital repeatedly criticized the Trustee for his management of Acis, and Highland Capital repeatedly expressed its desire to negotiate with Universal and to "onboard" Highland Capital as Universal's new sub-advisor. And even after Highland Capital was fired by the Trustee as Acis LP's sub-advisor and replaced with Brigade and Cortland, the

<sup>26</sup> The Court held a lengthy hearing on the Universal/BVK Agreement and related lift stay issues on September 11, 2018.

<sup>27</sup> Email chain from early February 2018 between Mike Warner (Acis's counsel), Isaac Leventon (Highland Capital's in-house counsel), Timothy Cournoyer (Highland Capital's in-house counsel) and Thomas Surgent (Highland Capital's Chief Compliance Officer), attached as Exhibit K.

communications did not stop. Highland Capital's scheme to transfer the Universal/BVK Agreement to Highland Capital or its affiliate was apparently only prevented by this Court imposing 11 U.S.C. § 363, effectively taking away Acis LP's right to operate outside the ordinary course of business without Court authority under 11 U.S.C. § 303(f) and then later not immediately lifting the automatic stay as to the Universal/BVK Agreement.

106. Finally, Highland Advisor and its sub-manager Highland Capital, used its newly acquired management rights (by way of the ALF PMA Transfer) to attempt to destroy the Debtor, as further described below.

### **5. *The First Optional Redemption Notices***

107. On April 30, 2018, without requesting relief from the automatic stay, Highland Funding sent five notices purportedly requesting optional redemption pursuant to Section 9.2 of each of the Indentures (the "First Optional Redemption Notices").<sup>28</sup> True and correct copies of the First Optional Redemption Notices are attached hereto as **Exhibit L**.

108. The First Optional Redemption Notices directed Acis LP to effectuate an Optional Redemption (as defined under each Indenture). Under Section 9.2 of each Indenture, upon the receipt of a notice of redemption, Acis, in its discretion, is to direct the sale of the Collateral Obligations (as defined by each Indenture) and other Assets. *See* CLO-1 Indenture, § 9.2; CLO-3 Indenture, § 9.2(b); CLO-4 Indenture, § 9.2; CLO-5 Indenture, § 9.2; & CLO-6 Indenture, § 9.2. In the Indentures, "Assets" is defined to include the PMAs. *See* CLO-1 Indenture, p. 8; CLO-3 Indenture, p. 10; CLO-4 Indenture, p. 10; CLO-5 Indenture, p. 10; & CLO-6 Indenture p. 10. Consequently, an Optional Redemption directs Acis LP to liquidate assets of the CLOs over which Acis has certain property rights, including, effectively, the PMAs.

<sup>28</sup> Nexpoint Strategic Opportunities Fund (f/k/a NexPoint Credit Strategies Fund) ("Nexpoint") and Drexel Limited ("Drexel") joined in one of the Optional Redemption Notices. Like HCLOF, Nexpoint is an affiliate of Highland.

109. The Trustee analyzed the First Optional Redemption Notices and determined there were various defects which rendered them ineffective. Therefore, on May 22, 2018, the Trustee sent his responses to the five First Optional Redemption Notices (the "Redemption Responses"). True and correct copies of the Redemption Responses are attached hereto as **Exhibit M.**

**6. *The Temporary Restraining Order Against the Highlands***

110. On May 30, 2018, Highland Capital and Highland Funding initiated this Adversary Proceeding and alleged, among other things, that the Trustee breached the PMAs by failing to effectuate an Optional Redemption pursuant to the First Optional Redemption Notices.

111. The next day, on May 31, 2018, upon the request of the Trustee, the Court held a status conference in the Bankruptcy Cases, and the Trustee explained that, almost immediately after his appointment, he began exploring plan options regarding a potential transaction that would transfer rights under the PMAs, the Sub-Advisory Agreement, the Shared Services Agreement, and the subordinated notes, with respect to CLO-3, CLO-4, CLO-5, and CLO-6, with the goal of maximizing value for all parties. The Trustee informed the Court that he was in the process of negotiating a transaction with a party that would potentially provide enough value to pay all parties, including potentially all of Acis's creditors in full.

112. On May 31, 2018, at the conclusion of the status conference, the Court, *sua sponte*, issued a temporary restraining order, which prevented all parties from taking any action in furtherance of the Optional Redemption for fourteen (14) days.

113. On June 6, 2018 the Court entered its *Temporary Restraining Order* (the "TRO"), whereby the Restrained Parties (as defined in the TRO) were enjoined until 12:01 a.m. on June 15, 2018, from:

- a) proceeding with, effectuating, or otherwise taking any action in furtherance of the Optional Redemption, call, or other liquidation of the Acis CLOs; and
- b) sending, mailing, or otherwise distributing any notice to the holders of the Acis CLOs in connection with the Optional Redemption, call, or other liquidation of the Acis CLOs.

114. On June 11, 2018, the Trustee filed his *Motion to Extend the Temporary Restraining Order* (the "Motion to Extend the TRO"), in which the Trustee sought to extend the TRO for an additional 14 days. *See* Docket No. 275.

115. Also on June 11, 2018, Highland Funding filed its *Memorandum of Law in Opposition to the Continuance of the Temporary Restraining Order* (the "Brief in Opposition to Extending the TRO"). *See* Case No. 18-3264, Docket. No. 271. This pleading did not mention that Highland Capital apparently violated the TRO by initiating approximately \$23 million of sales of CLO assets pursuant to the Optional Redemption after the Court issued its *sua sponte* TRO on May 31.

## **7. The Second Optional Redemption Notices**

116. On June 13, 2018, the day before the hearing on the Motion to Extend the TRO, Highland Funding advised the Trustee that Highland Funding would withdraw the First Optional Redemption Notices. Highland Funding's correspondence with the Trustee indicating its intent to withdraw the First Optional Redemption Notices is attached hereto as Exhibit N and incorporated herein for all purposes. Thereafter, the Trustee advised the Court that Highland Funding was withdrawing the First Optional Redemption Notices, and the Trustee therefore did not intend to go forward with the Motion to Extend the TRO on June 14.

117. On June 14, 2018, counsel for Highland Funding advised the Court that Highland Funding had withdrawn the First Optional Redemption Notices. Counsel for Highland Funding

further advised the Court that the First Optional Redemption Notices were withdrawn to bring "some sanity to this process":

That was done obviously for multiple reasons. My client doesn't believe that this is the appropriate time to be effectuating such a redemption for its own economic reasons, setting aside the complications it's obviously caused for others in this room. But needless to say, that, too, is an effort to try to bring, as I believe the Court has requested, and others have, some sanity to this process.<sup>29</sup>

118. On June 15, 2018, at 12:01 a.m., the TRO expired.

119. Later on June 15, 2018, despite the fact that Highland Funding had just withdrawn the First Optional Redemption Notices, had advised the Court of the same, and the Trustee and the Court acted in reliance on same, (again, without requesting relief from the automatic stay) Highland Funding gave notice to the Trustee that it was again requesting an Optional Redemption pursuant to the Section 9.2 of each of the Indentures (the "Second Optional Redemption Notices," and together with the First Optional Redemption Notices, the "Optional Redemption Notices"). The Second Optional Redemption Notices are attached hereto as **Exhibit Q** and are incorporated herein for all purposes.

120. By the Second Optional Redemption Notices, Highland Funding directed the Issuers:

to effect an Optional Redemption of all Secured Notes and the Subordinated Notes in full on July 30, 2018 for the express purpose of placement of a portion of the portfolio of assets held by the Co-Issuers into a warehouse arrangement or a total return swap or other derivative arrangement with Highland Capital Management, L.P. acting as the Sub-Advisor pursuant to a Sub-Advisory Agreement.

121. On June 20, 2018, Highland Capital presented to the Trustee hundreds of millions of dollars of "proposed trades" pursuant to this second Optional Redemption. In its correspondence to the Trustee regarding such proposed trades, Highland Capital further stated:

<sup>29</sup> See Docket No. 298 at 7, ll. 16-22 (June 14, 2018 Hr'g Tr.).

**In order to effectuate the Transaction and obtain best execution, Highland requests your consent by no later than 2pm tomorrow, Thursday June 21, 2018 (the "Deadline").** The Acis Accounts may incur losses as a result of your failure to respond by the Deadline.

**Highland believes it has an independent fiduciary obligation to the CLOs. If you instruct Highland not to proceed to undertake the Optional Redemption, Highland reserves its rights to seek appropriate protection and redress at law or in equity.**<sup>30</sup>

## H. Preferential Transfers Made within One Year of the Petition Date

122. Acis's Statement of Financial Affairs [ Case No. 18-30264, Docket No. 165] (the "SOFA")<sup>31</sup> and its general ledger disclose more than two dozen payments totaling \$16,113,790.14 made to Highland Capital within one year of the Petition Date based on four categories (the "Prepetition Payments"):

- (i) Contractual Payments: \$5,011,836.72
- (ii) Services: \$7,672,145.25<sup>32</sup>
- (iii) Unsecured Loan Repayments Including Interest: \$3,311,497.65
- (iv) Expense Reimbursement: \$118,311.32

123. The Prepetition Payments were made for the benefit of Highland Capital for or on account of an antecedent debt owed by the Debtors before the Prepetition Payments were made. Acis was insolvent at all times when the Prepetition Payments were made. Based on Terry's pending—or already decided—claims, as well as Highland Capital's absolute operational and financial control of Acis, Highland Capital was aware that Acis was insolvent or reasonably should have been aware Acis was insolvent at all times when the Prepetition Payments were made. The Prepetition Payments were made within one year of the Petition Date. At the time the

<sup>30</sup> Emphasis in original email correspondence.

<sup>31</sup> The SOFA is sworn under penalty of perjury and signed by Issac Leventon, a Highland employee and associate general counsel.

<sup>32</sup> The Statement of Financial Affairs, filed in the bankruptcy cases by Acis while under Highland Capital control, fails to list an additional \$1,868,203.44 in transfers to Highland Capital for "Services" that were made shortly before the Petition Date.



Prepetition Payments were made Highland Capital was an insider of the Debtors. The Prepetition Payments enabled Highland Capital to receive more than Highland Capital would have received if the cases were a case under chapter 7 of the Bankruptcy Code and if the Prepetition Payments had not been made. Highland Capital received the Prepetition Payments. *See Williams v. McKesson Corp. (In re Quality Infusion Care, Inc.)*, Nos. 10-36675, 13-3056, 2013 Bankr. LEXIS 5044 (Bankr. S.D. Tex. Nov. 25, 2013) (citing *Palmer Clay Prods. Co. v. Brown*, 297 U.S. 227, 229 (1936) and stating the 547(b)(5) is to be analyzed as of the Petition Date).

124. Further, to the extent that the Acis LP payables that served as the consideration for the Note Transfer and the 2017-7 Equity transfer were valid, these transfers would also constitute preferential payments to Highland Capital, Highland Management and Highland Holdings. The SOFA discloses that Highland Management is an "affiliate" of the Debtors and the Note Transfer is included on the list of "payments, distributions, withdrawals credited, or given to insiders" within one year before filing the Bankruptcy Cases. *See* SOFA p. 12.

## VI. CAUSES OF ACTION<sup>33</sup>

### ***Count 1: Declaratory Judgment that Expense Overpayments to Highland Capital Were Ultra Vires in Violation of the LPA [Against Highland Capital]***

125. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

126. Under Delaware law, *ultra vires* corporate acts are either void or voidable. *See Klaassen v. Allegro Dev. Corp.*, C.A. No. 8626-VCL, 2013 Del. Ch. LEXIS 247, at \*48-50 (Oct. 11, 2013); *see also Stephen A. Solomon v. Armstrong*, 747 A.2d 1098, 1114 n.45 (1999) (explaining the difference between void and voidable acts). Delaware courts apply the doctrine

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<sup>33</sup> All causes of action asserted herein are also asserted as counterclaims to the Highland Capital Claims pursuant to section 16.069 of the Texas Civil Practice & Remedies Code and other applicable law.

of *ultra vires* to partnerships by analogy. See, e.g., *In re Mesa Ltd. P'ship Preferred Unitholders Litig.*, Civil Action No. 12,243, 1991 Del. Ch. LEXIS 214, at \*20 (Dec. 10, 1991).

127. Highland Capital invoiced Acis for, and received payments for, at least \$7,021,924.00 in excess of 20% of Revenues, in violation of the LPA. Highland Capital, an Affiliate of Acis GP, accepted such funds in violation of Section 3.10(a) of the LPA.

128. Such Expense Overpayments, and any agreements supporting such Expense Overpayments, were economically irrational, not in the interest of Acis LP, and are therefore void; however, if not void, such actions are voidable because they were done without the consent or ratification of all members of the Founding Partner Group. The payments to Highland Capital of the Expense Overpayments in the amount of at least \$7,021,924.00 and any agreements supporting such overpayments were unauthorized or *ultra vires* acts of the partnership in violation of the LPA, and are therefore void or voidable.

***Count 2: Turnover of Property of the Estate under 11 U.S.C. § 542(a)  
for Unauthorized Overpayments  
[Against Highland Capital]***

129. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

130. Under section 542(a) of the Bankruptcy Code, "an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 . . . shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a).

131. Under section 541(a) of the Bankruptcy Code, property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). Further, the "estate is comprised of [such] property, wherever located and by whomever held." *Id.*

132. Highland Capital wrongfully received Expense Overpayments of at least \$7,021,924.00 in excess of 20% of Revenues in violation of the LPA.

133. The property, or value of such property, from the overpayment of funds wrongfully transferred to Highland Capital totaling at least \$7,021,924.00, in Highland Capital's possession, custody, or control is property of the estate, and the value of such property is not of inconsequential value or benefit to the estate.

134. Pursuant to section 542(a) of the Bankruptcy Code, Highland Capital must deliver to the Trustee the property or value of such property, totaling at least \$7,021,924.00, wrongfully transferred to Highland Capital.

135. Therefore, the Plaintiffs, now vested with all claims of the Trustee, seek turnover of the funds, totaling at least \$7,021,924.00, transferred to Highland Capital, to the extent allowed pursuant to section 542 of the Bankruptcy Code.

***Count 3: Money Had and Received for Overcharges and Unauthorized Overpayments  
[Against Highland Capital]***

136. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

137. "An action for money had and received arises when the defendant obtains money which in equity and good conscience belongs to the plaintiff. This action . . . looks only to the justice of the case and inquires whether the defendant has received money which rightfully belongs to another." *Amoco Prod. Co. v. Smith*, 946 S.W.2d 162, 164 (Tex. App.—El Paso 1997, no pet.) (internal citations omitted).

138. Highland Capital invoiced Acis for, and received Expense Overpayments for, at least \$7,021,924.00 in excess of 20% of Revenues in violation of the LPA. Highland Capital, an Affiliate of Acis GP, accepted such funds in violation of Section 3.10(a) of the LPA. Highland

Capital was therefore unjustly enriched in the amount of the Expense Overpayments of at least \$7,021,924.00.

139. Highland Capital invoiced Acis and accepted such Expense Overpayments from Acis despite Highland Capital's knowledge of the LPA. This money rightfully belongs to Acis, and the overpayment creates a debt in favor of Acis. Therefore, the Plaintiffs are entitled to damages on behalf of Acis in the amount of at least \$7,021,924.00. In addition, Highland Capital charged Acis more than a market rate under the Second Amended Sub-Advisory Agreement and the Third Amended Sub-Services Agreement and is liable to Acis in the amount of these overcharges.

***Count 4: Conversion for Unauthorized Overpayments  
[Against Highland Capital]***

140. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

141. "Conversion is defined as the wrongful exercise of dominion and control over another's property in denial of or inconsistent with his rights." *Green Int'l v. Solis*, 951 S.W.2d 384, 391 (Tex. 1997).

142. Highland Capital wrongfully exercised dominion and control over at least \$7,021,924.00 in excess of 20% of Revenues in violation of the LPA. Highland Capital, through the common control of Dondero, was aware that it was prohibited from receiving payment in excess of 20% of Revenues without the consent of all members of the Founding Partner Group. Highland Capital also had actual notice of the Arbitration Award through Dondero (who was represented at the arbitration proceeding) that Highland Capital was wrongfully in possession of such money. Despite Highland Capital's actual knowledge that the money does not rightfully belong to Highland Capital, Highland Capital continues to improperly retain the overpaid funds. Therefore, the Plaintiffs are entitled to damages in the amount of at least \$7,021,924.00. In

addition, Highland Capital charged Acis more than a market rate under the Second Amended Sub-Advisory Agreement and the Third Amended Shared Services Agreement and is liable to Acis in the amount of these overcharges.

***Count 5: Actual Fraudulent Transfer under 11 U.S.C. § 548(a)(1)(A) related to  
the Sub-Advisory Agreement  
[Against Highland Capital]***

143. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

144. Section 548(a)(1)(A) of the Bankruptcy Code provides that a trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, if the debtor made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted.

145. The Plaintiffs, now vested with all claims of the Trustee, seek to avoid the modifications to the Sub-Advisory Agreement made in the Second Amended Sub-Advisory Agreement and Third Amended Sub-Advisory Agreement, any obligations incurred by Acis in connection with these modifications to the Sub-Advisory Agreement, and any payments made (including increase in payments made) by Acis to Highland Capital in connection with these modifications to the Sub-Advisory Agreement because such modifications and payments were made with an actual intent to hinder, delay, or defraud Terry, a creditor of Acis, demonstrated by, among other things, that:

- (i) The modifications to the Sub-Advisory Agreement were made shortly after Terry's termination and just prior to litigation with Terry;
- (ii) The modifications to the Sub-Advisory Agreement—entered into by Dondero on behalf of Acis and Highland Capital—and payments

thereunder were made with the actual intent to divert assets to and for the benefit of Highland Capital, in fraud upon Acis's creditors, namely Terry.

- (iii) Acis was or became insolvent as a result of the modifications to the Sub-Advisory Agreement and payments thereunder;
- (iv) The modifications to the Sub-Advisory Agreement and payments thereunder occurred both before and after substantial debts were incurred by Acis;
- (v) The consideration received by Acis for the modifications to the Sub-Advisory Agreement and payments thereunder were not reasonably equivalent in value; and
- (vi) the transfer/obligation incurred was to an insider.

146. Therefore, such modifications to the Sub-Advisory Agreements and payments to Highland Capital pursuant to such modifications should be avoided to the extent avoidable under section 548(a)(1)(A) of the Bankruptcy Code.

***Count 6: Actual Fraudulent Transfer under Tex. Bus. & Com. Code § 24.005(a)(1) related to the Sub-Advisory Agreement [Against Highland Capital]***

147. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

148. Section 544 of the Bankruptcy Code provides the Trustee with the ability to avoid transfers or obligations that would be avoidable by certain prepetition creditors of Acis. Texas Business and Commerce Code section 24.005(a)(1) provides that a current or future creditor may avoid a transfer if the debtor made the transfer or incurred the obligation with an actual intent to hinder, delay or defraud any creditor of the debtor. Pursuant to section 544 of the Bankruptcy Code, the Trustee may seek to avoid transfers made by Acis, or obligations incurred by Acis, pursuant to Texas Business and Commerce Code sections 24.005(a)(1).

149. The Plaintiffs, now vested with all claims of the Trustee, seek to avoid the modifications to the Sub-Advisory Agreement made in the Second Amended Sub-Advisory Agreement and Third Amended Sub-Advisory Agreement, any obligations incurred by Acis in connection with these modifications to the Sub-Advisory Agreement, and any payments made (including increase in payments made) by Acis to Highland Capital in connection with these modifications to the Sub-Advisory Agreement because such modifications and payments were made with an actual intent to hinder, delay, or defraud Terry, a creditor of Acis, demonstrated by, among other things, that:

- (i) The modifications to the Sub-Advisory Agreement were made shortly after Terry's termination and just prior to litigation with Terry;
- (ii) The modifications to the Sub-Advisory Agreement—entered into by Dondero on behalf of Acis and Highland Capital—and payments thereunder were made with the actual intent to divert assets to and for the benefit of Highland Capital, in fraud upon Acis's creditors, namely Terry.
- (iii) Acis was or became insolvent as a result of the modifications to the Sub-Advisory Agreement and payments thereunder;
- (iv) The modifications to the Sub-Advisory Agreement and payments thereunder occurred both before and after substantial debts were incurred by Acis;
- (v) The consideration received by Acis for the modifications to the Sub-Advisory Agreement and payments thereunder were not reasonably equivalent in value; and
- (vi) The transfer/obligation incurred was to an insider.



150. Therefore, Acis's creditors have the right to avoid the Sub-Advisory Agreement and payments thereunder under section 24.005(a)(1) of the Texas Business and Commerce Code, and the Plaintiffs, now vested with all claims of the Trustee, can seek to enforce that right under section 544 of the Bankruptcy Code.

***Count 7: Constructive Fraudulent Transfer under 11 U.S.C. § 548(a)(1)(B) related to the Sub-Advisory Agreement [Against Highland Capital]***

151. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

152. Section 548(a)(1)(B) of the Bankruptcy Code provides that a trustee may avoid any transfer of any interest of the debtor in property, or any obligation incurred by the debtor, if the debtor (i) received less than reasonably equivalent value in exchange for the transfer or obligation; and (ii) (A) was insolvent on the date the transfer was made or the obligation was incurred, or became insolvent as the result of the transfer or obligation; (B) was engaged in business or a transaction, or was about to engage in business or a transaction for which any remaining property was unreasonably small capital; or (C) intended to incur, or believed the debtor would incur, debts that would be beyond the debtors' ability to pay such debts.

153. As described above, among other things, Acis LP:

- (i) received less than reasonably equivalent value in exchange for the modifications to the Sub-Advisory Agreement and payments made thereunder;
- (ii) was or became insolvent as the result of the modifications to the Sub-Advisory Agreement and payments made thereunder; and
- (iii) intended to incur, or believed Acis would incur, debts that would be beyond Acis's ability to pay such debts.

154. Therefore, the modifications to the Sub-Advisory Agreement made in the Second Amended Sub-Advisory Agreement and the Third Amended Sub-Advisory Agreement, any obligations incurred by Acis in connection with these modifications to the Sub-Advisory Agreement and any payments made (including increase in payments made) by Acis to Highland Capital in connection with these modifications to the Sub-Advisory Agreement are avoidable by the Plaintiffs, now vested with all claims of the Trustee, under section 548(a)(1)(B).

***Count 8: Constructive Fraudulent Transfer under Tex. Bus. & Com. Code §§ 24.005(a)(2) and 24.006(a) related to the Sub-Advisory Agreement  
[Against Highland Capital]***

155. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

156. Section 544 of the Bankruptcy Code provides the Trustee with the ability to avoid transfers or obligations that would be avoidable by certain prepetition creditors of Acis. Texas Business and Commerce Code section 24.005(a)(2) provides that a current or future creditor may avoid a transfer if the debtor made the transfer or incurred the obligation (i) without receiving reasonably equivalent value in exchange for the transfer or obligation; and (ii) (A) was engaged or about to engage in a business or transaction for which the remaining assets were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed, that the debtor would incur debts beyond the debtor's ability to pay as they became due. Similarly, Texas Business and Commerce Code section 24.006(a) provides that a current creditor may avoid a transfer if the debtor made the transfer or incurred the obligation (i) without receiving reasonably equivalent value in exchange for the transfer or obligation; and (ii) the debtor was insolvent or rendered insolvent by the transfer or obligation sought to be avoided. Pursuant to section 544 of the Bankruptcy Code, the Plaintiffs, now vested with all claims of the Trustee, may seek to avoid transfers made by Acis, or obligations incurred by Acis, pursuant to Texas Business and Commerce Code sections 24.005(a)(2) and 24.006(a).

157. As described above, Acis LP did not receive reasonably equivalent value in exchange for the modifications to the Sub-Advisory Agreement and payments made thereunder to Highland Capital, and creditors at the time of such modifications and payments could have avoided such modifications and payments under section 24.005(a)(2) of the Texas Business and Commerce Code.

158. At the time of the modifications to the Sub-Advisory Agreement and payments made thereunder to Highland Capital, Acis intended to incur, or believed or reasonably should have believed that Acis would incur, debts beyond its ability to pay as they became due, and/or was engaged, or was about to engage in a business or transaction for which the remaining assets of Acis were unreasonably small in relation to such business or transaction.

159. Moreover, as described above, Acis was insolvent or became insolvent by the modifications to the Sub-Advisory Agreement and payments made thereunder.

160. Therefore, the modifications to the Sub-Advisory Agreement made in the Second Amended Sub-Advisory Agreement and the Third Amended Sub-Advisory Agreement, any obligations incurred by Acis in connection with these modifications to the Sub-Advisory Agreement and any payments made (including increase in payments made) by Acis to Highland Capital in connection with these modifications to the Sub-Advisory Agreement are avoidable under Texas Business and Commerce Code sections 24.005(a)(2) and 24.006(a).

***Count 9: Actual Fraudulent Transfer under 11 U.S.C. § 548(a)(1)(A)  
for the ALF PMA Transfer  
[Against Highland Capital, Highland Funding, and Highland Advisor]***

161. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

162. Section 548(a)(1)(A) of the Bankruptcy Code provides that a trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, if the debtor made such transfer or incurred such obligation with actual intent to hinder, delay, or

defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted.

163. The Plaintiffs, now vested with all claims of the Trustee, seek to avoid the ALF PMA Transfer because such transfer was made with an actual intent to hinder, delay, or defraud Terry, a creditor of Acis, demonstrated by, among other things, that:

- (i) The ALF PMA Transfer was made just seven days after Terry's Arbitration Award against Acis;
- (ii) The ALF PMA Transfer was made with the actual intent to divert Acis LP's contractual rights under the ALF PMA to and for the benefit of Highland Advisor, in fraud upon Acis LP's creditors, namely Terry.
- (iii) Acis LP was insolvent at the time of the ALF PMA Transfer or became insolvent as a result of the ALF PMA Transfer;
- (iv) The ALF PMA Transfer occurred both before and after substantial debts were incurred by Acis LP;
- (v) Acis LP received less than a reasonably equivalent value in exchange for the ALF PMA Transfer;
- (vi) The transfer was made to an insider (Highland Advisor) and for the benefit of insiders (Highland Funding and Highland Capital); and
- (vii) Highland Capital (as sub-advisor to Highland Advisor) retained effective possession and control of the property transferred after the transfer.

164. Therefore, the ALF PMA Transfer should be avoided to the extent avoidable under section 548(a)(1)(A) of the Bankruptcy Code.

***Count 10: Actual Fraudulent Transfer under Tex. Bus. & Com. Code § 24.005(a)(1)  
for the ALF PMA Transfer  
[Against Highland Capital, Highland Funding, and Highland Advisor]***

165. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

166. Section 544 of the Bankruptcy Code provides the Trustee with the ability to avoid transfers or obligations that would be avoidable by certain prepetition creditors of Acis. Texas Business and Commerce Code section 24.005(a)(1) provides that a current or future creditor may avoid a transfer if the debtor made the transfer or incurred the obligation with an actual intent to hinder, delay or defraud any creditor of the debtor. Pursuant to section 544 of the Bankruptcy Code, the Trustee may seek to avoid transfers made by Acis, or obligations incurred by Acis, pursuant to Texas Business and Commerce Code sections 24.005(a)(1).

167. The Plaintiffs, now vested with all claims of the Trustee, seek to avoid the ALF PMA Transfer because such transfer was made with an actual intent to hinder, delay, or defraud Terry, a creditor of Acis, demonstrated by, among other things, that:

- (i) The ALF PMA Transfer was made just seven days after Terry's Arbitration Award against Acis;
- (ii) The ALF PMA Transfer was made with the actual intent to divert Acis LP's contractual rights under the ALF PMA to and for the benefit of Highland Advisor, in fraud upon Acis LP's creditors, namely Terry.
- (iii) Acis LP was insolvent at the time of the ALF PMA Transfer or became insolvent as a result of the ALF PMA Transfer;
- (iv) The ALF PMA Transfer occurred both before and after substantial debts were incurred by Acis LP; and
- (v) Acis LP received less than a reasonably equivalent value in exchange for the ALF PMA Transfer;

- (vi) The transfer was made to an insider (Highland Advisor) and for the benefit of insiders (Highland Funding and Highland Capital); and
- (vii) Highland Capital (as sub-advisor to Highland Advisor) retained effective possession and control of the property transferred after the transfer.

168. Therefore, Acis's creditors have the right to avoid the ALF PMA Transfer under section 24.005(a)(1) of the Texas Business and Commerce Code, and the Plaintiffs can seek to enforce that right under section 544 of the Bankruptcy Code.

***Count 11: Constructive Fraudulent Transfers under 11 U.S.C. § 548(a)(1)(B)  
for the ALF PMA Transfer  
[Against Highland Capital, Highland Funding, and Highland Advisor]***

169. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

170. Section 548(a)(1)(B) of the Bankruptcy Code provides that a trustee may avoid any transfer of any interest of the debtor in property, or any obligation incurred by the debtor, if the debtor (i) received less than reasonably equivalent value in exchange for the transfer or obligation; and (ii) (A) was insolvent on the date the transfer was made or the obligation was incurred, or became insolvent as the result of the transfer or obligation; (B) was engaged in business or a transaction, or was about to engage in business or a transaction for which any remaining property was unreasonably small capital; or (C) intended to incur, or believed the debtor would incur, debts that would be beyond the debtors' ability to pay such debts.

171. As described above, among other things, Acis LP:

- (i) received less than reasonably equivalent value in exchange for the ALF PMA Transfer;
- (ii) was insolvent on the date the ALF PMA Transfer was made or became insolvent as the result of the ALF PMA Transfer;

- (iii) was engaged in business or a transaction, or was about to engage in business or a transaction for which any remaining property was unreasonably small capital; and
- (iii) intended to incur, or believed Acis would incur, debts that would be beyond Acis's ability to pay such debts.

172. Therefore, ALF PMA Transfer is avoidable under section 548(a)(1)(B) of the Bankruptcy Code.

***Count 12: Constructive Fraudulent Transfer under Tex. Bus. & Com. Code §§ 24.005(a)(2) and 24.006(a) for the ALF PMA Transfer  
[Against Highland Capital, Highland Funding, and Highland Advisor]***

173. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

174. Section 544 of the Bankruptcy Code provides the Trustee with the ability to avoid transfers or obligations that would be avoidable by certain prepetition creditors of Acis. Texas Business and Commerce Code section 24.005(a)(2) provides that a current or future creditor may avoid a transfer if the debtor made the transfer or incurred the obligation (i) without receiving reasonably equivalent value in exchange for the transfer or obligation; and (ii) (A) was engaged or about to engage in a business or transaction for which the remaining assets were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed, that the debtor would incur debts beyond the debtor's ability to pay as they became due. Similarly, Texas Business and Commerce Code section 24.006(a) provides that a current creditor may avoid a transfer if the debtor made the transfer or incurred the obligation (i) without receiving reasonably equivalent value in exchange for the transfer or obligation; and (ii) the debtor was insolvent or rendered insolvent by the transfer or obligation sought to be avoided. Pursuant to section 544 of the Bankruptcy Code, the Plaintiffs, now vested with all claims of the



Trustee, may seek to avoid transfers made by Acis, or obligations incurred by Acis, pursuant to Texas Business and Commerce Code sections 24.005(a)(2) and 24.006(a).

175. As described above, Acis LP did not receive reasonably equivalent value in exchange for the ALF PMA Transfer, and creditors at the time of the ALF PMA Transfer could have avoided such transfer under section 24.005(a)(2) of the Texas Business and Commerce Code.

176. At the time of the ALF PMA Transfer, Acis intended to incur, or believed or reasonably should have believed that Acis would incur, debts beyond its ability to pay as they became due, and/or was engaged, or was about to engage in a business or transaction for which the remaining assets of Acis were unreasonably small in relation to such business or transaction.

177. Moreover, as described above, Acis was insolvent or was rendered insolvent by the ALF PMA Transfer.

178. The ALF PMA Transfer is therefore avoidable under Texas Business and Commerce Code sections 24.005(a)(2) and 24.006(a).

***Count 13: Actual Fraudulent Transfer under 11 U.S.C. § 548(a)(1)(A)  
for the ALF Share Transfer  
[Against Highland Capital and Highland Funding]***

179. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

180. Section 548(a)(1)(A) of the Bankruptcy Code provides that a trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, if the debtor made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted.

181. The Plaintiffs, now vested with all claims of the Trustee, seek to avoid the ALF Share Transfer because such transfer was made with an actual intent to hinder, delay, or defraud Terry, a creditor of Acis, demonstrated by, among other things, that:

- (i) The ALF Share Transfer was made just four days after Terry's Arbitration Award against Acis;
- (ii) The ALF Share Transfer was made with the actual intent to divert Acis LP's interest and control in ALF to and for the benefit of Highland Funding, in fraud upon Acis LP's creditors, namely Terry.
- (iii) Acis LP was insolvent at the time of the ALF Share Transfer or became insolvent as a result of the ALF Share Transfer;
- (iv) The ALF Share Transfer occurred both before and after substantial debts were incurred by Acis LP; and
- (v) Acis LP received less than a reasonably equivalent value in exchange for the ALF Share Transfer;
- (vi) The transfer was made to an insider (Highland Funding) and for the benefit of an insider (Highland Capital); and
- (vii) Highland Capital (as sub-advisor to Highland Advisor) retained effective possession and control of the property transferred after the transfer.

182. Therefore, the ALF Share Transfer should be avoided to the extent avoidable under section 548(a)(1)(A) of the Bankruptcy Code.

***Count 14: Actual Fraudulent Transfer under Tex. Bus. & Com. Code § 24.005(a)(1)  
for the ALF Share Transfer  
[Against Highland Capital and Highland Funding]***

183. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

184. Section 544 of the Bankruptcy Code provides the Trustee with the ability to avoid transfers or obligations that would be avoidable by certain prepetition creditors of Acis. Texas Business and Commerce Code section 24.005(a)(1) provides that a current or future creditor may avoid a transfer if the debtor made the transfer or incurred the obligation with an actual intent to hinder, delay or defraud any creditor of the debtor. Pursuant to section 544 of the Bankruptcy Code, the Trustee may seek to avoid transfers made by Acis, or obligations incurred by Acis, pursuant to Texas Business and Commerce Code sections 24.005(a)(1).

185. The Plaintiffs, now vested with all claims of the Trustee, seek to avoid the ALF Share Transfer because such transfer was made with an actual intent to hinder, delay, or defraud Terry, a creditor of Acis, demonstrated by, among other things, that:

- (i) The ALF Share Transfer was made just four days after Terry's Arbitration Award against Acis;
- (ii) The ALF Share Transfer was made with the actual intent to divert Acis LP's interest and control in ALF to and for the benefit of Highland Funding, in fraud upon Acis LP's creditors, namely Terry.
- (iii) Acis LP was insolvent at the time of the ALF Share Transfer or became insolvent as a result of the ALF Share Transfer;
- (iv) The ALF Share Transfer occurred both before and after substantial debts were incurred by Acis LP; and
- (v) Acis LP received less than a reasonably equivalent value in exchange for the ALF Share Transfer;
- (vi) The transfer was made to an insider (Highland Funding) and for the benefit of an insider (Highland Capital); and

- (vii) Highland Capital (as sub-advisor to Highland Advisor) retained effective possession and control of the property transferred after the transfer.

186. Therefore, Acis's creditors have the right to avoid the ALF Share Transfer under section 24.005(a)(1) of the Texas Business and Commerce Code, and the Plaintiffs can seek to enforce that right under section 544 of the Bankruptcy Code.

***Count 15: Constructive Fraudulent Transfers under 11 U.S.C. § 548(a)(1)(B)  
for the ALF Share Transfer  
[Against Highland Capital and Highland Funding]***

187. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

188. Section 548(a)(1)(B) of the Bankruptcy Code provides that a trustee may avoid any transfer of any interest of the debtor in property, or any obligation incurred by the debtor, if the debtor (i) received less than reasonably equivalent value in exchange for the transfer or obligation; and (ii) (A) was insolvent on the date the transfer was made or the obligation was incurred, or became insolvent as the result of the transfer or obligation; (B) was engaged in business or a transaction, or was about to engage in business or a transaction for which any remaining property was unreasonably small capital; or (C) intended to incur, or believed the debtor would incur, debts that would be beyond the debtors' ability to pay such debts.

189. As described above, among other things, Acis LP:

- (i) received less than reasonably equivalent value in exchange for the ALF Share Transfer;
- (ii) was insolvent on the date the ALF Share Transfer was made or became insolvent as the result of the ALF Share Transfer;
- (iii) was engaged in business or a transaction, or was about to engage in business or a transaction for which any remaining property was unreasonably small capital; and

- (iii) intended to incur, or believed Acis would incur, debts that would be beyond Acis's ability to pay such debts.

190. Therefore, ALF Share Transfer is avoidable by the Plaintiffs, now vested with all claims of the Trustee, under section 548(a)(1)(B) of the Bankruptcy Code.

***Count 16: Constructive Fraudulent Transfer under Tex. Bus. & Com. Code §§ 24.005(a)(2) and 24.006(a) for the ALF Share Transfer  
[Against Highland Capital and Highland Funding]***

191. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

192. Section 544 of the Bankruptcy Code provides the Trustee with the ability to avoid transfers or obligations that would be avoidable by certain prepetition creditors of Acis. Texas Business and Commerce Code section 24.005(a)(2) provides that a current or future creditor may avoid a transfer if the debtor made the transfer or incurred the obligation (i) without receiving reasonably equivalent value in exchange for the transfer or obligation; and (ii) (A) was engaged or about to engage in a business or transaction for which the remaining assets were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed, that the debtor would incur debts beyond the debtor's ability to pay as they became due. Similarly, Texas Business and Commerce Code section 24.006(a) provides that a current creditor may avoid a transfer if the debtor made the transfer or incurred the obligation (i) without receiving reasonably equivalent value in exchange for the transfer or obligation; and (ii) the debtor was insolvent or rendered insolvent by the transfer or obligation sought to be avoided. Pursuant to section 544 of the Bankruptcy Code, the Plaintiffs, now vested with all claims of the Trustee, may seek to avoid transfers made by Acis, or obligations incurred by Acis, pursuant to Texas Business and Commerce Code sections 24.005(a)(2) and 24.006(a).

193. As described above, Acis LP did not receive reasonably equivalent value in exchange for the ALF Share Transfer, and creditors at the time of the ALF Share Transfer could

have avoided such transfer under section 24.005(a)(2) of the Texas Business and Commerce Code.

194. At the time of the ALF Share Transfer, Acis intended to incur, or believed or reasonably should have believed that Acis would incur, debts beyond its ability to pay as they became due, and/or was engaged, or was about to engage in a business or transaction for which the remaining assets of Acis were unreasonably small in relation to such business or transaction.

195. Moreover, as described above, Acis was insolvent or rendered insolvent by the ALF Share Transfer.

196. The ALF Share Transfer is therefore avoidable under Texas Business and Commerce Code sections 24.005(a)(2) and 24.006(a).

***Count 17: Actual Fraudulent Transfer under 11 U.S.C. § 548(a)(1)(A)  
for the Note Transfer  
[Against Highland Capital and Highland Management]***

197. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

198. Section 548(a)(1)(A) of the Bankruptcy Code provides that a trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, if the debtor made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted.

199. The Plaintiffs, now vested with all claims of the Trustee, seek to avoid the Note Transfer because such transfer was made with an actual intent to hinder, delay, or defraud Terry, a creditor of Acis, demonstrated by, among other things, that:

- (i) The Note Transfer was made shortly after Terry's Arbitration Award against Acis;

- (ii) The Note Transfer was made with the actual intent to divert the \$9.5 million promissory note by Highland Capital in favor of Acis LP to and for the benefit of Highland Management, in fraud upon Acis LP's creditors, namely Terry.
- (iii) Acis LP was insolvent at the time of the Note Transfer or became insolvent as a result of the Note Transfer;
- (iv) The Note Transfer occurred both before and after substantial debts were incurred by Acis LP; and
- (v) Acis LP received less than a reasonably equivalent value in exchange for the Note Transfer;
- (vi) The transfer was made to an insider (Highland Management) and for the benefit of an insider (Highland Capital); and
- (vii) Highland Capital retained effective possession and control of the property transferred after the transfer.

200. Therefore, the Note Transfer should be avoided to the extent avoidable under section 548(a)(1)(A) of the Bankruptcy Code.

***Count 18: Actual Fraudulent Transfer under Tex. Bus. & Com. Code § 24.005(a)(1)  
for the Note Transfer  
[Against Highland Capital and Highland Management]***

201. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

202. Section 544 of the Bankruptcy Code provides the Trustee with the ability to avoid transfers or obligations that would be avoidable by certain prepetition creditors of Acis. Texas Business and Commerce Code section 24.005(a)(1) provides that a current or future creditor may avoid a transfer if the debtor made the transfer or incurred the obligation with an actual intent to hinder, delay or defraud any creditor of the debtor. Pursuant to section 544 of the Bankruptcy



Code, the Trustee may seek to avoid transfers made by Acis, or obligations incurred by Acis, pursuant to Texas Business and Commerce Code sections 24.005(a)(1).

203. The Plaintiffs, now vested with all claims of the Trustee, seek to avoid the Note Transfer because such transfer was made with an actual intent to hinder, delay, or defraud Terry, a creditor of Acis, demonstrated by, among other things, that:

- (i) The Note Transfer was made shortly after Terry's Arbitration Award against Acis;
- (ii) The Note Transfer was made with the actual intent to divert the \$9.5 million promissory note by Highland Capital in favor of Acis LP to and for the benefit of Highland Management, in fraud upon Acis LP's creditors, namely Terry.
- (iii) Acis LP was insolvent at the time of the Note Transfer or became insolvent as a result of the Note Transfer;
- (iv) The Note Transfer occurred both before and after substantial debts were incurred by Acis LP; and
- (v) Acis LP received less than a reasonably equivalent value in exchange for the Note Transfer;
- (vi) The transfer was made to an insider (Highland Management) and for the benefit of an insider (Highland Capital); and
- (vii) Highland Capital retained effective possession and control of the property transferred after the transfer.

204. Therefore, Acis's creditors have the right to avoid the ALF Share Transfer under section 24.005(a)(1) of the Texas Business and Commerce Code, and the Plaintiffs can seek to enforce that right under section 544 of the Bankruptcy Code..

***Count 19: Constructive Fraudulent Transfers under 11 U.S.C. § 548(a)(1)(B)  
for the Note Transfer  
[Against Highland Capital and Highland Management]***

205. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

206. Section 548(a)(1)(B) of the Bankruptcy Code provides that a trustee may avoid any transfer of any interest of the debtor in property, or any obligation incurred by the debtor, if the debtor (i) received less than reasonably equivalent value in exchange for the transfer or obligation; and (ii) (A) was insolvent on the date the transfer was made or the obligation was incurred, or became insolvent as the result of the transfer or obligation; (B) was engaged in business or a transaction, or was about to engage in business or a transaction for which any remaining property was unreasonably small capital; or (C) intended to incur, or believed the debtor would incur, debts that would be beyond the debtors' ability to pay such debts.

207. As described above, among other things, Acis LP:

- (i) received less than reasonably equivalent value in exchange for the Note Transfer;
- (ii) was insolvent on the date the Note Transfer was made or became insolvent as the result of the Note Transfer;
- (iii) was engaged in business or a transaction, or was about to engage in business or a transaction for which any remaining property was unreasonably small capital; and
- (iii) intended to incur, or believed Acis would incur, debts that would be beyond Acis's ability to pay such debts.

208. Therefore, Note Transfer is avoidable by the Plaintiffs, now vested with all claims of the Trustee, under section 548(a)(1)(B) of the Bankruptcy Code.

***Count 20: Constructive Fraudulent Transfer under Tex. Bus. & Com. Code §§ 24.005(a)(2) and 24.006(a) for the Note Transfer  
[Against Highland Capital and Highland Management]***

209. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

210. Section 544 of the Bankruptcy Code provides the Trustee with the ability to avoid transfers or obligations that would be avoidable by certain prepetition creditors of Acis. Texas Business and Commerce Code section 24.005(a)(2) provides that a current or future creditor may avoid a transfer if the debtor made the transfer or incurred the obligation (i) without receiving reasonably equivalent value in exchange for the transfer or obligation; and (ii) (A) was engaged or about to engage in a business or transaction for which the remaining assets were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed, that the debtor would incur debts beyond the debtor's ability to pay as they became due. Similarly, Texas Business and Commerce Code section 24.006(a) provides that a current creditor may avoid a transfer if the debtor made the transfer or incurred the obligation (i) without receiving reasonably equivalent value in exchange for the transfer or obligation; and (ii) the debtor was insolvent or rendered insolvent by the transfer or obligation sought to be avoided. Pursuant to section 544 of the Bankruptcy Code, the Plaintiffs, now vested with all claims of the Trustee, may seek to avoid transfers made by Acis, or obligations incurred by Acis, pursuant to Texas Business and Commerce Code sections 24.005(a)(2) and 24.006(a).

211. As described above, Acis LP did not receive reasonably equivalent value in exchange for the Note Transfer, and creditors at the time of the Note Transfer could have avoided such transfer under section 24.005(a)(2) of the Texas Business and Commerce Code.

212. At the time of the Note Transfer, Acis intended to incur, or believed or reasonably should have believed that Acis would incur, debts beyond its ability to pay as they

became due, and/or was engaged, or was about to engage in a business or transaction for which the remaining assets of Acis were unreasonably small in relation to such business or transaction.

213. Moreover, as described above, Acis was insolvent or rendered insolvent by the Note Transfer.

214. The Note Transfer is therefore avoidable under Texas Business and Commerce Code sections 24.005(a)(2) and 24.006(a).

***Count 21: Actual Fraudulent Transfer under 11 U.S.C. § 548(a)(1)(A)  
for the 2017-7 Equity and 2017-7 Agreement Transfers  
[Against Highland Capital and Highland Holdings]***

215. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

216. Section 548(a)(1)(A) of the Bankruptcy Code provides that a trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, if the debtor made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted.

217. The Plaintiffs, now vested with all claims of the Trustee, seek to avoid the transfers of the 2017-7 Agreements and the 2017-7 Equity because such transfers were made with an actual intent to hinder, delay, or defraud Terry, a creditor of Acis, demonstrated by, among other things, that:

- (i) The transfers of the 2017-7 Agreements and the 2017-7 Equity were made shortly after Terry's Arbitration Award against Acis and immediately after Terry's judgment against Acis;
- (ii) The transfers of the 2017-7 Agreements and the 2017-7 Equity were made with the actual intent to divert the 2017-7 Agreements and the 2017-7

Equity from Acis LP to Highland Holdings, in fraud upon Acis LP's creditors, namely Terry;

- (iii) Acis LP was insolvent at the time of the transfers of the 2017-7 Agreements and the 2017-7 Equity or became insolvent as a result of the transfers;
- (iv) The transfers of the 2017-7 Agreements and the 2017-7 Equity occurred shortly after substantial debts were incurred by Acis LP; and
- (v) Acis LP received less than a reasonably equivalent value in exchange for the transfers of the 2017-7 Agreements and the 2017-7 Equity;
- (vi) The transfers were made to an insider (Highland Holdings) and for the benefit of an insider (Highland Capital); and
- (vii) Highland Capital retained effective possession and control of the property transferred after the transfer.

218. Therefore, the transfers of the 2017-7 Agreements and the 2017-7 Equity should be avoided under section 548(a)(1)(A) of the Bankruptcy Code.

***Count 22: Actual Fraudulent Transfer under Tex. Bus. & Com. Code § 24.005(a)(1)  
for the 2017-7 Equity and 2017-7 Agreement Transfers  
[Against Highland Capital and Highland Holdings]***

219. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

220. Section 544 of the Bankruptcy Code provides the Trustee with the ability to avoid transfers or obligations that would be avoidable by certain prepetition creditors of Acis. Texas Business and Commerce Code section 24.005(a)(1) provides that a current or future creditor may avoid a transfer if the debtor made the transfer or incurred the obligation with an actual intent to hinder, delay or defraud any creditor of the debtor. Pursuant to section 544 of the Bankruptcy

Code, the Trustee may seek to avoid transfers made by Acis, or obligations incurred by Acis, pursuant to Texas Business and Commerce Code sections 24.005(a)(1).

221. The Plaintiffs, now vested with all claims of the Trustee, seek to avoid the transfers of the 2017-7 Agreements and the 2017-7 Equity because such transfers were made with an actual intent to hinder, delay, or defraud Terry, a creditor of Acis, demonstrated by, among other things, that:

- (i) The transfers of the 2017-7 Agreements and the 2017-7 Equity were made shortly after Terry's Arbitration Award against Acis and immediately after Terry's judgment against Acis;
- (ii) The transfers of the 2017-7 Agreements and the 2017-7 Equity were made with the actual intent to divert the 2017-7 Agreements and the 2017-7 Equity from Acis LP to Highland Holdings, in fraud upon Acis LP's creditors, namely Terry;
- (iii) Acis LP was insolvent at the time of the transfers of the 2017-7 Agreements and the 2017-7 Equity or became insolvent as a result of the transfers;
- (iv) The transfers of the 2017-7 Agreements and the 2017-7 Equity occurred shortly after substantial debts were incurred by Acis LP; and
- (v) Acis LP received less than a reasonably equivalent value in exchange for the transfers of the 2017-7 Agreements and the 2017-7 Equity;
- (vi) The transfers were made to an insider (Highland Management) and for the benefit of an insider (Highland Capital); and
- (vii) Highland Capital retained effective possession and control of the property transferred after the transfers.

222. Therefore, Acis's creditors have the right to avoid the transfers of the 2017-7 Agreements and the 2017-7 Equity under section 24.005(a)(1) of the Texas Business and Commerce Code, and the Plaintiffs can seek to enforce that right under section 544 of the Bankruptcy Code.

***Count 23: Constructive Fraudulent Transfers under 11 U.S.C. § 548(a)(1)(B)  
for the 2017-7 Equity and 2017-7 Agreement Transfers  
[Against Highland Capital and Highland Holdings]***

223. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

224. Section 548(a)(1)(B) of the Bankruptcy Code provides that a trustee may avoid any transfer of any interest of the debtor in property, or any obligation incurred by the debtor, if the debtor (i) received less than reasonably equivalent value in exchange for the transfer or obligation; and (ii) (A) was insolvent on the date the transfer was made or the obligation was incurred, or became insolvent as the result of the transfer or obligation; (B) was engaged in business or a transaction, or was about to engage in business or a transaction for which any remaining property was unreasonably small capital; or (C) intended to incur, or believed the debtor would incur, debts that would be beyond the debtors' ability to pay such debts.

225. As described above, among other things, Acis LP:

- (i) received less than reasonably equivalent value in exchange for the transfers of the 2017-7 Agreements and the 2017-7 Equity;
- (ii) was insolvent on the date the transfers of the 2017-7 Agreements and the 2017-7 Equity were made or became insolvent as the result of the transfers;
- (iii) was engaged in business or a transaction, or was about to engage in business or a transaction for which any remaining property was unreasonably small capital; and



- (iii) intended to incur, or believed Acis would incur, debts that would be beyond Acis's ability to pay such debts.

226. Therefore, the transfers of the 2017-7 Agreements and the 2017-7 Equity are avoidable by the Plaintiffs, now vested with all claims of the Trustee, under section 548(a)(1)(B) of the Bankruptcy Code.

***Count 24: Constructive Fraudulent Transfer under Tex. Bus. & Com. Code §§ 24.005(a)(2) and 24.006(a) for the 2017-7 Equity and 2017-7 Agreement Transfers  
[Against Highland Capital and Highland Holdings]***

227. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

228. Section 544 of the Bankruptcy Code provides the Trustee with the ability to avoid transfers or obligations that would be avoidable by certain prepetition creditors of Acis. Texas Business and Commerce Code section 24.005(a)(2) provides that a current or future creditor may avoid a transfer if the debtor made the transfer or incurred the obligation (i) without receiving reasonably equivalent value in exchange for the transfer or obligation; and (ii) (A) was engaged or about to engage in a business or transaction for which the remaining assets were unreasonably small in relation to the business or transaction, or (B) intended to incur, or believed or reasonably should have believed, that the debtor would incur debts beyond the debtor's ability to pay as they became due. Similarly, Texas Business and Commerce Code section 24.006(a) provides that a current creditor may avoid a transfer if the debtor made the transfer or incurred the obligation (i) without receiving reasonably equivalent value in exchange for the transfer or obligation; and (ii) the debtor was insolvent or rendered insolvent by the transfer or obligation sought to be avoided. Pursuant to section 544 of the Bankruptcy Code, the Plaintiffs, now vested with all claims of the Trustee, may seek to avoid transfers made by Acis, or obligations incurred by Acis, pursuant to Texas Business and Commerce Code sections 24.005(a)(2) and 24.006(a).

229. As described above, Acis LP did not receive reasonably equivalent value in exchange for the transfers of the 2017-7 Agreements and the 2017-7 Equity, and creditors at the time of the transfers of the 2017-7 Agreements and the 2017-7 Equity could have avoided such transfer under section 24.005(a)(2) of the Texas Business and Commerce Code.

230. At the time of the transfers of the 2017-7 Agreements and the 2017-7 Equity, Acis intended to incur, or believed or reasonably should have believed that Acis would incur, debts beyond its ability to pay as they became due, and/or was engaged, or was about to engage in a business or transaction for which the remaining assets of Acis were unreasonably small in relation to such business or transaction.

231. Moreover, as described above, Acis was insolvent or rendered insolvent by the transfers of the 2017-7 Agreements and the 2017-7 Equity.

232. The transfers of the 2017-7 Agreements and the 2017-7 Equity are therefore avoidable under Texas Business and Commerce Code sections 24.005(a)(2) and 24.006(a).

***Count 25: Preferential Transfers to Highland Capital, Highland Holdings and Highland Management under 11 U.S.C. § 547(b) and Texas Business and Commerce Code § 24.006(b) [Against Highland Capital, Highland Holdings, and Highland Management]***

233. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

234. Section 547(b) of the Bankruptcy Code provides that a trustee may avoid any transfer of any interest of the debtor in property (i) to or for the benefit of a creditor; (ii) for or on account of an antecedent debt; (iii) made while the debtor was insolvent; (iv) made within one year to an insider; and (v) that enables such creditor to receive more than such creditor would receive in a hypothetical chapter 7 liquidation.

235. Likewise, section 544 of the Bankruptcy Code provides the Trustee with the ability to avoid transfers that would be avoidable by certain prepetition creditors of Acis. Texas Business and Commerce Code section 24.006(b) provides that a current creditor may avoid a

transfer if the debtor made the transfer to an insider for an antecedent debt, the debtor was insolvent, and the insider had reasonable cause to believe that the debtor was insolvent. Pursuant to section 544 of the Bankruptcy Code, the Plaintiffs, now vested with all claims of the Trustee, may seek to avoid transfers made by Acis pursuant to Texas Business and Commerce Code section 24.006(b).

236. Within one year of the Petition Date, Highland Capital received the Prepetition Payments in the amount \$16,113,790.14 from Acis on account of purported debt claims owed by Acis. To the extent that the Prepetition Payments satisfied legitimate debt claims not avoided by any of the causes of action asserted herein, these transfers are avoidable under section 547(b) of the Bankruptcy Code and Texas Business and Commerce Code sections 24.006(b).

237. Similarly, the 2017-7 Equity transfer and the Note Transfer are purportedly in satisfaction of payables owed by Acis LP to Highland Capital (later conveyed to Highland Holdings and Highland Management). To the extent that these transfers satisfied legitimate debt claims not avoided by any of the causes of action asserted herein, these transfers are avoidable under section 547(b) of the Bankruptcy Code and Texas Business and Commerce Code sections 24.006(b).

***Count 26: Liability for Avoided Transfers under 11 U.S.C. § 550  
[Against All Defendants]***

238. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

239. Section 550 of the Bankruptcy Code provides that, if a transfer is avoided under section 544, 547 or 548, the trustee may recover the property transferred or the value of the property transferred from (i) the initial transferee of such transfer or (ii) the entity for whose benefit such transfer was made.

240. Highland Capital is an initial transferee of all transfers sought to be avoided in Counts 5 – 8 and 25 above. The Plaintiffs, now vested with all claims of the Trustee, may recover all avoided transfers from Highland Capital pursuant to section 550, specifically including any transfers made in connection with any obligations avoided through Counts 5 – 8 above.

241. Highland Advisor is an initial transferee of all transfers sought to be avoided in Counts 9 – 12 above, and Highland Capital are entities for whose benefit such transfers were made. The Plaintiffs, now vested with all claims of the Trustee, may recover all avoided transfers from Highland Advisor, Highland Funding, and Highland Capital pursuant to section 550.

242. Highland Funding is an initial transferee of all transfers sought to be avoided in Counts 13 – 16 above, and Highland Capital is an entity for whose benefit such transfers were made. The Plaintiffs, now vested with all claims of the Trustee, may recover all avoided transfers from Highland Funding and Highland Capital pursuant to section 550.

243. Highland Management is an initial transferee of all transfers sought to be avoided in Counts 17 – 20 and 25 above, and Highland Capital is an entity for whose benefit such transfers were made. The Plaintiffs, now vested with all claims of the Trustee, may recover all avoided transfers from Highland Management and Highland Capital pursuant to section 550.

244. Highland Holdings is an initial transferee of all transfers sought to be avoided in Counts 21 – 25 above, and Highland Capital is an entity for whose benefit such transfers were made. The Plaintiffs, now vested with all claims of the Trustee, may recover all avoided transfers from Highland Holdings and Highland Capital pursuant to section 550.

***Count 27: Civil Conspiracy to Commit Fraud, Including Fraudulent Transfers  
[Against Highland Capital, Highland Advisor, Highland Management, and Highland  
Holdings]***

245. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

246. Highland Capital, Highland Advisor, Highland Management, Highland Holdings, Dondero, and Waterhouse (collectively, the "Highland Enterprise")<sup>34</sup> sought to engage in a series of fraudulent transfers and other fraudulent schemes, including the ALF PMA Transfer, the ALF Share Transfer, the Note Transfer, the 2017-7 Equity transfer, the 2017-7 Agreements transfer and the thwarted Universal/BVK Agreement transfer in order to denude Acis's assets and take over Acis LP's valuable business.

247. The Highland Enterprise, which is comprised of two or more business entities and individuals, had a meeting of the minds on the object or course of action related to the foregoing fraudulent transfers and schemes, including the ALF PMA Transfer, the ALF Share Transfer, the Note Transfer the 2017-7 Equity transfer, the 2017-7 Agreements transfer and the thwarted Universal/BVK Agreement transfer.

248. The fraudulent transfers and schemes, including the ALF PMA Transfer, the ALF Share Transfer, the Note Transfer, the 2017-7 Equity transfer, the 2017-7 Agreements transfer and the thwarted Universal/BVK Agreement transfer, constitute one or more unlawful, overt acts.

249. The Debtors and the Debtors' estates suffered damages as a proximate result of the fraudulent transfers and schemes, including the ALF PMA Transfer, the ALF Share Transfer, the Note Transfer, the 2017-7 Equity transfer, the 2017-7 Agreements transfer and the thwarted Universal/BVK Agreement transfer.

250. The Plaintiffs, now vested with all claims of the Trustee, seek actual and exemplary damages for the Highland Enterprise's conspiracy.

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<sup>34</sup> This is without limitation to other entities or individuals that may ultimately be shown to be part of Highland Enterprise.

***Count 28: Tortious Interference with the Universal/BVK Agreement  
[Against Highland Capital]***

251. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

252. Under Texas law, a claim for tortious interference with contract requires: "(1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract, (3) that proximately caused the plaintiff's injury, and (4) caused actual damages or loss." *Official Brands, Inc. v. Roc Nation Sports, LLC*, 2015 U.S. Dist. LEXIS 167320 \*7 (N.D. Tex.) (J. Boyle) (quoting *Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000)). The fact that a contract is an at-will agreement is no defense to a tortious interference claim. *Id.*

253. The Universal/BVK Agreement is an existing contract to which Acis LP is a party. The Universal/BVK Agreement is an existing contract that is subject to interference.

254. From nearly day one of these Bankruptcy Cases, Highland Capital has sought to terminate Acis LP as the manager under the Universal/BVK Agreement, and replace Acis LP with Highland Capital or one of its affiliates. Highland Capital's actions involve communications over many months with Universal and BVK, including numerous communications after Highland Capital was terminated as sub-advisor on August 1, 2018 and no longer had any legitimate reason to communicate with Universal or BVK. Highland Capital even prepared and sent to Universal and BVK a new outsourcing agreement, which would be entered once Acis LP and its bankruptcy were out of the way.

255. Acis LP and its estate have suffered and will suffer actual damages as a proximate result of the interference of Highland Capital.

256. The Plaintiffs, now vested with all claims of the Trustee, seek actual and exemplary damages for Highland Capital's tortious interference with the Universal/BVK Agreement.

***Count 29: Breach of Contract by Highland Capital under the Sub-Advisory Agreement and Shared Services Agreement  
[Against Highland Capital]***

257. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

258. Under Texas law, to prevail on a breach of contract claim, a party must show: "(1) the existence of a valid contract; (2) the plaintiff performed or tendered performance as the contract required; (3) the defendant breached the contract by failing to perform or tender performance as the contract required; and (4) the plaintiff sustained damages as a result of the breach." *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018).

259. The Sub-Advisory Agreement is a valid contract between Acis LP and Highland Capital, under which Highland Capital was obligated to, *inter alia*:<sup>35</sup>

- (i) make recommendations to Acis LP for the purchase, retention, or sale of specific loans or assets in the CLOs;
- (ii) place orders with respect to the purchase or sale of specific loans or assets for the CLOs, upon instruction from Acis LP;
- (iii) identify, evaluate, recommend to Acis LP, and, if applicable, negotiate the structure or terms of investment opportunities for the CLOs;
- (iv) assist Acis LP in performing its due diligence on prospective investments for the CLOs; and

<sup>35</sup> Although the Plaintiffs plead herein that certain provisions of the Sub-Advisory Agreement, which are in violation of the LPA, are unauthorized and *ultra vires*, section 15 of the Sub-Advisory Agreement provides that any such invalid provision does not affect or render "invalid or unenforceable by virtue of the fact that for any reason any other or others of them may be invalid or unenforceable in whole or in part."



(v) provide information to Acis LP regarding any investments in the CLOs, and, if requested by Acis LP, provide information to assist in monitoring and servicing investments by the CLOs.

See Sub-Advisory Agreement § 1(b). Further, "[n]otwithstanding the foregoing, all investment decisions will ultimately be the responsibility of, and will be made by and at the sole discretion of, [Acis LP]." *Id.*

260. Section 4(a) of the Sub-Advisory Agreement specifically provides:

[T]he Sub-Advisor will perform its obligations [under the Sub-Advisory Agreement] in good faith with reasonable care using a degree of skill and attention no less than that which the Sub-Advisor uses with respect to comparable assets that it manages for others and, without limiting the foregoing, in a manner which the Sub-Advisor reasonably believes to be consistent with the practices and procedures followed by institutional managers of national standing relating to assets of the nature and character of the Portfolios[.]

261. Since at least the time the Trustee was appointed in these Bankruptcy Cases, while acting as sub-advisor, Highland Capital failed to purchase a single loan for the CLOs, and only provided for the sale of loans, in an attempt to complete a stealth liquidation of the CLOs for the Highlands' benefit, and to the detriment of Acis LP. Such practice is inconsistent with the practices and procedures followed by institutional managers of national standing, such as Brigade, relating to assets of the nature and character of the CLOs. Highland Capital's activities are, however, completely consistent with the Highlands' ultimate goal to take away Acis LP's valuable assets and take over Acis LP's valuable business as portfolio manager of the CLOs.

262. Highland Capital grossly mismanaged the CLOs, in abrogation of its duties and disregard of the standard of care under the Sub-Advisory Agreement. Accordingly, Highland Capital has breached its obligations under the Sub-Advisory Agreement, and such breach caused economic damages to Acis LP. Acis LP is therefore entitled to recover, to the fullest extent under applicable law, the amount of such damages from Highland Capital.

263. Further, to the extent any of the above-mentioned acts constitute services Highland Capital asserts it provided pursuant to the Shared Services Agreement, such services failed to meet the "Standard of Care" set forth in the Shared Services Agreement and were committed in bad faith or were the result of gross negligence, fraud, and/or willful misconduct. Highland Capital's breach of the Shared Services Agreement caused economic damages to Acis LP. Acis LP is therefore entitled to recover, to the fullest extent under applicable law, the amount of such damages from Highland Capital.

***Count 30: Breach of Fiduciary Duties by Highland Capital  
[Against Highland Capital]***

264. The Plaintiffs incorporate the preceding paragraphs as if fully set forth herein.

265. Pursuant to the Sub-Advisory Agreement, a principal-agent relationship existed between Acis LP and Highland Capital. As its investment adviser, Highland Capital owed Acis LP fiduciary duties. *See Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191, (1963); Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Release No. IA-5248. 17, C.F.R. Part 276 (June 5, 2019). Further, based on Highland Capital's role as sub-advisor and investment adviser to Acis LP, a special relationship of trust and confidence existed between Acis LP and Highland Capital. *See W. Reserve Life Assur. Co. of Ohio v. Graben*, 233 S.W.3d 360, 373-74 (Tex. App.—Fort Worth 2007, no pet.). Accordingly, in its capacity of sub-advisor to Acis LP, Highland Capital owed fiduciary duties to Acis LP.

266. Highland Capital, while acting as sub-advisor for Acis LP, purposefully engaged in conduct that was detrimental to Acis LP in order to enrich itself. As outlined in detail above, Highland Capital increased the amount due to Highland Capital under the Sub-Advisory Agreement, including charging amounts far in excess of appropriate market rates and amounts in

excess of the compensation limits of the LPA. Highland Capital was also the ringleader, and ultimate beneficiary, for the series of fraudulent schemes executed in the Fall of 2017 that terminated or transferred away Acis LP's valuable rights in the ALF PMA, the ALF Shares, the Note, the 2017-7 Equity and the 2017-7 Agreements. This was done with the very specific intent to make Acis "judgment proof," as Acis's own counsel later boasted, and in order to ensure that Terry would never receive payment on his judgment, as Dondero has threatened. These transfers, while very damaging to Acis LP, also furthered Highland Capital's plan to take over Acis LP's very lucrative portfolio management business and keep it under the control of Highland Capital and Dondero. Finally, Highland Capital sought to transfer the Universal/BVK Agreement away from Acis LP and to itself or an affiliate, including while Highland Capital was serving as sub-advisor (and as a fiduciary) for such agreement.

267. By its actions, Highland Capital specifically intended to cause harm to Acis LP by denuding it of its assets and enriching Highland Capital. In doing so, Highland Capital breached its fiduciary duties to Acis LP.

268. As a consequence, the Plaintiffs, now vested with all claims of the Trustee, are entitled to an award of punitive damages against Highland Capital in an amount to be determined by the Court.

***Count 31: Punitive Damages  
[Against All Defendants]***

269. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

270. The Highlands, led by Highland Capital and Dondero, engaged in fraud against Acis and its creditors, acted with malice toward Acis and its creditors, and were, at best, grossly negligent in their dealings with Acis.

271. Further, Plaintiffs are entitled to punitive damages in connection with Highland Capital's: (i) breach of fiduciary duties to Acis due to its fraudulent conduct, (ii) tortious interference, and (iii) violations of TUFTA. *See Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W. 3d 213, 232 (Tex. 2019) (fiduciary duties); *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996) (tortious interference); *Mullins v. Testamerica, Inc.*, CIV.A. 3:02-CV-0106-, 2006 WL 2167401, at \*10 (N.D. Tex. Aug. 2, 2006) (TUFTA).

272. Thus, the Plaintiffs, now vested with all claims of the Trustee, are entitled to punitive damages, and the Plaintiffs plead for such damages in connection with each Count pleaded herein that will support a claim for punitive damages.

***Count 32: Disregarding the Corporate Form/Alter Ego/Collapsing Doctrine/Unjust  
Enrichment  
[Against All Defendants]***

273. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

274. Under Texas law, ignoring the separateness of business entities and holding affiliated entities liable for all debts of the fraudulent enterprise is appropriate "when the corporate form has been used as part of a basically unfair device to achieve and inequitable result. Examples are when the corporate structure has been abused to perpetrate a fraud, evade an existing obligation . . . or justify a wrong." *SSP Partners v. Gladstrong Inv. (USA) Corp.*, 275 S.W.3d 444, 451 (Tex. 2008); *see also Flores v. Bodden*, 488 Fed. App'x 770, 775-76 (5th Cir. 2012) (listing "six situations in which a court may disregard the corporate form"); *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 416 (5th Cir. 2006) (finding alter ego present).<sup>36</sup>

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<sup>36</sup> To the extent Delaware law applies to any of the alter ego claims, Delaware also recognizes alter ego on similar grounds. "Delaware does, however, recognize the traditional alter ego doctrine as grounds to pierce the corporate veil in cases involving the members of a corporate group. To state an alter ego claim under Delaware law, the [plaintiff] must plead (1) that [the] defendants 'operated as a single economic entity' and (2) that an 'overall element

275. Highland Capital, Highland Funding, Highland Adviser, Highland Management, and Highland Holdings (the "Alter Egos") are all controlled by the CEO and ultimate majority owner of Highland Capital, Dondero. Each of the Alter Egos should be held liable for any damages awarded under any Count in this Second Amended Complaint, as each is the alter ego of the others. Further, each of the Alter Egos should be held liable for any debts of the Debtors, as they are also the alter ego of the Debtors.

276. In this case, the Alter Egos unquestionably used the corporate form as a means of perpetuating the fraudulent scheme set forth above. For example, creating shell corporations in the Cayman Islands days after the Arbitration Award in order to avoid payment of Acis's creditors is precisely the type fraud or injustice that warrants disregarding the corporate form. Such actions satisfy, at a minimum, the first three situations in which a court may disregard the corporate form.

277. Further, "multistep transactions can be collapsed when the steps of the transaction are 'part of one integrated transaction.'" *In re Yazoo Pipeline Co., L.P.*, 448 B.R. 163, 187 (Bankr. S.D. Tex. 2011) (J. Isgur) (internal citations omitted). The Supreme Court likewise has held that a bankruptcy court, as a court of equity, may look through form to substance when determining the true nature of a transaction as it relates to the rights of parties against a bankrupt's estate. *Pepper v. Litton*, 308 U.S. 295, 304-05 (1939).

278. The ALF PMA Transfer, the ALF Share Transfer, the Note Transfer, and the transfer of the 2017-7 Equity and the 2017-7 Agreements should be collapsed and recognized for what they are: Highland Capital using offshore entities to take over Acis LP's assets and business while Highland Capital maintains absolute control over such assets and business, and even using

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of injustice or unfairness' is present. "*Precht v. Global Tower LLC*, No. 2:14-CV-00743, 2016 U.S. Dist. LEXIS 177910, at \*9 (W.D. La. Dec. 22, 2016) (internal citations omitted).

alleged debt owed to Highland Capital as the purported consideration for these transactions in order to mask Highland Capital's otherwise clear liability for avoidable transfers.

279. Finally, unjust enrichment is an equitable theory of recovery holding that one who receives benefits unjustly should make restitution for those benefits. *Bransom v. Standard Hardware, Inc.*, 874 S.W.2d 919, 927 (Tex. App.--Fort Worth 1994). A party is unjustly enriched when it obtains a "benefit from another by fraud, duress, or the taking of an undue advantage." *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992).

280. Each of the Highlands, and in particular Highland Capital and Highland Funding, benefitted from the ALF PMA Transfer, the ALF Share Transfer, the Note Transfer, and the transfer of the 2017-7 Equity and the 2017-7 Agreements even if they were not the direct transferee. Each of the Highlands should be held liable for benefits unjustly received and make restitution to the Debtors and their estates for those benefits.

***Count 33: Willful Violation of the Automatic Stay  
[Against Highland Capital and Highland Funding]***

281. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

282. A willful violation of the automatic stay does not require a specific intent.

Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and the defendant's actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was 'willful' or whether compensation must be awarded.

*Campbell v. Countrywide Home Loan, Inc.*, 545 F.3d 348, 355 (5th Cir. 2008) (quoting *In re Chestnut*, 422 F.3d.298, 302 (5th Cir. 2005).

283. "It is not up to a party exercising a self-help remedy to determine, to the preclusion of this court, what is or is not property of the estate." *Chesnut v. Brown (In re Chesnut)*, 300 B.R. 880, 887 (Bankr. N.D. Tex. 2003).

284. Section 362(k)(1) of the Bankruptcy Code provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." The Fifth Circuit has indicated that remedies under 362(k)(1) are available to trustees. *St Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 539-540 (5th Cir. 2009). The term "individual" is not defined by the Bankruptcy Code, but it is used throughout the Code to refer to debtors and non-debtors. *See Homer Nat'l Bank v. Namie*, 96 B.R. 652, 654 (W.D. La. 1989) (citing, *inter alia*, 11 U.S.C. §§ 522(b) (individual as debtor), 321(a)(1) (individual as trustee)).

285. Further, pursuant to section 105(a) of the Bankruptcy Code, "[t]he Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The purpose of section 105(a) is "to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction." 2 COLLIER ON BANKRUPTCY ¶ 105.01 (collecting cases). This is consistent with the broad equitable authority of the bankruptcy courts. *See United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 549 (1990).

286. Highland Capital knew the automatic stay was in effect when it intentionally acted, without Court approval, to force the Trustee to effectuate the optional redemptions, including when it demanded on June 20, 2018, that the Trustee take actions to effectuate the optional redemption by June 21, 2018.

287. Highland Funding knew the automatic stay was in effect when it intentionally acted, without Court approval, to force the Trustee to effectuate the optional redemptions, including each occasion described herein when it sent the Trustee the Optional Redemption Notices.



288. Pursuant to section 362(k)(1), the Plaintiffs seek recovery of damages commensurate with its injury, due to Highland Capital's and Highland Funding's violations of the automatic stay. Further, given Highland Capital's and Highland Funding's blatant and willful violation of the automatic stay (as well as the TRO), the Plaintiffs seek attorneys' fees, punitive damages, and sanctions, as the Court finds appropriate, pursuant to section 105(a) of the Bankruptcy Code.

***Count 34: Attorneys' Fees and Costs,  
Including all Allowed Professionals' Fees and Expenses in the Bankruptcy Cases  
[Against All Defendants]***

289. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

290. Pursuant to Texas Business and Commerce Code section 24.013, Civil Practice and Remedies Code section 38.001, TUFTA, and any other applicable law, the Plaintiffs may recovery attorneys' fees and costs incurred in bringing this Adversary Proceeding.

291. Plaintiffs further seek recovery from Highland Capital of all allowed professionals' fees and expenses in the Bankruptcy Cases, which were losses to Acis resulting from Highland Capital's breach of fiduciary duties to Acis. *See Meyers v. Moody*, 693 F.2d 1196, 1214 (5th Cir. 1982).

**VII. REQUEST FOR DISGORGEMENT**

292. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

293. "Under the equitable remedy of disgorgement or fee forfeiture, a person who renders service to another in a relationship of trust may be denied compensation for his service if he breaches that trust." *McCullough v. Scarbrough, Medlin & Assocs.*, 435 S.W.3d 871, 904-05 (Tex. App.—Dallas 2014) (citing *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999)). "The remedy essentially returns to the principal the value of what it paid for because it did not receive the trust or loyalty." *McCullough*, 435 S.W.3d at 905 (citing *Burrow*, 997 S.W.2d at 237-38).

"The amount of disgorgement is within the trial court's discretion; the court may 'deny him all compensation or allow him a reduced compensation or allow him full compensation.'" *McCullough*, 435 S.W.3d at 905 (citing *Burrow*, 997 S.W.2d at 237 (quoting RESTATEMENT (SECOND) OF TORTS § 243 (1959))).

294. "Equitable disgorgement is distinct from an award of actual damages in that the disgorgement award 'serves a separate function of protecting fiduciary relationships.'" *McCullough*, 435 S.W.3d at 905 (quoting *Saden v. Smith*, 415 S.W.3d 450, 469 (Tex. App.—Houston [1st] Dist. 2013, pet. denied)); *see also Burrow*, 997 S.W.2d at 238 ("[T]he central purpose of the equitable remedy of [disgorgement] is to protect relationships of trust by discouraging agent's disloyalty.").

295. The basis for the disgorgement award against Highland Capital stems from its liability in connection with its breach of fiduciary duty, as pleaded herein, and should be "phrased in terms of the salary, profits or other income [Highland Capital] received during the time [it] committed the tortious conduct." *McCullough*, 435 S.W.3d at 905 (internal quotation marks omitted).

296. Accordingly, Plaintiffs request disgorgement of all funds received by Highland Capital, who breached its fiduciary duties to Acis.

### **VIII. REQUEST FOR IMPOSITION OF CONSTRUCTIVE TRUST**

297. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

298. "A constructive trust is not a cause of action under Texas law." *In re Moore*, 608 F.3d 253, 263 (5th Cir. 2010). Rather, "[a] constructive trust is an equitable remedy used to prevent unjust enrichment." *Baxter v. PNC Bank Nat'l Ass'n*, 541 Fed. App'x 395, 398 (5th Cir. 2013) (citing *Everett v. TK-Taito, LLC*, 178 S.W.3d 844, 859 (Tex. App.—Fort Worth 2005, no pet.)); *see also Messier v. Messier*, 458 S.W.3d 155, 164 (Tex. App.—Houston [14th Dist.] 2015,

no pet.) ("A constructive trust is imposed when one party holds property that legally belongs to the other.")). "In order to establish a constructive trust, the proponent must prove: (1) breach of a special trust, fiduciary relationship, or actual fraud; (2) unjust enrichment of the wrongdoer; and, (3) tracing to an identifiable res." *Baxter*, 541 Fed. App'x at 398; *accord Clapper v. Am. Realty Inv'rs, Inc.*, 3:14-CV-2970-D, 2015 U.S. Dist. LEXIS 71543, at \*26 (N.D. Tex. June 3, 2015).

299. As described herein, Highland Capital breached its fiduciary duties to Acis, and the Highlands acted in concert to perpetrate the series of fraudulent transfers in order to strip Acis of its assets for the benefit of Highlands.

300. The Highlands were unjustly enriched because they benefitted from the "fraud [and] the taking of an undue advantage" against Acis. *See Heldenfels Bros.*, 832 S.W.2d at 41. Each of the Highlands, and in particular Highland Capital and Highland Funding, benefitted from the property transferred, which is traceable and identified herein, as a result of the ALF PMA Transfer, the ALF Share Transfer, the Note Transfer, and the transfer of the 2017-7 Equity and the 2017-7 Agreements even if they were not the direct transferee.

301. Further, Highland Capital, who breached its fiduciary duties to Acis, was unjustly enriched in connection with the Expense Overpayments as well as by the payments received as a result of the modifications to the Sub Agreements, and such benefits may be traced and identified by the payments from Acis LP to Highland Capital under the modified Sub Agreements.

302. Accordingly, the Plaintiffs requests that a constructive trust is established for those benefits unjustly received by the Highlands.

## **IX. OBJECTIONS TO HIGHLAND CAPITAL PROOFS OF CLAIM**

303. The Plaintiffs incorporate the preceding paragraphs as if set forth fully herein.

304. The Highland Capital Claims are allegedly based on claims arising from the Sub-Advisory Agreement and the Shared Services Agreement. The Highland Capital Claims<sup>37</sup> are summarized as follows:

<b>Alleged Pre-Petition Claim<sup>38</sup></b>	<b>Alleged Claim Amount</b>
Sub-Advisory Agreement	\$1,605,362.41
Shared Services Agreement	\$1,017,213.62
Total alleged Pre-Petition Claim	\$2,622,576.03
<b>Alleged 502(f) Claim<sup>39</sup></b>	<b>Alleged 502(f) Claim Amount</b>
Sub-Advisory Agreement	\$1,170,147.06
Shared Services Agreement	\$ 879,417.29
Total alleged 502(f) Claim	\$2,049,564.35
<b>Total Claim Amount</b>	<b>\$4,672,140.38</b>

<sup>37</sup> Highland Capital filed identical claims against both Acis LP and Acis GP. Acis GP is not a party to the Sub-Advisory Agreement or the Shared Services Agreement. Presumably, Highland Capital is relying on Delaware partnership law to argue that Acis GP is also liable under the Sub-Advisory Agreement and Shared Services Agreement. See 6 Del. C. § 17-403(b) ("Except as provided in this chapter, a general partner of a limited partnership has the liabilities of a partner in a partnership that is governed by the Delaware Uniform Partnership Law in effect on July 11, 1999 (6 Del. C. § 1501 et seq.) to persons other than the partnership and the other partners. Except as provided in this chapter or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership that is governed by the Delaware Uniform Partnership Law in effect on July 11, 1999 (6 Del. C. § 1501 et seq.) to the partnership and to the other partners."); see also 6 Del. C. § 15-306(a) ("(a) Except as otherwise provided in subsections (b) and (c) of this section, all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law"). If this is the case, Acis does not dispute this basic tenet of partnership law; however, Acis disputes the Highland Capital Claims for the reasons set forth herein. Accordingly, all arguments set forth herein are applicable to both Highland Capital Claims.

<sup>38</sup> The Alleged Pre-Petition Claim relates to Highland Capital's alleged claim arising prior to the Petition Date.

<sup>39</sup> The Alleged 502(f) Claim relates to Highland Capital's alleged claim arising after the Petition Date and prior to April 13, 2018, the date the Court entered the Orders for Relief.

The Highland Capital Claims also include contingent indemnity claims arising under the Sub Agreements.

305. The Highland Capital Claims should be disallowed under (i) section 502(b)(1) of the Bankruptcy Code; (ii) section 502(b)(4) of the Bankruptcy Code; (iii) and section 502(d) of the Bankruptcy Code. The Highland Capital Claims are unenforceable against the Debtors under the LPA and applicable law. The Highland Capital Claims are for services of an insider of the Debtors and exceed the reasonable value of the services. As set forth above, Plaintiffs have asserted avoidance actions against Highland Capital such that the Highland Capital Claims should be disallowed. Finally, to the extent allowed at all, the Highland Capital Claims should be equitably subordinated under section 510(c) of the Bankruptcy Code.

306. Pursuant to section 502(b) and (d) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 3007, the Plaintiffs seek entry of an order disallowing and expunging the Highland Capital Claims from the Debtors' claims registers.

**A. The Highland Capital Claims Should be Disallowed under 11 U.S.C. § 502(b)(1).**

307. "Section 502(b)(1) provides that a claim is allowed except to the extent it is unenforceable under applicable law." *In re White*, No. 06-50247-RLJ-13, 2008 Bankr. LEXIS 167, at \*17-18 (Bankr. N.D. Tex. Jan. 28, 2008). "[T]he the validity of a creditor's claims against the debtor at the time the bankruptcy petition is filed 'is to be determined by reference to state law.'" *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 529 (5th Cir. 2004) (quoting *Kellogg v. United States (In re W. Tex. Mktg. Co.)*, 54 F.3d 1194, 1196 (5th Cir. 1995)).

308. As set forth more fully above, the Highland Capital Claims are based entirely on amounts alleged to be due pursuant to the Sub Agreements. As outlined in the causes of action above, there are significant amounts due to Acis LP by Highland Capital under or in connection with the Sub Agreements, which constitute a right of recoupment and/or offset to the entirety of

the Highland Capital Claims. Further, any portion of the Highland Capital Claims that are based on *ultra vires* acts, as alleged in Count 1 above, are void or voidable. Accordingly, the Highland Capital Claims are not enforceable under applicable law, and the Highland Capital Claims should therefore be disallowed.

**B. The Highland Capital Claims Should be Disallowed under 11 U.S.C. § 502(b)(4).**

309. The Highland Capital Claims are claims for services by an insider, Highland Capital, and the Highland Capital Claims exceed the reasonable value of the services provided by Highland Capital. Section 502(b)(4) of the Bankruptcy Code provides, in relevant part, that a claim for services of an insider or attorney of a debtor shall not be allowed to the extent that "such claim exceeds the reasonable value of such services."

310. The purpose of section 502(b)(4) is: "(1) to prevent insiders of a debtor from extracting inflated compensation from the debtor at the expense of the debtor's creditors; and (2) to prevent over-generosity of a debtor prior to a bankruptcy filing." *Faulkner v. Canada (In re Heritage Org., L.L.C.)*, Case No. 04-35574-BJH-11, Adv. No. 04-3338, 2006 Bankr. LEXIS 4662, at \*22-23 (Bankr. N.D. Tex. Jan. 5, 2006); *see also In re Allegheny Int'l*, 158 B.R. 332, 339 (Bankr. W.D. Pa. 1992) ("The purpose underlying 11 U.S.C. § 502(b)(4) is to prevent officers and directors (insiders) of a debtor from extracting inflated amounts for their services at the expense of the creditors.").

**1. Highland Capital is an Insider of the Debtors.**

311. Under section 101(31) of the Bankruptcy Code, an insider includes certain enumerated parties, such as an officer of the debtor, affiliate, etc. Further, the list of enumerated "insiders" is not exclusive or exhaustive. *See In re Missionary Baptist Foundation of Am., Inc.*, 712 F.2d 206, 210 (5th Cir. 1983). Recently, the United States Supreme Court stated: "Courts have additionally recognized as insiders some persons not on that [101(31)] list—commonly

known as 'nonstatutory insiders.' The conferral of that status often turns on whether the person's transactions with the debtor (or another of its insiders) were at arm's length." *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 963 (2018).

312. The Fifth Circuit has noted that "cases which have considered whether insider status exists generally have focused on two factors in making that determination: (1) the closeness of the relationship between the parties and (2) whether the transaction . . . [was] conducted at arm's length." *In re Holloway*, 955 F.2d 1008, 1011 (5th Cir. 1992).

313. Highland Capital is a statutory insider, a non-statutory insider, an admitted insider, and an adjudicated insider. The statutory definition of "insider" includes an "affiliate" of the debtor. 11 U.S.C. § 101(31)(E). Prior to the entry of the Orders for Relief, Highland Capital met the statutory definition of "affiliate" because Highland Capital "operate[d] the business or substantially all of the property of the [D]ebtor under a[n] . . . operating agreement." *See* 11 U.S.C. § 101(2)(D). Under the Sub Agreements, Acis LP effectively ceded control over its operations to Highland Capital.<sup>40</sup>

314. Highland Capital is a non-statutory insider because Dondero controlled both Acis and Highland Capital prior to the date the Court entered the Orders for Relief. The closeness of the Highland Capital-Acis relationship is demonstrated by the fact that both companies are under Dondero's common control, Acis had no employees and Acis was operated exclusively by Highland Capital employees. Transactions were not conducted at arm's length. Indeed, Dondero

<sup>40</sup> For purposes of section 502(b)(4), courts examine whether a party is an "insider" on the date the operative document was executed. Here, it is indisputable that Highland Capital was an insider when the Sub-Advisory Agreement and the Shared Services Agreement were executed, and Highland Capital was an insider on the Petition Date. *See Faulkner*, 2006 Bankr. LEXIS 4662, at \*17 ("The determination of insider status is made as of the time the claimant provided services to the debtor."); *In re Allegheny Int'l*, 158 B.R. 332, 339 (Bankr. W.D. Pa. 1992) ("[T]he relevant time for determining one's status as an insider, under 11 U.S.C. § 502(b)(4), is the time services were rendered and when the compensation contracts for such services were formed[.]").



signed both the Sub-Advisory Agreement and the Shared Services Agreement for Highland Capital and Acis.

315. Highland Capital is an admitted insider and an adjudicated insider. During the trial on the involuntary petitions, the Debtors, controlled by Highland Capital, admitted that Highland Capital is an insider of the Debtors.<sup>41</sup> Acis LP's SOFA lists payments to Highland Capital in the section titled "Payments or transfers of property made within 1 year before the filing of this case that benefited any insider." The SOFA is signed by Isaac Leventon, an employee of Highland Capital (who, on information and belief, had no official title or position with the Debtors). Additionally, this Court has found that Highland Capital is an insider of the Debtors, stating: "the court believes it necessary to remove certain *insider* creditor claims, which are required not to be counted pursuant to section 303(b)(2) of the Bankruptcy Code. *This would clearly include Highland Capital* (the Alleged Debtors do not dispute this)." Opinion ¶ 38 (footnotes omitted) (emphasis added).

## 2. The Highland Capital Claims Exceed the Reasonable Value of the Services Provided.

316. "In analyzing the reasonableness of a claim for services under § 502(b)(4), a court should consider the totality of the circumstances involved at the time that the services were rendered." *Faulkner*, 2006 Bankr. LEXIS 4662, at \*23 (citing *In re Gutierrez*, 309 B.R. 488, 493 (Bankr. W.D. Tex. 2004)). "Reasonable value" under Section 502(b)(4) is "synonymous with 'market value.'" *In re Delta Air Lines, Inc.*, No. 05-17923 (cgm), 2010 Bankr. LEXIS 233, at \*22 (Bankr. S.D.N.Y. Feb. 3, 2010). "The burden of proof on reasonableness under

<sup>41</sup> Transcript of Hearing on Emergency Motion to Abrogate or Modify 11 U.S.C Section 303(f), Prohibit Transfer of Assets, and Impose, Inter Alia, 11 U.S.C Section 363 Filed by Petitioning Creditor Joshua Terry (3); Emergency Motion to Set Hearing (related to Document (8) Motion to Dismiss Case Filed by Alleged Debtor Acis Capital Management, LP (9) (Case Nos. 18-30264-SGJ7 & 18-30264-SGJ7) (the "2-7-18 Transcript"), at 246: 8-9 ("[T]here are no insiders other than Highland on the list of eighteen[.]").

§ 502(b)(4) ultimately lies with the insider." *Id.* at 24. Thus, Highland Capital has the burden to establish the reasonableness of its claims. Further, when the validity of an insider's contract with a corporation is at issue, the burden is on the insider "not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein." *In re Marquam Inv. Corp.*, 942 F.2d 1462, 1465 (9th Cir. 1991) (quoting *Pepper v. Litton*, 308 U.S. 295, 306 (1939)).

317. Together, the Sub Agreements (as amended) charge Acis LP fees far exceeding the market value of the services provided under such agreements. First, the Trustee's professionals engaged in a marketing process in connection with the Brigade Motion. After conducting a diligent search of the market, the Trustee located a replacement for Highland Capital that provided the services Highland Capital previously provided the Debtor for roughly half the cost Highland Capital charged Acis LP. The Sub Agreements also significantly contributed to rendering Acis insolvent. In fact, the General Counsel of Highland Capital, Scott Ellington, admitted that as of February 7, 2018—one week after the Petition Date—Acis was insolvent or close to insolvent.<sup>42</sup>

318. Highland Capital cannot show that the exorbitant fees charged under the Sub Agreements are reasonable or that entry into such agreements was in good faith and demonstrates inherent fairness. Therefore, pursuant to section 502(b)(4), the Highland Capital Claims should be disallowed in their entirety.

**C. Highland Capital Received Voidable Transfers and Holds Property of the Estate, and the Trustee is Entitled to Setoff under Section 502(d) of the Bankruptcy Code.**

319. As set out more fully in the causes of action above, the Plaintiffs seek: (i) avoidance of actual and constructively fraudulent transfers and obligations pursuant to sections

<sup>42</sup> 2-7-18 Transcript at 219: 22-25 (THE COURT: Do you think Acis is in the zone of insolvency? THE WITNESS: I don't know the answer to that, but I would -- I would assume that it was -- that it's close.")

544 and 548 of the Bankruptcy Code, (ii) avoidance of preferential transfers pursuant to section 547 of the Bankruptcy Code; (iii) turnover of property the estate pursuant to section 542 of the Bankruptcy Code; and (iv) liability for the foregoing under section 550 of the Bankruptcy Code.

320. "Under section 502(d), 'the court shall **disallow** any claim of any entity . . . that is a transferee of a transfer avoidable under section . . . 544 [or 548] of this title, unless such . . . transferee has paid the amount, or turned over any such property.'" *In re Consol. Capital Equities Corp.*, 143 B.R. 80, 84 (Bankr. N.D. Tex. 1992) (quoting 11 U.S.C. § 502(d)) (emphasis in original).<sup>43</sup> Application of section 502(d) is not restricted to cases where a fraudulent transfer has already been avoided, but rather applies to pending fraudulent transfer claims as well. In other words, the statute does not require that the transfer actually be avoided, only that it be "avoidable." *Id.* As a result, once a fraudulent transfer claim has been asserted, the mandatory language of section 502(d) requires bankruptcy courts to consider the fraudulent transfer issue as a component of the claims allowance process. *U.S. Bank N.A. v. Verizon Communs., Inc.*, 761 F.3d 409, 419 (5th Cir. 2014) (finding mandatory language of section 502(d) precluded the court from resolving claims where the trustee alleged the claimant was the transferee of a fraudulent transfer). Moreover, the Court may disallow the Highland Capital Claims before adjudicating the causes of action set forth herein. *See In re Heritage Org., L.L.C.*, 375 B.R. 230, 288-289 (Bankr. N.D. Tex. 2007) (finding a court order avoiding a transfer is not a prerequisite to disallowance of a claim).

321. Thus, pursuant to section 502(d) of the Bankruptcy Code, the Court should disallow the Highland Capital Claims.

<sup>43</sup> "Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title [11 USCS § 542, 543, 550, or 553] or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title." 11 U.S.C. § 502(d)

**D. The Highland Capital Claims Should be Equitably Subordinated.**

322. Section 510(c) of the Bankruptcy Code expressly authorizes subordination of the allowed claim of one creditor to the allowed claims of other creditors "under principles of equitable subordination."

323. In *In re Mobile Steel Co.*, 563 F.2d 692 (5th Cir. 1977), the Fifth Circuit articulated what has become the most commonly accepted standard for equitable subordination of a claim. Under the *Mobile Steel* standard, a claim can be subordinated if the claimant engaged in some type of inequitable conduct that resulted in injury to creditors (or conferred an unfair advantage on the claimant) and if equitable subordination of the claim is consistent with the provisions of the Bankruptcy Code.

324. During the time it completely dominated control of Acis, Highland Capital clearly engaged in abundant inequitable conduct related to Acis, as well as conferring numerous unfair advantages to itself, which resulted in injury to Acis's creditors. As outlined in detail above, Highland Capital increased the amount due to Highland Capital under the Sub-Advisory Agreement, including charging amounts far in excess of appropriate market rates. This has resulted in a grossly inflated claim for Highland Capital as well as significant overpayments to Highland Capital for whatever services and value it did provide to Acis under these agreements.

325. Highland Capital was also the ringleader, and ultimate beneficiary, for the series of fraudulent schemes executed in the fall of 2017 that terminated or transferred away Acis LP's valuable rights in the ALF PMA, the ALF Shares, the Note, the 2017-7 Equity and the 2017-7 Agreements. This was done with the very specific intent to make Acis "judgment proof," as

Acis's own counsel later boasted,<sup>44</sup> and in order to ensure that Terry and other creditors would never receive payment on his judgment, as Dondero has threatened.<sup>45</sup> These transfers, while very damaging to Acis LP and its creditors, also furthered Highland Capital's plan to take over Acis LP's very lucrative portfolio management business and keep it under the control of Highland Capital and Dondero. Finally, even during the Bankruptcy Cases, Highland Capital has attempted to transfer and take over Acis LP's very lucrative Universal/BVK Agreement.

326. To the extent the Highland Capital Claims are allowed in any amount, they are subject to equitable subordination and should be subordinated below all other allowed unsecured claims in the bankruptcy case.

## **X. OBJECTIONS TO HIGHLAND CAPITAL'S ADMINISTRATIVE CLAIM**

### **A. Highland Capital's Administrative Claim is Subject to Disallowance for the Same Reasons the Highland Capital Claims Should be Disallowed.**

#### **1. Prevailing on the Causes of Action Set Forth Herein Mandates the Disallowance of Highland Capital's Administrative Claim.**

327. In its Application, without specifically citing the causes of actions or making any reference whatsoever to the objections to the Highland Capital Claims contained herein (as they were previously asserted in the Amended Counterclaims), Highland Capital asserts that the Trustee "apparently has furthered a theory that Highland overcharged the Debtors," but must "provide evidence, not simply allegations, to rebut the prima facie case that Highland is entitled to an administrative claim." Application ¶ 33. Highland Capital then rashly contends that the Trustee "has provided no such evidence" and that "the Contracts speak for themselves and are the best evidence of the validity of the claim asserted by Highland." *Id.* A simple review of the

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<sup>44</sup> See Plaintiff's Motion for Expedited Discovery, Ex. 1 (Declaration of Rogge Dunn) ¶ 4, *Terry v. Acis Capital Mgmt., L.P.*, Cause No. DC-17-15244, 44th District Court of Dallas County, Texas ("On October 31, 2017, counsel for Acis, Jamie Welton, called me on the telephone. In that call, Mr. Welton stated that Acis is 'judgment proof.'").

<sup>45</sup> See June 28, 2017 Dondero Dep. Tr. 262:2-8 (Ex. 101 from the involuntary trial) ("Nobody's going to let a dime go out of the firm that we don't have to pay ever to – to Josh, period. I mean, it's . . . I think it's personal[.]").

causes of action herein (as well as evidence presented in connection with the involuntary hearings, confirmation hearings, and other hearings during these Bankruptcy Cases) belies its position and demonstrates otherwise.

328. As is discussed below, Highland Capital must demonstrate that the services provided conferred a direct and substantial benefit on the Debtors' estates. And before Highland Capital can ask the Court to assess whether its services provided the required direct and substantial benefit, it must first demonstrate that it had the right to even charge the Debtors the amount set forth in the agreements. The causes of action asserted against Highland Capital herein, which dispute the amounts charged by Highland Capital, directly implicate the validity of, and support the disallowance of, the Administrative Claim (just as they refute Highland Capital's purported prepetition claims). The Plaintiffs therefore expressly incorporate Counts 1, 5 – 8, and 27 – 30 herein and specifically raises such Counts as objections to the Administrative Claim asserted by Highland Capital in its Application.

329. If the Plaintiffs prevail on the causes of action against Highland Capital as set forth herein, the basis for allowance of the Administrative Claim would also be invalidated. Moreover, as discussed below, based on such causes of action, the Plaintiffs are entitled to recover millions of dollars in damages, all of which may be offset against the Administrative Claim.

## **2. Highland Capital's Administrative Claim is Also Subject to Disallowance under Section 502(d).**

330. Because Highland Capital is alleged to have received fraudulent transfers, its Administrative Claim is also subject to disallowance under section 502(d) until the property or its value has been returned to the Debtors.

331. Although Highland Capital's Application involves an administrative claim, nothing in section 502(d) limits its application to prepetition claims. *MicroAge, Inc. v. Viewsonic Corp. (In re MicroAge, Inc.)*, 291 B.R. 503, 508 (B.A.P. 9th Cir. 2002). Section 502(d) by its terms applies to "any claim" and the definition of a "claim" in section 101(5) is sufficiently broad to include requests for payment of expenses of administration. *Id.* Because the objective of section 502(d) is to encourage transferees to return avoidable transfers to the estate, a number of courts have held that section 502(d) applies to administrative claims. *See, e.g., id.* at 508-12; *In re Georgia Steel*, 38 B.R. 829, 839-40 (Bankr. M.D. Ga. 1984) (applying section 502(d) and stating, "[t]he fact that [the] claim is for an administrative expense has no bearing").

332. The Plaintiffs acknowledge that courts are split on the issue of whether section 502(d) applies to administrative expenses. *Compare MicroAge, Inc.*, 291 B.R. at 508-512 (considering split of authority and finding that "the better analysis is that § 502(d) may be raised in response to the allowance of an administrative claim"), *and Georgia Steel*, 38 B.R. at 839-40 (finding the fact that the claim "is for an administrative expense has no bearing" for purposes of section 502(d)), *with In re Plastech Engineered Prods.*, 394 B.R. 147, 164 (Bankr. E.D. Mich. 2008) (concluding that "§ 502(d) does not apply to the allowance and payment of administrative expenses under § 503(b)"). Although not binding on this Court, the Plaintiffs also note that one bankruptcy court in this district has found that section 502(d) does not apply to administrative claims. *Rand Energy Co. v. Del Mar Drilling Co. (In re Rand Energy Co.)*, 256 B.R. 712, 719 (Bankr. N.D. Tex. 2000) (Felsenthal, J.).

333. As described above, Highland Capital is the recipient of certain preferential payments and/or fraudulent transfers. Thus, while acknowledging the split of authority on the issue, the Plaintiffs assert that the plain language of section 502(d), as well as the policy



underlying section 502(d), requires that Highland Capital's Administrative Claim be disallowed in its entirety.

**3. The Indemnity Provisions Relied on by Highland Capital Are Invalid and, in Any Event, Do Not Apply to Highland Capital's Intentional Torts.**

334. In the Application, Highland Capital also asserts defenses against the causes of action brought herein pursuant to its purported indemnity rights against the Debtors under section 6.03 of the Shared Services Agreement and section 4(c) of the Sub-Advisory Agreement. Application ¶ 34. Any contention by Highland Capital that it is immune from liability arising from the causes of action brought against it herein due to the indemnity provisions of the Sub Agreements lacks merit. First, the indemnity provisions cited by Highland Capital were included only in the last iteration of the Sub Agreements, in March 2017. Thus, even if valid and applicable (which they are not), such provisions do not cover actions of Highland Capital prior to March 2017. Second, to the extent that the indemnity provisions in the Sub Agreements were included in an attempt to shield Highland Capital from liability in connection with its fraudulent scheme to denude Acis (and were added for no consideration), such provisions were themselves fraudulently incurred and should be avoided pursuant to section 548 of the Bankruptcy Code and sections 24.005 and 24.006 of TUFTA.<sup>46</sup> Further, the protection Highland Capital seeks is outside the scope of the indemnity provisions, which indemnify Highland Capital in connection with its actions taken as sub-advisor under the Sub Agreements—not in connection with torts and other wrongful conduct intentionally committed against Acis as part of Highland Capital's calculated scheme to denude the estate. Finally, it is against public policy for indemnity provisions in contract to shield a party from intentional tortious conduct. *See, e.g., Hamblin v.*

<sup>46</sup> Notably, all versions prior to the last iteration of the Sub-Advisory Agreement (before March 2017) contained no indemnity provision; also, it is telling that the indemnity provisions were added to the Sub-Advisory Agreement and significantly amended in the Shared Services Agreement only after arbitration had been ordered in state court.

*Lamont*, 433 S.W.3d 51, 55 (Tex. App.—San Antonio 2013, pet. denied); *In re Oil Spill by the Oil Rig*, 841 F. Supp. 2d 988, 1001-02 (E.D. La. 2012). Accordingly, such provisions are inapplicable as a defense to the causes of action asserted herein against Highland Capital.

**B. Highland Capital Cannot Satisfy Its Burden of Proving Its Services Directly and Substantially Benefitted the Debtors' Estates.**

**1. Administrative Priority Status is Narrowly Construed and Only Awarded Upon a Showing of a Direct and Substantial Benefit to the Estate.**

335. Under section 503(b)(1) of the Bankruptcy Code, an administrative expense claim shall be allowed for "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). The ultimate burden of proof is on Highland Capital to establish it is entitled to an administrative priority claim pursuant to 11 U.S.C. § 503(b). *See In re Transamerican Natural Gas Corp.*, 978 F.2d 1409, 1416 (5th Cir. 1992). Further, because section 503 administrative claims are priority claims, which are entitled to special treatment, section 503 must be narrowly construed. *See In re Templeton*, 154 B.R. 930, 934 (Bankr. W.D. Tex. 2009); *see also In re Federated Dep't Stores, Inc.*, 270 F.3d 994, 1000 (6th Cir. 2001) ("Claims for administrative expenses under § 503(b) are strictly construed because priority claims reduce the funds available for creditors and other claimants.").

336. At a minimum, Highland Capital must establish that "(1) the claim arises from a transaction with the [debtor]; and (2) the goods or services supplied enhanced the ability of the [debtor's] business to function." *See Total Minatome Corp. v. Jack/Wade Drilling, Inc. (In re Jack/Wade Drilling, Inc.)*, 258 F.3d 385, 387 (5th Cir. 2001) (citing *Transamerican*, 978 F.2d at 1416); *see also ASARCO, Inc. v. Elliott Mgmt. (In re ASARCO, LLC)*, 650 F.3d 593, 601 (5th Cir. 2011) ("Claim under this section 'generally stem from voluntary transactions with third parties who lend goods or services necessary to the successful reorganization of the debtor's estate.'") (quoting *Jack/Wade Drilling*, 258 F.3d at 387).

337. Moreover, the benefit is measured from the point of view of the bankruptcy estate, not that of the applicant. *In re Premium Well Drilling, Inc.*, 2012 Bankr. LEXIS 1554, at \*9 (Bankr. W.D. Tex. Apr. 10, 2012). "The focus on allowance of administrative claims which enjoy priority over other creditors is to prevent unjust enrichment of the estate. It is *not* to compensate the creditor . . . for his or her loss." *In re Am. Plumbing & Mech., Inc.*, 323 B.R. 442, 462 (Bankr. W.D. Tex. 2005) (emphasis in original).

## 2. Highland Capital Cannot Demonstrate It Conferred a Direct and Substantial Benefit on the Debtors' Estates.

338. As set forth herein, as it had done prior to these Bankruptcy Cases, following entry of the Orders for Relief, Highland Capital continued perpetrating its scheme to steal, and otherwise attempted to damage, Acis's business—in order to *minimize* value for creditors and ensure that Acis could not successfully reorganize—and to line its own pockets. Aside from Highland Capital's actions in sending notices of optional redemption to liquidate the CLOs (without Court approval and in violation of the automatic stay), following entry of the Orders for Relief, Highland Capital also actively mismanaged the Acis CLOs to undermine the business of the Debtors, as evidenced by, *inter alia*, the vast disparity between the trades made in CLOs 3, 4 5, and 6, as opposed to CLO 7, in 2018, as testified to by Terry at the second confirmation hearing. *See* Dec. 12, 2018 Hr'g Tr. (AM) at pp. 19-35.

339. Additionally, while mismanaging CLOs 3, 4 5, and 6, Highland Capital sought to carry out its plan "to transfer the BVK investment management agreement from Acis LP to another Highland-affiliated manager."<sup>47</sup> As explained herein, Highland Capital's attempt to steal BVK's business from Acis began from nearly day one of these Bankruptcy Cases and continued

<sup>47</sup> *See Exhibit K* (email chain from early February 2018 between Mike Warner (Acis's counsel), Isaac Leventon (Highland Capital's in-house counsel), Timothy Cournoyer (Highland Capital's in-house counsel) and Thomas Sargent (Highland Capital's Chief Compliance Officer)).

even after Highland Capital was terminated as sub-advisor on August 1, 2018—when Highland Capital no longer had any legitimate reason to communicate with Universal or BVK.

340. Highland Capital's actions during the pendency of these Bankruptcy Cases demonstrate that Highland Capital did not service the Acis CLOs in a way that "enhanced the ability of the [debtor's] business to function." *Transamerican*, 978 F.2d at 1416. Indeed, Highland Capital acted to destroy the Debtors' business—therefore, Highland Capital's request for allowance of its Administrative Claim must be denied.

341. In its Application, Highland Capital essentially asserts that it provided services to the Debtors on a postpetition basis pursuant to various prepetition agreements and, therefore, the expenses are entitled to administrative priority. In order to qualify as an administrative expense, however, Highland Capital must show that its claim arose postpetition "as a result of actions by the trustee that benefitted the estate." *Id.* Further, although the terms of the Debtors' prepetition contracts may be probative of the reasonable value of postpetition services, they are not dispositive. *In re Am. Plumbing & Mech., Inc.*, 323 B.R. at 462. Indeed, "all that the estate is required to pay is the *reasonable value* of those services which were rendered." *Id.* (emphasis in original) (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531, 104 S. Ct. 1188, 79 L. Ed. 2d 482 (1984)). Consequently, the provisions of the prepetition contracts do not automatically and dispositively translate into an allowed administrative claim. Highland Capital must still demonstrate a quantifiable benefit to the estate.

342. Highland Capital's assertion that its costs were incurred postpetition fails to satisfy its burden of proving entitlement to administrative priority. Specifically, aside from merely referencing the Sub-Agreements and the Universal/BVK Agreement, and contending that monies owed to it under such agreements are an administrative expense, Highland Capital fails to show that (i) such costs were necessary for the preservation of the Debtors' estate, and (ii) the

Debtors received any benefit, let alone a direct and substantial benefit, as a result of such services and expenses.

### 3. The Amount Charged by Highland Capital Was Inflated and Unnecessary.

343. Further, even if Highland Capital could show that, rather than undermining Acis's business, it provided postpetition services that enhanced the ability of Acis to function, to the extent the rates Highland Capital charged Acis were inflated or above market, the amounts charged to Acis under the Sub Agreements did not benefit the estates or its creditors, and such inflated amounts were therefore not necessary. *See NL Indus., Inc. v. GHR Energy Corp.*, 940 F.2d 957, 966 (5th Cir. 1991) ("Courts have construed the words 'actual' and 'necessary' narrowly: the debt must benefit the estate and its creditors."). Indeed, at the July 6, 2018 hearing, regarding approval of the break-up fee and replacement of Highland Capital as sub-servicer with Oaktree, J.P. Sevilla, assistant general counsel for Highland Capital, testified that Highland Capital would reduce its rates charged to Acis LP for sub-servicing from 35 basis points to 17.5 basis points, in order to match competing offers:

Q Okay. Would Highland be willing to reduce its fee during the pendency of the bankruptcy, maybe without its rights to assert the validity of the contract, but would Highland otherwise be willing to assert -- to reduce its fees during the pendency of the bankruptcy?

A I think at the very least Highland would match Saratoga or whatever the 17.5 bps offer is. Again, reserving all rights, but in order to stay in the deal and to establish Highland's commitment to this deal, we would do it for 17-1/2 basis points, no question.

July 6, 2018 Hr'g Tr. at pp. 243-44. Moreover, the effective rate for such services charged by Brigade and Cortland also approached 17.5 basis points.<sup>48</sup> Accordingly, notwithstanding the objections otherwise raised herein, and assuming the services provided to Acis LP enhanced,

<sup>48</sup> Pursuant to the Third Amended Joint Plan, Brigade agreed to provide sub-advisory and shared services to the Acis CLOs for 15 basis points (and decreasing after one year). *See* Docket No. 661 at pp. 28, 136; *see also* Dec. 11, 2018 (PM) Hr'g Tr. at 89 & Dec. 12, 2018 (AM) Hr'g Tr. at 62.

rather than undermined, the ability of Acis's business to function, such amounts should be reduced to reflect a rate of at most 17.5 basis points.

**4. The Plaintiffs Dispute Highland Capital's Calculation of its Administrative Claim.**

344. The Plaintiffs further object to Highland Capital's calculation of the amount of the Administrative Claim. Subject to the objections raised herein, in the *Amended Disclosure Statement Pursuant to Section 1125 of the United States Bankruptcy Code with Respect to the Second Amended Joint Plan for Acis Capital Management, L.P. and Acis Capital Management GP, LLC* [Case No. 18-30264, Docket No. 621] (the "Disclosure Statement"), the Trustee estimated that under the terms of the Sub Agreements, Highland Capital's alleged Administrative Claim would be approximately \$2,612,574.00, rather than \$3,007,678.41. Highland Capital fails to explain or substantiate this discrepancy. The Administrative Claim also includes \$543,545.88 for expenses. Highland Capital fails to show that these alleged expenses were incurred or payable under the Sub Agreements. *See In re Packard Props., Ltd.*, 118 B.R. 61, 63 (Bankr. N.D. Tex. 1990) ("Since this claim is a request for payment of administrative expenses, the [creditor] carries the burden of proof throughout the entire proceeding."). Therefore, in addition to the objections herein, the Plaintiffs also object to Highland Capital's calculation of its purported Administrative Claim.

**C. Highland Capital Is Not Entitled to Payment of Any Allowed Administrative Claim Because Acis's Right of Offset and Recoupment May Reduce or Eliminate Its Administrative Claim.**

345. Even if the Court were to determine that Highland Capital is entitled to an allowed Administrative Claim, it should not be entitled to payment because Acis has rights of offset and recoupment that may be applied under section 558 of the Bankruptcy Code to reduce

or eliminate any allowed Administrative Claim.<sup>49</sup> As set forth above, Highland Capital charged Acis excessive and unreasonable fees for its services, and Acis has asserted a number of causes of action against Highland Capital for such overcharges, including for recovery of overcharges resulting from *ultra vires* actions, turnover of unauthorized payments, money had and received, conversion, fraudulent transfer, civil conspiracy, breach of contract, and breach of fiduciary duty. As a result of these overcharges, the Debtors' estates suffered many millions of dollars in damages which should be offset against any valid administrative claim awarded to Highland Capital. Indeed, the causes of action against Highland Capital may offset, or eliminate altogether, any right of recovery Highland Capital may have against the Debtors' estates on account of any Administrative Claim.

**D. To the Extent Allowed, Highland Capital's Administrative Claim Should Also Be Equitably Subordinated.**

346. In addition to applying equitable subordination to prepetition claims, courts have equitably subordinated administrative claims when the claimant acted in ways to harm the estate. *See, e.g., Principal Mut. Life Ins. Co. v. Langhorne (In re 848 Brickell Ltd.)*, 243 B.R.142, 149 (S.D. Fla. 1998) (holding that while "pursuit of one's legal rights may not be grounds for equitable subordination, the lower court's findings that [the claimant's] protracted and abusive litigation tactics harmed the estate by causing it to incur about \$400,000 in fees" justified equitable subordination of its administrative claim).

347. For the same reasons described above with respect to Highland Capital's prepetition claims, Highland Capital's Administrative Claim should also be equitably subordinated to the extent allowed. Further, during these Bankruptcy Cases, the Debtors' estates

<sup>49</sup> The Plan provided for the payment of allowed administrative claims on (i) the later of the effective date or the tenth business day after the administrative expense is allowed, or (ii) as otherwise agreed in writing between the Reorganized Debtor, or as otherwise ordered by the Bankruptcy Court. *See* Case No. 18-30264, Docket No. 660 at 11, § 3.01(b).



and the Reorganized Debtors have incurred substantial administrative fees in responding to the protracted and abusive litigation tactics of Highland Capital, including arguing for (and against) injunctive relief to prevent the liquidation of the CLOs and litigating the numerous appeals initiated by Highland Capital against the Trustee. Such litigation tactics by Highland Capital were attempts to thwart the reorganization of the Debtors, damage the estate, and harm its creditors. Accordingly, the Court should equitably subordinate Highland Capital's Administrative Claim. *See Principal Mut. Life Ins. Co.*, 243 B.R. at 149.

348. Thus, to the extent the Highland Capital's Administrative Claim is allowed in any amount, it should be subordinated below all other allowed claims in these Bankruptcy Cases.

## VI. PRAYER

Plaintiffs respectfully request that the Court:

(i) enter judgment declaring that Expense Overpayments made to Highland Capital in excess of 20% of Revenue and any agreements supporting such overpayments were *ultra vires* and, thus, void or voidable;

(ii) enter judgment against Highland Capital for the recovery of any *ultra vires* payments made to Highland Capital;

(iii) enter judgment against Highland Capital, Highland Funding, Highland Advisor, Highland Holdings, and Highland Management for the avoidance and recovery of transfers fraudulently made and obligations fraudulently incurred and for civil conspiracy in connection with such fraudulent transfers and schemes;

(iv) enter judgment against Highland Capital, Highland Holdings, and Highland Management for avoidance and recovery of preferential transfers received;

(v) enter judgment against Highland Capital for tortious interference with contract;

(vi) enter judgment against Highland Capital for breach of contract;

(vii) enter judgment against Highland Capital for breach of its fiduciary duties and order disgorgement of all funds received by Highland Capital as a result of such breach;

(viii) enter judgment against Highland Capital and Highland Funding for willful violation of the automatic stay, pursuant to section 362(k) of the Bankruptcy Code;

(ix) enter judgment against Highland Capital, Highland Funding, Highland Advisor, Highland Management, and Highland Holdings for punitive damages;

(x) enter judgment against Highland Capital, Highland Funding, Highland Advisor, Highland Management, and Highland Holdings for pre- and post-judgment interest at the greatest amount permitted by law;

(xi) enter judgment against Highland Capital, Highland Funding, Highland Advisor, Highland Management, and Highland Holdings for all attorneys' fees and costs incurred in connection with the prosecution of this Adversary Proceeding and for all allowed professionals' fees and expenses incurred by the estates in the Bankruptcy Cases;

(xii) establish a constructive trust for all benefits unjustly received by that Highland Capital, Highland Funding, Highland Advisor, Highland Management and Highland Holdings;

(xiii) declare that Highland Capital, Highland Funding, Highland Advisor, Highland Management and Highland Holdings are alter egos of each other, or that the corporate for should otherwise be disregarded, and each is fully liable for any judgment entered for the Plaintiffs in this Adversary Proceeding;

(xiv) disallow, expunge and/or subordinate the Highland Capital Claims;

(xv) deny, disallow, and/or subordinate Highland Capital's Administrative Claim; and

(xvi) grant any other such relief that the Plaintiffs may show themselves to be justly entitled in law or in equity.

**Dated: June 20, 2019.**

Respectfully submitted,

By: /s/Rakhee V. Patel

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## CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2019, notice of this document will be electronically mailed to the parties that are registered or otherwise entitled to receive electronic notices in this adversary proceeding pursuant to the Electronic Filing Procedures in this District. Service will also be made as required and allowed by Federal Rule of Bankruptcy Procedure 7004.

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/s/ Annmarie Chiarello

## One of Counsel